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# A.N INDEX

*To all the Reported Cases in the Courts of Equity*

IN IRELAND,

FROM T. T. 1838 TO H. T. 1867.

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VOL. II.



AN INDEX  
TO  
ALL THE REPORTED CASES

IN THE SEVERAL

Courts of Equity in Ireland,

FROM

TRINITY TERM 1838 to HILARY TERM 1867,

WITH A COMPLETE TABLE OF CASES.

BY

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IN TWO VOLUMES.

VOL. II.



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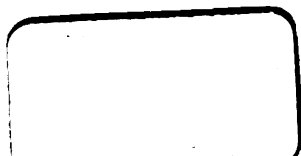


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Ireland 150 G191





## PIN-MONEY.

See HUSBAND AND WIFE, V.

## PLAINTIFF.

- Dismissal of Bill by. See PRACTICE, BILL, DISMISSAL OF.
- Generally. See PRACTICE, PARTY.

## PLEA.

- Of Account. See ACCOUNT, II.
- Of Infancy. See INFANCY, II.
- In general. See PLEADING, PLEA.
- Answer in conjunction with. See PLEADING, ANSWER.
- When it lies. See PLEADING, PLEA.
- When ordered to stand for Answer. See *ibid.*
- When overruled by Answer. See *ibid.*
- Of Account stated and settled. See *ibid.*
- Of Agreement. See *ibid.*
- Of Attainder. See *ibid.*
- Of Alien Enemy. See *ibid.*
- Of Award. See *ibid.*
- Of Bankruptcy. See *ibid.*
- Of Insolvency. See *ibid.*
- Of Discovery tending to Criminate, or to Forfeiture. See *ibid.*
- Of Statute of Frauds. See *ibid.*
- To Jurisdiction. See *ibid.*
- Of Statute of Limitations, or length of Time. See *ibid.*
- Of *Lis Pendens*, former Suit, or Decree. See *ibid.*
- Of Lunacy. See *ibid.*
- Of Outlawry. See *ibid.*
- Of Want of Parties. See *ibid.*
- Of Purchase, Release, Payment, or Compromise. See *ibid.*
- Of Title. See *ibid.* AND TITLE, III.
- Costs of. See PRACTICE, COSTS.

## PLEADING.

- In Charity Causes. See CHARITY, IV.
- In Lunacy Causes. See LUNACY, IX.
- In Bankruptcy. See BANKRUPTCY.
- In Tithes Suits. See TITHES, VI.
- As to Modus. See TITHES X.

[See The Chancery (Ireland) Act 1867, and General Orders of October 1867.]

## I. ANSWER.

Under the Old System.

1. Its general Form, Nature, and Effect.
    - a. In general.
    - b. As a Defence.
  2. Effect of Admission by.
  3. What and when defendant is bound to discover and answer: generally of the sufficiency of Answers.
- See also PLEADING, DEMURRER, *passim*.
4. When the discovery would tend to criminate, or to create a forfeiture.
  5. When the defendant may, by answer, refuse to answer further.
  6. What facts are, or must be put in issue by answer.

7. In conjunction with Demurrer.
8. In conjunction with Pleas.
9. Impertinence and Scandal in, what is.
10. Uncertainty in.
11. When Answer is a proper Defence.
  - a. In general.
  - b. To gain benefit of Statutes of Frauds and Limitations.
12. By Infants and Attorney-General.
13. Schedule to answer.

Under the Court of Chancery (Ireland) Regulation Act 1850.

Under The Chancery (Ireland) Act 1867.

[See The Chancery (Ireland) Act 1867, ss. 63, 64, 65, &c., General Orders, Oct. 1867, Nos. 56 to 78 inclusive.]

## II. BILL OR PETITION.

Under the Old System.

1. When proper, generally.
2. The general Form of.
  - a. What Facts must be stated, and by what Allegations they are put in issue.
    1. Before the Chancery (Ir.) Regulation Act, 1850.
    2. Under the Chancery (Ir.) Regulation Act, 1850.
  - b. The mode of Statement.
  - c. Offer to Pay just Demands.
  - d. Waiver of Penalties and Forfeiture.
  - e. Multifariousness.
  - f. What amounts to Scandal and Impertinence.
  - g. Charging part.
  - h. Interrogatories.
    1. Before the Chancery (Ir.) Regulation Act, 1850.
    2. Under the Chancery (Ir.) Regulation Act, 1850.
  - i. The Prayer.
  - j. Affidavits annexed.
  - k. Suppression of Facts.
3. Supplemental Bill.
4. Supplemental Bill in nature of Bill of Review.
5. Supplemental Bill in nature of Bill of Revivor.
6. Where a Bill of Review lies—necessary steps for bringing it, and by and against whom it may be brought.
7. Revivor.
  - a. Bill of Revivor, and original Bill in the nature of a Bill of Revivor.
  - b. Revivor under the Chancery (Ir.) Regulation Act, 1850.
8. Amended Bill.
9. Cross Bill.
10. Bill for Discovery and Relief generally.
11. Bill for Discovery merely.
12. Bill of Interpleader.
13. Bill of Peace, and Quia Timet.
14. Bill to Perpetuate.
15. Bill for Partition, and other matters.
16. Discharge. See PRACTICE, CHARGE.
17. Bill, Possessory.
18. Cause Petitions under the Chancery (Ir.) Reg. Act, 1850.
19. Under The Chancery (Ir.) Act, 1867.

### III. DEMURRER.

*Under the Old System.*

1. *The general Form.*
2. *Speaking Demurrer.*
3. *When it lies.*
  - a. *In general.*
  - b. *For Want, or Misjoinder of Parties.*
  - c. *For Matter of Form, or Defective Statement.*
4. *When over-ruled by Answer or Plea.*  
See PLEADING, ANSWER, 7.

*Under The Chancery Ireland Act, 1867.*

### IV. INFORMATION.

#### V. PARTIES TO SUIT.

*Under The Old System.*

1. *Generally—Effect of Want or Misjoinder of Parties—how to be taken advantage of.*
  - a. *In general.*
  - b. *Misjoinder.*
2. *Assignors and Assignees.*
3. *Attorney-General, or Solicitor-General.*
4. *Bank of England; other Banks; Shareholders.*
5. *Bankrupts and Insolvents, and their Assignees.*
6. *Co-obligors and others having Joint Interests and Liabilities.*
7. *Debtor to Testator's Estate.*
8. *Debtor and Creditor.*
9. *Ecclesiastical Persons.*
10. *Executors and Administrators.*
  - a. *In general.*
  - b. *Of Deceased Representative.*
11. *Heir-at-law and Next-of-kin.*
12. *Husband and Wife.*
13. *Legatees and Devisees generally; Residuary Legatees.*
14. *Lessor, Lessee, and Sub-lessee.*
15. *Lord of Manor.*
16. *Incumbrancers, Mortgagor, and Mortgagee, &c.*
17. *When they are very numerous.*
18. *Partners and Part-owners—Joint Tenants and Tenants in Common.*
19. *Parties not interested, as Witnesses, Agents, &c.*
20. *Tenants for Life and in Tail, and Remainderman.*
21. *Tithe Causes.*
22. *Trustees and Cestui que Trusts—Guardian and Infant, Lunatic and Committee.*
23. *Vendor and Purchaser.*
24. *When one or more of several are made Parties on behalf of themselves and all others interested.*
25. *When leave is given at the Hearing to amend by adding Parties.*

*Under the Court of Chancery (Ireland) Regulation Act, 1850, and General Orders.*

*Under The Chancery (Ireland Act), 1867.*

### VI. PETITIONS. *Under the Statutory Jurisdiction of the Court.*

### VII. PLEA. *Under the Old System.*

1. *Its Form and Validity.*
  - a. *Generally.*
  - b. *False Plea.*

c. *Uncertainty.*

d. *Surplusage.*

e. *Double.*

f. *Negative.*

2. *Of Accounts Stated and Settled.*
3. *Of Agreement.*
4. *Of Attainder and Alien Enemy.*
5. *Of Award.*
6. *Of Bankruptcy and Insolvency.*
7. *Of Discovery tending to Criminate, or to Forfeiture.*
8. *Of Statute of Frauds.*
9. *To Jurisdiction.*
10. *Of Statute of Limitations and length of Time.*
11. *Lis Pendens, Former Suit, and Decree.*
12. *Of Lunacy.*
13. *Of Outlawry.*
14. *Of Want of Parties.*
15. *Of Purchase.*
16. *Of Release, Payment, Compromise.*
17. *Of Title.*
18. *When it lies generally.*
19. *Ordered to stand for Answer.*
20. *When over-ruled by Answer.*
21. *Effect of Allowance of.*

*Under The Chancery (Ireland) Act, 1867.*

### VIII. REPLICATIONS.

#### IX. RIGHT TO SUE.

#### X. PLEADING IN GENERAL.

#### XI. PLEADING IN THE COURT OF PROBATE.

#### 1. ANSWER.

*Under the Old System.*

1. *Its general Form, Nature, and Effect.*
    - a. *In general.*
    - b. *As a Defence.*
  2. *Effect of Admission by.*
  3. *What and when Defendant is bound to discover and answer: respecting the sufficiency of Answers.*
- See PLEADING, DEMURRER, *passim*.
4. *When the discovery would tend to criminate, or to create a forfeiture.*
  5. *When Defendant may, by Answer, refuse to answer further.*
  6. *What Facts are or must be put in issue by the Answer.*
  7. *Conjoined with Demurrer.*
  8. *Conjoined with Pleas.*
  9. *What constitutes Impertinence and Scandal in Answer.*
  10. *Uncertainty in.*
  11. *When Answer is a proper Defence.*
    - a. *In general.*
    - b. *To gain benefit of the Statutes of Fraud and Limitations.*
  12. *By Infants and Attorney-General.*
  13. *Schedule to Answer.*

*Under the Court of Chancery (Ireland) Regulation Act, 1850.*

*Under The Chancery (Ireland) Act, 1867.*

#### I. ANSWER, UNDER THE OLD SYSTEM.

*Its general Form, Nature, and Effect.*

1. *In a redemption suit, the bill charged that the habere was executed "on or about the*

18th of Nov., and possession was on that day taken." Answer:—"It is not true, as in bill untruly stated, that said *habere* was executed on the 18th of Nov., for that the defendant believed it was executed on the 17th of Nov." Held, that the precise day of the execution of the *habere* was sufficiently put in issue.—*Fitzgerald v. Hussey*, 3 I. E. R. 319. (E.E.).

1. It is not the right of the defendant to file his answer after a decree on sequestration against him, upon payment of the costs thereof.—*M'Cartney v. O'Neil*, 5 I. E. R. 159. (E.E.)

2. If a case, wholly destructive of the foundation of the plaintiff's title, is put forward in the answer of one defendant, and established, the Court will not give effect to it as between the plaintiff and that defendant merely; but it shall enure to the benefit of the other defendants, though they have not made that case by their answers.—*Wilson v. Bell*, 5 I. E. R. 501. (E.E.)

3. The answer of one co-defendant acknowledging the charge cannot read against the other.—*Cruise v. Clancy*, 6 I. E. R. 552. (C.)

4. The officer of this Court ordered to attend in the Court of Ch., at the hearing of a cause, with an answer sworn in this Court, the signature to which was impeached as a forgery in the Ch. cause.—*Grove v. Bowen*, 6 I. E. R. 656. (E.E.)

5. Husband and wife entered a joint appearance, and the husband alone answered. Held, the answer was a nullity, and the plaintiff might proceed as for want of an answer.—*Thompson v. Lockwood*, 8 I. E. R. 367. (R.)

6. Leave to answer an amended bill after replication is not subject to all the same rules as leave to file a supplemental answer.

If a special case be made, the Court may permit the defendant to file an answer to the amended bill notwithstanding the replication, although the notice of motion does not set out the contents or substance of the intended answer.

The bill was amended on the 1st of April, and notice was served on the defendant that she was not required to answer. She was at the time charged with two criminal offences by the plaintiff. Bills were found on the 9th, and the trials lasted from the 18th to the 21st, when she was acquitted. The plaintiff's solicitor was also his agent for the prosecution. The replication was filed on the 22nd. The Court gave the defendant liberty to answer the amended bill, although she had not, pursuant to the 58rd G. O., served notice of her intention to answer the amendments, and the time for so doing had expired.—*Scott v. S.*, 9 I. E. R. 461. (R.)

#### I. 1. b. As a Defence.

7. *Quære*—Whether it is necessary to rely on the Statute of Limitations in the answer,

in order to entitle a party to set it up in the office?—*Drought v. Jones*, 2 I. E. R. 303. (C.)

8. The futility of a defence resting on an unproved prior inconsistent conveyance, evidenced by admissions in an answer to another suit, observed on.

Expenditure on the estate claimed with plaintiff's knowledge, but chiefly in his minority: Held, no defence.—*Scott v. S.*, 11 I. E. R. 487. (C.)

#### I. 2. Effect of Admission by Answer.

9. An admission in an answer of a document as stated in the bill, qualified by a reference to the document itself for greater certainty, will not authorise the reading of the document from the bill.—*Dowling v. Legh*, 9 I. E. R. 413; 3 Jon. & L. 716. (C.)

10. In a suit by a principal against his agent for an account, a sum admitted by answer to be due will be ordered to be paid into Court.—*Blake v. Comins*, 1 I. Jur. 330. (R.)

11. The bill in an administration suit erroneously stated, in respect to dates and other particulars, agreements for leases to the testator. His heir-at-law in his answer admitted the agreements to be of the purport stated in the bill, but for greater certainty referred to the original agreements when produced. He died. The suit was revived as against his son and heir-at-law, T., a minor, who, in his answer (by his guardian) to the original and revived bill, also admitted the agreements to be of the nature set forth in the bill. A decree directed the Master to take an account of the real and personal estate of the testator, and to state whether the premises agreed to be demised to him formed part of his real or personal assets. The original agreements were not produced before the Master; but T. in his charge made an admission similar to that contained in his answer. The Master by his report found that the premises formed part of the testator's personal estate. To that report T. filed exceptions. After the cause was set down for hearing, on the report, exceptions, and further directions, T.'s solicitor, who had also been solicitor for T.'s father, for the first time obtained copies of the agreements. Counsel for T. mentioned at the hearing that the agreements differed from the description given of them in the bill, and tended to show that the testator took a freehold estate in the premises. Other parties in the cause objected to the admission of the original agreements in evidence in opposition to the previous admission in the pleadings. The Court yielded to that objection, and overruled the exceptions; but upon a special motion afterwards made,—Held, that the Master should be directed to review his report; and that T. should be permitted to file a supplemental charge in the office, putting in issue the original agreements, but should pay the costs of the motion, and the costs arising on the new reference to the Master.

That, before the decree to account, T. would have been permitted by supplemental answer to rectify the erroneous admissions; but that, after the decree, leave to file a supplemental answer could not be granted.—*Carbery v. Cox*, 2 I. C. R. 377; 2 I. Jur. 25. (C.)

1. A statement of an admission, in the petitioner's affidavit in reply, is not a compliance with the rules of equity pleading, requiring admissions to be put in issue.—*Corry v. Cremona*, 12 I. C. R. 186; 7 I. Jur. N. S. 21. (C.)

**L. 3. What and when the Defendant is bound to discover: of the sufficiency of Answers.**

[See G. O. (1867), 78.]

2. The bill stated that the defendant, a stock-broker, had converted old £3½ per cent. stock, which he had received as the attorney for the plaintiff, to his own use; and prayed a re-transfer. The defendant answered that, on the dissolution of a partnership between him and H., and the formation of two new establishments for carrying on the business of brokers, he, by the directions of the plaintiff, and other customers of the old firm, transferred to H. a large specified sum, of like stock, in which was included the stock belonging to the plaintiff and the other customers of the old firm, who were similarly circumstanced. The plaintiff amended his bill, stating the defence as a pretence; and interrogated as to the quantity of stock vested in the old firm at the time of the dissolution; the quantity that belonged to the customers of the old firm at that time; the name of, and quantity of stock belonging to each of them; the name of, and the quantity of stock belonging to each of the customers of the old firm who transferred their business to H., and the same of those who continued their business with the defendant. *Held*, that the defendant was bound to answer the interrogatories so far as they related to the old £3½ per cent. stock, but not as to other stocks.

That the defendant was bound so to answer, although to give the discovery sought would be a breach of faith on his part with his other customers.—*Flanagan v. Williams*, 2 Jones, 557. (E.E.)

3. An information against distillers charged them with distilling large quantities of spirits for which they had not paid duty; they having evaded payment by concealing the distillation, and pretending that their distillery had been silent during the time when the spirits were distilled. The information required them to discover the actual quantities of wort fermented in the distillery, and prayed an account of the duties payable to the Crown on spirits distilled by them. The Att.-Gen. waived all penalties and forfeitures. *Held*, that the defendants were bound to answer the charges fully; and could not protect themselves on the ground that the facts charged would, if coupled with other facts, show that they had been guilty of a conspiracy to defraud the Crown.—*The Att.-Gen. v. Conroy*, 2 Jon. 791. (E.E.)

4. A defendant who means to rely on his being a purchaser for value without notice, must, by his answer, deny notice, although it is not charged in the bill that he had notice.—*Ireland v. Kidd*, Jon. & Ca. 249. (E.E.)

5. The Commissioners of Ch. Don. filed a bill against A. and B., seeking a discovery of the estates in fee-simple, fee-tail, and other freehold and leasehold estates of the testatrix, and all her personal estate and effects, &c.; praying that an account might be taken of her freehold and leasehold estates, &c., and that the title deeds relating thereto might be brought into Court. The bill did not state that the personal assets of the testatrix were insufficient for the payment of her debts; but averred that the defendants had paid a specific bequest in her will mentioned. Demurrer to so much of the bill as sought discovery of the estates tail of the testatrix, and of her personal estate and effects (except chattels real), allowed.—*Commissioners of Ch. Don. v. Espinasse*, 3 I. E. R. 324. (R.)

6. Three testamentary trustees were made defendants to a bill; and, although in the same interest, answered separately. The Lord Chancellor said, that circumstances might justify the defendants in putting in separate answers; and directed the Master, in taxing the costs, to allow to the trustees the costs as of one answer only, unless he should find that any one had properly put in a separate answer, and then to allow his reasonable costs accordingly.—*Dudgeon v. Corley*, 4 Dr. & War. 158. (C.)

7. Notwithstanding the 34th G. O. of March 1843, leave was given to defendant to file his answer after an order to take the bill as confessed against him, although more than three years had elapsed after the order to take the bill as confessed was pronounced, and the cause was in the Lord Chancellor's term-list of causes for hearing; the plaintiff having been himself guilty of delay, there being a full affidavit of merits, and the defendant being put under terms not to postpone the hearing of the cause.—*Cruise v. Shiel*, 6 I. E. R. 132. (R.)

8. The 45th G. O. applies as well to cases in which there is but one defendant, as to those in which there is more than one defendant. Therefore, a sole defendant is not bound to answer more than the interrogatories in the bill.—*Millar v. M.*, 6 I. E. R. 308. (R.)

9. H. was seized in fee of estates in T. and L., and for life of estates in K., with remainder to his son, W., in tail, who had an equitable title to have part of T. settled to the same uses as K., and who claimed a lien under deeds on the rest of T. and L. They, by deed, reciting that H. was entitled to T. and L. in fee, and to K., for life, remainder to W., in tail, subject to charges and trusts, and reciting the embarrassment of H.; that advances had been, and that others were intended to be made by D. to pay debts; con-



18th of Nov., and possession was on that day taken." Answer:—"It is not true, as in bill untruly stated, that said *habere* was executed on the 18th of Nov., for that the defendant believed it was executed on the 17th of Nov." *Held*, that the precise day of the execution of the *habere* was sufficiently put in issue.—*Fitzgerald v. Hussey*, 3 I. E. R. 319. (E.E.).

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I. 3. *What and when the Defendant is bound to discover: of the sufficiency of Answers.*

[See G. O. (1867), 78.]

2. The bill stated that the defendant, a stock-broker, had converted old £3½ per cent. stock, which he had received as the attorney for the plaintiff, to his own use; and prayed a re-transfer. The defendant answered that, on the dissolution of a partnership between him and H., and the formation of two new establishments for carrying on the business of brokers, he, by the directions of the plaintiff, and other customers of the old firm, transferred to H. a large specified sum, of like stock, in which was included the stock belonging to the plaintiff and the other customers of the old firm, who were similarly circumstanced. The plaintiff amended his bill, stating the defence as a pretence; and interrogated as to the quantity of stock vested in the old firm at the time of the dissolution; the quantity that belonged to the customers of the old firm at that time; the name of, and quantity of stock belonging to each of them; the name of, and the quantity of stock belonging to each of the customers of the old firm who transferred their business to H., and the same of those who continued their business with the defendant. *Held*, that the defendant was bound to answer the interrogatories so far as they related to the old £3½ per cent. stock, but not as to other stocks.

That the defendant was bound so to answer, although to give the discovery sought would be a breach of faith on his part with his other customers.—*Flanagan v. Williams*, 2 Jones, 557. (E.E.)

3. An information against distillers charged them with distilling large quantities of spirits for which they had not paid duty; they having evaded payment by concealing the distillation, and pretending that their distillery had been silent during the time when the spirits were distilled. The information required them to discover the actual quantities of wort fermented in the distillery, and prayed an account of the duties payable to the Crown on spirits distilled by them. The Att.-Gen. waived all penalties and forfeitures. *Held*, that the defendants were bound to answer the charges fully; and could not protect themselves on the ground that the facts charged would, if coupled with other facts, show that they had been guilty of a conspiracy to defraud the Crown.—*The Att.-Gen. v. Conroy*, 2 Jon. 791. (E.E.)

4. A defendant who means to rely on his being a purchaser for value without notice, must, by his answer, deny notice, although it is not charged in the bill that he had notice.—*Ireland v. Kidd*, Jon. & Ca. 249. (E.E.)

5. The Commissioners of Ch. Don. filed a bill against A. and B., seeking a discovery of the estates in fee-simple, fee-tail, and other freehold and leasehold estates of the testatrix, and all her personal estate and effects, &c.; praying that an account might be taken of her freehold and leasehold estates, &c., and that the title deeds relating thereto might be brought into Court. The bill did not state that the personal assets of the testatrix were insufficient for the payment of her debts; but averred that the defendants had paid a specific bequest in her will mentioned. Demurrer to so much of the bill as sought discovery of the estates tail of the testatrix, and of her personal estate and effects (except chattels real), allowed.—*Commissioners of Ch. Don. v. Espinasse*, 3 I. E. R. 324. (R.)

6. Three testamentary trustees were made defendants to a bill; and, although in the same interest, answered separately. The Lord Chancellor said, that circumstances might justify the defendants in putting in separate answers; and directed the Master, in taxing the costs, to allow to the trustees the costs as of one answer only, unless he should find that any one had properly put in a separate answer, and then to allow his reasonable costs accordingly.—*Dudgeon v. Corley*, 4 Dr. & War. 158. (C.)

7. Notwithstanding the 34th G. O. of March 1843, leave was given to defendant to file his answer after an order to take the bill as confessed against him, although more than three years had elapsed after the order to take the bill as confessed was pronounced, and the cause was in the Lord Chancellor's term-list of causes for hearing; the plaintiff having been himself guilty of delay, there being a full affidavit of merits, and the defendant being put under terms not to postpone the hearing of the cause.—*Cruise v. Shiel*, 6 I. E. R. 132. (R.)

8. The 45th G. O. applies as well to cases in which there is but one defendant, as to those in which there is more than one defendant. Therefore, a sole defendant is not bound to answer more than the interrogatories in the bill.—*Millar v. M.*, 6 I. E. R. 308. (R.)

9. H. was seized in fee of estates in T. and L., and for life of estates in K., with remainder to his son, W., in tail, who had an equitable title to have part of T. settled to the same uses as K., and who claimed a lien under deeds on the rest of T. and L. They, by deed, reciting that H. was entitled to T. and L. in fee, and to K., for life, remainder to W., in tail, subject to charges and trusts, and reciting the embarrassment of H.; that advances had been, and that others were intended to be made by D. to pay debts; con-

veyed T., L., and K., in trust to receive the rents, and thereout pay D. past and future advances to H. and W., or either of them, or to pay incumbrances; and on further trust, at D.'s request, by sale or mortgage, the sums necessary to pay D. past or future advances made by him to discharge incumbrances: that the rents remaining after paying the incumbrances should be subject to such annuity for H. as D. should appoint; the overplus to form a fund to make up £30,000, for younger children's portions; after H.'s death, payment of the incumbrances, and the raising the £30,000 for W. in fee. Proviso: that during H.'s life the lands should first be charged with an annuity for W.: proviso empowering D. to restrict the raising of the £30,000: proviso, that nothing therein should invalidate the securities then or thereafter to be vested in D., who should stand in respect of all his advances in the same priority as the incumbrances paid by him. *Held*, that the deed was not void as against a creditor of H., as containing a power of revocation, or as intended to delay creditors.

F., a simple contract creditor of H., and fully acquainted with this deed, treated for a loan for H. from an Insurance Co. to pay off D., after which F. was to get a second mortgage for his own demand. He afterwards obtained a judgment, and filed the bill to impeach the deed. Sales to a large amount were had under the deed. W. settled his remainder in fee (which settlement was also impeached), and on several other occasions, for nearly twenty years, the deed had been acted on. *Held*, that F., by his own acts had precluded himself from objecting to the deed, even if it was impeachable; and that, having been thus acted on so long, it could not now be disturbed.

That whatever rights H. took under the deed were subject to the plaintiff's judgment; and, as D. had made no appointment of H.'s annuity, an account was directed to ascertain what allowance had been made to H. under it.

That F.'s right attached only from the time he had applied for a receiver on foot of his judgment, and the account should be limited to that time.

F.'s judgment was impeached in the answer of H. as fraudulently obtained, and his account as usurious and improper. *Held*, that this case could not be made by answer; but liberty was given to file a cross-bill.—*Myers v. The Duke of Leinster*, 7 I. E. R. 146. (C.)

1. Plaintiff, by bill, sought to establish his right to fees and dues for weighing and stallage of goods in a market, whether weighed or not, alleged to be immemorially payable in lieu of all other fees and dues in the market; and for an account of those dues claimed to be payable by the defendants from a period at which they had ceased to frequent the market, and had established themselves in shops opening into the street in which the market was held. Plaintiff deduced title, by grant from the lord of the market, of the offices of clerk of the markets and weighmaster within the manor, and "of all fees

and dues to the said offices appertaining." The bill alleged that the lords of the market had not been in the habit of receiving those fees, but of granting them to the clerks and weighmasters, and that the plaintiff's predecessor had so enjoyed them, or a composition in lieu of them, from the defendants. *Held*, that the grant to the plaintiff did not pass those fees, which, if legally payable, belonged to the lord of the market; and plaintiff having failed to show any title whatever to the relief prayed, could not except to the answer for insufficiency in not affording a discovery in aid of an account, the right to which depended on that title.

*Semble*—Where a bill is demurrable in substance, by reason of a total want of setting out of title to the relief prayed, the 36th and 79th G. O. enable a defendant to decline or omit answering any interrogatory relating to matters connected with the relief prayed, or the title to it.—[*See G. O. (1867)*, 58.]

*Quære*—Whether in such case defendant might so decline answering other parts of the bill; and whether, if a bill be demurrable on any grounds, he may so decline, according to the decisions of Wigram, V. C., in *Tipping v. Clarke*, 2 Hare, 383, and *Drake v. D.*, 2 Hare 647; *Kaye v. Wall*, 4 Hare, 127?—*Russell v. Beakey*, 8 I. E. R. 559. (R.)

2. To a legatee's bill the executor admitted assets sufficient to pay the legacies, but relied on his right to retain them as an indemnity for the contingent liability on the testator's covenants, and did not set out the amount of the assets. *Held*, that the answer was insufficient, and that he was bound to set out that amount.—*M'Auley v. M'A.*, 9 I. E. R. 142. (R.)

3. A statement or charge in a bill, though it relates only to one deft., puts the matter of it in issue as to all of them. Therefore, they cannot decline to answer an interrogatory founded on it.—*Sherlock v. Disney*, 13 I. E. R. 233. (R.)

4. The bill in an administration suit erroneously stated, in respect to dates and other particulars, agreements for leases to the testator, whose heir-at-law, in his answer admitted the agreements to be of the purport stated in the bill, but for greater certainty referred to the original agreements when produced. He died. The suit was revived against his son and heir-at-law, T., a minor, who in his answer (by his guardian) to the original and revived bill also admitted the agreements to be of the nature set forth in the bill. A decree directed the Master to take an account of the real and personal estate of the testator, and to state whether the premises agreed to be demised to him formed part of his real or personal assets. The original agreements were not produced before the Master, but T. in his charge made an admission similar to that contained in his answer. The Master, by his report, found that the premises formed part of the testator's personal estate. To that report T. took exceptions.

After the cause was set down for hearing,

on the report, exceptions and further directions, T.'s solicitor, who had also been solicitor for T.'s father, for the first time obtained copies of the agreements. Counsel for T. mentioned at the hearing that the agreements differed from the description given of them in the bill, and tended to show that the testator took a freehold estate in the premises. Other parties in the cause objected to the admission of the original agreements in evidence in opposition to the previous admission in the pleadings. The Court then yielded to that objection, and overruled the exceptions; but upon a special motion being afterwards made—*Held*, that the Master should be directed to review his report; and that T. should be permitted to file a supplemental charge in the office, putting in issue the original agreements, but should pay the costs of the motion, and the costs arising on the new reference to the Master.

That before the decree to account, T. would have been permitted by supplemental answer to rectify the erroneous admissions; but that, after the decree, leave to file a supplemental answer could not be granted.—*Carbery v. Cox*, 2 I. C. R. 377; 2 I. Jur. 25. (C.)

I. 4. *When the Discovery would tend to criminate, or to create a Forfeiture or Penalty.*

1. An information against distillers charged them with distilling large quantities of spirits for which they had not paid duty: they having evaded payment by concealing the distillation, and pretending that their distillery had been silent during the time when the spirits were distilled. The information required them to discover the actual quantities of wort fermented in the distillery, and prayed an account of the duties payable to the Crown on spirits distilled by them. The Att.-Gen. waived all penalties and forfeitures. *Held*, that the defendants were bound to answer the charges fully; and could not protect themselves on the ground that the facts charged would, if coupled with other facts, show that they had been guilty of a conspiracy to defraud the Crown.—*The Att.-Gen. v. Conroy*, 2 Jon. 791. (E.E.)

2. When a penalty is imposed upon the doing of an act which a party covenants not to do, he cannot refuse to discover whether he has done it or not, on the ground that it will subject him to a penalty.

If a man enter into a covenant of this nature for payment of a sum of money if he do a particular act, he cannot protect himself from a discovery if he do the act, under the allegation that that discovery will subject him to a forfeiture; because after having covenanted to pay money for doing the act, he cannot be heard to say that it is a penalty, in order to protect himself from discovering whether he has done the act. If he choose to do the act, he must pay the stipulated sum.—*French v. Macale*, 4 I. E. R. 574; 1 Con. & L. 459; 2 Dr. & War. 269. (C.)

I. 5. *When the Defendant may, by Answer, refuse to answer further.*

I. 6. *What Facts are or must be put in issue by the Answer.*

3. A defendant, who means to rely on his being a purchaser for value without notice, must, by his answer, deny notice, although it be not charged in the bill that he had notice.—*Ireland v. Kidd*, Jon. & Ca. 249. (E.E.)

4. A party, who has failed in the defence set up by his answer, cannot be permitted to try another defence depending on matters not put in issue by the answer, and which, therefore his adversary had not any means of disproving.—*Persse v. P.*, 7 Cl. & F. 279; West, 110.

5. When letters or conversations are relied upon by the plaintiff as taking the case out of the Statute of Limitations, they should be stated in the bill.—*O'Hara v. Creagh*, L. & T. 65; 3 I. E. R. 179. (E.E.)

6. The Statute of Limitations cannot be relied upon by a defendant who has not made that case by his answer.—*Purcell v. Cole*, Long. & T. 454. (E.E.)

7. In all cases previous to the recent Statute, if the defendant meant to rely upon the Statute of Limitations, he should do so in his pleading.—*Cummins v. Adams*, 2 I. E. R. 898. (E.E.)

8. A compromise made after bill filed may be relied on by answer, if it completely disposes of the rights in question; but if its validity be doubtful, or it requires something further to carry it into effect, a bill must be filed to execute or set it aside. A bill claimed a share of property. An agreement to dispose of it, and divide the proceeds in a certain manner, was made, but never carried out. The agreement being impeached by amendments in the bill, the cause was allowed to stand over.—*Bristow v. B.*, 12 I. E. R. 329. (C.)

I. 7. *In conjunction with Demurrer.*

[See G. O. (1867), 54, 62, 64.]

9. A clerk of a patron, who had recovered in a *quare impedit*, filed against the wrongfully instituted clerk a bill for an account of intermediate profits; and charged waste by cutting trees, &c. Defendant demurred to so much of the bill as sought an account of the waste, &c., or discovery relating thereto, and put in to the residue an answer offering thereby to account for the trees cut. *Held*, that the demurrer should be overruled, because the answer to one of the charges of waste had overruled the demurrer; and because the parts of the bill demurred to were not distinctly specified, though the demurrer was taken only to part of the bill.—*Crompton v. Bishop of Meath*, S. & Sc. 297. (R.)

1. Demurrer to the whole relief. Answer to part of the discovery.

*Quære*—Whether the demurrer is not overruled by the answer?—*Fitzmaurice v. Sadlier*, 12 I. E. R. 136. (R.)

I. 8. *Answer conjoined with Plea.*

[See G. O. (1867), 62, 64.]

2. Plea to the whole relief and discovery, except that sought by interrogatories specified in the plea. Answer to the excepted interrogatories. *Held*, that the answer overruled the plea, notwithstanding the 66th G. R.—*Fitzmaurice v. Sadlier*, 12 I. E. R. 136. (R.)

I. 9. *What constitutes Scandal or Impertinence in an Answer.*

[See 30 & 31 Vic., c. 44, ss. 70, 155.]

3. The defendant being required to set forth whether a document in the plaintiff's possession, purporting to have been signed by the person under whom the defendant derived, was correctly stated in the bill. *Held*, not prolix, to state that in a book belonging to that person, he found an entry which he believed to be the document referred to in the bill, and to set out a *verbatim* copy of it in the answer, it differing slightly from the document in the bill.

When the defendant is required to set forth a document at length, it is not impertinent to set forth merely an abstract of it.

When the answer set forth a *verbatim* copy of a letter of plaintiff to defendant, which was not called for by the bill, nor stated in the answer to be evidence of any fact stated therein as part of defendant's case—*Held*, that it was prolix and impertinent, though the latter might be material.

An interrogatory called for accounts. Setting out very minute accounts—*Held*, not to be prolix or impertinent, although they were unnecessary.—*Barry v. Harrison*, 2 I. E. R. 60; Jon. & Ca. 278. (E.E.)

I. 10. *Uncertainty in.*

I. 11. *When Answer is proper Defence.*

a. *Generally.*

b. *To gain the benefit of Statutes of Frauds and Limitations.*

I. 11. a. *Generally.*

4. When a defendant by his answer sets up as a defence to plaintiff's case, that the original grant, in relation to which plaintiff had come to a Court of Equity, ought not to have been executed, in general he will not be allowed to impeach the grant in such a way, but must file a cross bill.—*Ker v. Dungannon*, 4 I. E. R. 343; 1 Dr. & War. 509; 1 Con. & L. 335 (C.)

5. To enforce a defendant's equity by impeaching securities, a cross bill is necessary according to the English practice.

*Semble*—In Ireland, it may be done by answer.—*Carter v. Palmer*, 8 Cl. & F. 668, n.

6. In a suit by the purchaser of a charge upon an estate to enforce his right, it is not competent to the owner of the estate (the defendant) to attempt to reduce the claim, because plaintiff being incompetent to purchase the charge, is only entitled to the amount actually paid for it by him: he must file a cross bill for that purpose.—*Carter v. Palmer*, 11 Bli. N. S. 397.

I. 11. b. *To gain the benefit of the Statute of Frauds and Statute of Limitations.*

7. A defendant who does not by pleading claim the benefit of the 3 & 4 W. 4, c. 27, s. 40, cannot rely upon it in the office, in bar of the account.—*Walsh v. W.*, Jon. & Ca. 52. (E.E.)

8. The defendant's answer submitted, that by reason of the 3 & 4 W. 4, c. 27, s. 40, the plaintiff was barred from maintaining his suit against him as the heir-at-law of the conuzor, and that it was a good defence, both as to the real and personal estate of the conuzor; and he relied upon the Statute as if he had pleaded the same. *Held*, that it was competent for him, as personal representative of the conuzor, to rely on the defence given him by that Statute.—*O'Hara v. Creagh*, 3 I. E. R. 179; L. & T. 65. (E.E.)

9. When the grantor of an annuity, charged upon lands, sells the lands subject to the payment thereof, in a suit by the annuitant, to which the grantor is not a party, to raise the arrears of the annuity, the Court will not, to avoid circuity of action, prevent the purchaser from setting up the 42nd sec. of 3 & 4 W. 4, c. 27, against the annuitant.—*Kyme v. Dignam*, 1 Con. & L. 376; 2 Dr. & War. 295; 4 I. E. R. 562. (C.)

10. In cause petitions an affidavit is not necessary to raise the question of the Statute of Limitations.—*Richardson v. Goodman*, 3 I. Jur. 317. (C.)

I. 12. *By Infants and Attorney-General.*

I. 13. *Schedule to Answer.*

*Answer under the Court of Chancery (Ireland) Regulation Act, 1850.*

[See 13 & 14 Vic., c. 89.]

11. 4th G. O. of 1857 required every "matter of defence" to be stated in the answering affidavit.—*Duffy v. Johnson*, 4 I. Jur. 14. (C.); *Swift v. M'Tiernan*, 11 I. E. R. 602; *Irvine v. Frew*, 7 I. Jur. N. S. 72.

12. As to enlarging time for filing affidavits, 5th G. O. 1857.

Any allegation in petition to be taken as confessed if not denied; 6th G. O. 1857.—*Gilmore v. Clark*, 5 I. Jur. N. S. 53. (R.); *Rice v. O'Connor*, 7 I. Jur. N. S. 107; *Browne v. Coppinger*, 4 I. C. R. 72; *Knox v. Mahon*, 4 I. C. R. 84.

13. As to who should answer, and when.—*Kernaghan v. Kells*, 5 I. Jur. N. S. 163. (C.)

1. Leave given to a mortgagee defendant to file a supplemental answer to a cause petition, varying in some measure the statement of his title to the mortgage as put forward in his original answer, and putting in issue a deed under which he claimed, but which he had forgotten to mention in his original answer.

*Semle*—Mere inconsistency between the proposed matter of defence and the original defence is not sufficient ground for refusing leave to a defendant to file a supplemental answer.—*Glascok v. Ross*, 1 I. C. R. 50; 3 I. Jur. 115. (C.)—[Followed: *Kirwan v. Lindsay*, 2 I. C. R. 23. (C.)]

#### UNDER THE CHANCERY (IRELAND) ACT 1867.

Sec. 63, 30 & 31 *Vic.*, 44.—In what cases to answer: similar to sec. 12 of 15 & 16 *Vic.*, c. 86.

Sec. 64.—As to time for answering: similar to sec. 12 of 15 & 16 *Vic.*, c. 86.

Sec. 65.—What answer must contain: similar to sec. 13 of 15 & 16 *Vic.*, c. 86.—[See G. O. of 1867, Nos. 41, 42, 43, 44, 45, 46, and 64.]

Sec. 70.—Exceptions to answer for insufficiency: similar to sec. 17 of 15 & 16 *Vic.*, c. 86. [See G. O. of 1867, Nos. 56 to 78, and Nos. 147 to 151.]

As to mode of taking answers.—[See sec. 74 to 84. See ss. 68, 161.]

#### II. BILL OR PETITION.

1. *When proper, generally.*

2. *Its general form.*

a. *What facts it must state: by what allegations they are put in issue.*

1. *Before the Chancery Regulation (Ireland) Act 1850.*

2. *Under the Chancery Regulation (Ireland) Act 1850.*

b. *Mode of Statement.*

c. *Offer to Pay just Demands.*

d. *Waiver of Penalties: Forfeiture.*

e. *Multifariousness.*

f. *What amounts to Scandal and Impertinence.*

g. *Charging Part.*

h. *Interrogatories.*

1. *Before the Ct. of Chancery Regulation (Ireland) Act 1850.*

2. *Under the Ct. of Chancery Regulation (Ireland) Act 1850.*

3. *Under the Ct. of Chancery (Ireland) Act 1867.*

i. *Prayer.*

j. *Affidavits annexed.*

k. *Suppression of Facts.*

3. *Supplemental Bill.*

4. *Supplemental Bill in nature of a Bill of Review.*

5. *Supplemental Bill in nature of a Bill of Revivor.*

6. *When a Bill of Review lies: necessary steps to bring it: by and against whom it may be brought.*

7. *Revivor.*

a. *Bill of Revivor under the Old System: original Bill in its nature.*

b. *Under the Ct. of Ch. Regulation (Ireland) Act 1850.*

c. *Under The Chancery (Ireland) Act 1867.*

8. *Admended Bill.*

9. *Cross Bill.*

10. *Bill for Discovery and Relief generally.*

11. *Bill for Discovery merely.*

12. *Bill of Interpleader.*

13. *Bill of Peace and Quia Timet.*

14. *Bill to Perpetuate.*

15. *Bill for Partition, and other matters.*

16. *Discharge.* See PRACTICE, CHARGE.

17. *Bill Possessory.*

18. *Cause Petition under the Court of Ch. Regulation (Ireland) Act 1850.*

19. *Bill under The Chancery (Ireland) Act 1867.*

#### II. 1. *Bill or Petition: when proper generally.*

2. In pleading a will of real estate it is sufficient to state that it was made in such manner as the law requires for rendering valid devises of real estates, without stating the number of witnesses or mode of execution.—*Hatton v. Waddy*, H. & J. 601. (E.E.)

3. When a legal remedy to recover a rent-charge exists, a bill in Equity to recover it will not lie, merely because proceeding at Law is difficult. The rule is: that a party must abide by the legal remedy which his deed provides for him, unless the remedy is defeated by fraud, or rendered insufficient by some contingency.—*Roberts v. Hughes*, Beat Rep. 417. (C.)

4. *Semle*—If a bill was filed as an illusory proceeding, to evade the Statute of Limitations, the Court might, on a proper application, order it to be taken off the file.—*Boyd v. Higginson*, 5 I. E. R. 97. (R.)

5. The 12th & 14th G. O. apply to supplemental, as well as to original bills; and when any such bill is filed in violation of those rules, it will be taken off the file of the Court.—*Tommey v. White*, 6 I. E. R. 303. (R.)—[S. c., 6 Cl. & F. 786; 1 H. L. Cas. 160; 3 H. L. Cas. 49; 4 H. L. Cas. 818.]

6. The 26 G. 3, c. 57 (*Ir.*), empowers the Crown to grant letters patent to keep a theatre in Dublin, and prohibits all persons from performing plays in Dublin for hire, under a penalty of £300 for each offence, to be recovered by action of debt, &c. Letters patent authorised W. to establish a theatre, and perform plays in Dublin, and contained a clause prohibiting all other persons from doing so, unless duly authorised. *Held*, that W. could not sustain an injunction bill to restrain unauthorised persons, who opened a theatre, and performed plays contrary to the statute and patent.—*Calcraft v. West*, 8 I. E. R. 74; 2 Jon. & L. 123. (C.)

7. A., possessed of a term of 820 years in lands and premises at B., in 1822 demised them to C. for 800 years, at a rent of £140,



subject to the usual covenants to repair and pay the rent. C. entered and expended money on the premises. Conceiving the rent too high, A., at C.'s solicitation, agreed by letter to reduce it, in consideration of the permanent improvements made, to £130 a-year for the residue of the term. After the date of the letter, C. continued to make improvements; and then sub-let to D., at a fine, at the rent of £140. D. for £100 purchased from C. at a similar reduction in his rent. Thereupon C. handed to D. A.'s letter. For some years A. received the reduced rent, but then insisted on the original rent. C. filed a bill, to which D. was not a party, against A. for specific performance. *Held*, that D. ought to have been a party.

*Semble*—At D.'s suit the Court would have entertained a bill for specific performance.—*Morgan v. Rainsford*, 8 I. E. R. 299. (E.E.)

1. On a bill filed by a termor for years, who had leased for his whole term, reserving a rent, with a power of distress—*Held*, that a receiver should be refused, since it was doubtful whether the bill could be sustained, ptf. having a remedy at law.—*Cremen v. Hawkes*, 8 I. E. R. 508; 2 Jon. & L. 674. (C.)—[*Affg.* 8 I. E. R. 158. (R.)]

2. A bill in Equity does not lie to recover the arrears of a rentcharge, unless it be proved that there are circumstances which rendered the legal remedies useless or very difficult.—*Brady v. Fitzgerald*, 12 I. E. R. 278. (C.)

3. To a bill to perpetuate the testimony of witnesses respecting the execution and attestation of a will of 1845, whereby a will of 1833, under which deft. claimed, was stated to be revoked, deft. pleaded that ptf. put deft., by force, out of a part of the lands, and that the remainder was in the occupation of tenants, under leases, or from year to year, who had not acknowledged ptf.'s title, or paid him rent due; and that ptf. would, by action at law, against the tenants, forthwith try his title. *Held*, on the authority of *Deane v. Clarke*, 1 Sim. & Stu. 108, that the plea was good.—*Lindesay v. L.*, 12 I. E. R. 508. (R.)—[*Revd.* 1 I. Jur. 289. (C.)]

4. A return made by the registrar of a diocese, in answer to the enquiry of a clergyman whose benefice was under sequestration, enumerating the writs lodged with him, with the dates of the delivery and the sums due, though not proved to be made in virtue of his office, is evidence against the bishop; so are letters of the registrar of a similar character.

The applotment book of a parish is not evidence to prove the value of the benefice in years previous to the establishment of tithe composition in the parish.

A suit is sustainable for an account on foot of a sequestration over a benefice in the diocese against the personal representatives of two successive bishops, and against the present bishop, on the allegation of loss to the creditor by the default of the sequestrator during their respective bishoprics.

*Quare*—If a sequestration, not issued until the *levari* on which it is founded is out of return, be not void, although the benefice was in the bishop's hands under a prior sequestration.—*Hogg v. Garrett*, 12 I. E. R. 559. (C.)

5. *Semble*—A petition by way of peremptory exception in an interest suit is irregular; and, having an erroneous title, was dismissed with costs.—*Flood v. Bradley*, 8 I. Jur N. S. 114. (P.)

6. A petition presented under the Ch. Reg. (Ir.) Act 1850, praying the extension of a receiver, ought not to be entitled in the suit in which the receiver was originally appointed.—*Thunder v. T.*, 4 I. C. R. 491. (C.)

7. When an administrator has recovered a chattel interest in lands by a decree declaring his costs to be duly charged on the estate, his solicitor cannot file a petition in his own name to realise his own portion of those costs.—*In re M'Alister's Estate*, 16 I. C. R. 134. (L.E.C.)

## II. 2. Its general Form.

a. *What Facts it must state; by what Allegations they are put in issue.*

1. *Before the Court of Chancery Regulation (Ireland) Act, 1850.*

2. *Under the Court of Chancery Regulation (Ireland) Act 1850.*

b. *Mode of Statement.*

c. *Offer to Pay just Demands.*

d. *Waiver of Penalties: Forfeiture.*

e. *Multifariousness.*

f. *What amounts to Scandal and Impertinence.*

g. *Charging Part.*

h. *Interrogatories.*

1. *Before the Court of Chancery Regulation (Ireland) Act 1850.*

2. *Under the Court of Chancery Regulation (Ireland) Act 1850.*

3. *Under The Chancery Ireland Act 1867.*

i. *Prayer.*

j. *Affidavits annexed.*

k. *Suppression of Facts.*

## II. 2. a. *What Facts must be stated; by what Allegations they are put in Issue.*

1. *Before the Court of Chancery Regulation (Ireland) Act 1850.*

8. A defendant, who does not, by pleading, claim the benefit of the Statute of Limitations, cannot rely upon it in the office in bar of the account.—*Walsh v. W., Jon. & Ca.* 52. (E.E.)

9. *Semble*—When a bill seeks to open a settled account, some specific error, entitling the party to do so, must be pointed out, even though the transactions at which the account had been settled were impeached, and re-

quired subsequent circumstances to confirm them.—*De Montmorency v. Devereux*, 1 Dr. & Wal. 119. (C.)—[Affd.: 2 Dr. & Wal. 410; 7 Cl. & F. 188; West, 64; 4 I. Jur. 403.]

1. In a suit for £6. 1s. 5d. for tithes, the bill did not contain an allegation of any special circumstances arising from combination, or of any right to be ascertained, or any difficulty in the way of proceeding at law. *Held*, that the bill might have been demurred to, or dismissed at the hearing.—*Disney v. Taaffe*, 1 Dr. & Wal. 94. (C.)—[Affg. S. & Sc. 105. (R.)]

2. *Quære*—Whether the evidence of a witness should be read, who had deposed to ptf.'s admission of his having abandoned the contract; the fact of that abandonment, but not the admission itself, having been put in issue by the answer.—*Garrett v. Earl of Bessborough*, 2 I. E. R. 180; 2 Dr. & Wal. 441. (C.)

3. The general rule was that a bill, filed by the judgment creditor during the conuzor's life, should state that ptf. had issued an *elegit*. When, however, the conuzor was seized only of an equity of redemption upon a mortgage in fee, and it had been decided on motion that the conuzee was not entitled to issue an *elegit*—*Held*, that the bill need not contain that statement.

Neither need ptf. have revived his judgment within a year before.—*Handley v. Lord Langford*, 2 Jon. 421. (E.E.)

4. Evidence cannot be received of admissions made by a party, unless they are properly put in issue by the pleadings, so that he may have an opportunity of contradicting them.—*Austin v. Chambers*, 6 Cl. & F. 1.—[See 3 Dr. & Wal. 178; Dr. Rep. temp. Sugden, 85.]

5. In a bill to foreclose and sell, ptf. set forth so much of a mortgage deed as showed it to be in the nature of a Welsh mortgage, and at the hearing his counsel sought to read in aid of the bill, the deed, which contained an express trust for sale. *Held*, that it should not be read.—*O'Connell v. Cummins*, 2 I. E. R. 251. (R.)

6. The bill charged "that A., the surviving executor of B., was long since dead, intestate; although plaintiff has made enquiry, he cannot now set forth the name of the person who, plaintiff is informed, administered to the said B. with his will annexed, since the death of said executors; and plaintiff has applied to the several confederates herein named for discovery of the name of such administrator, but which, although well known to them, they refuse to discover." Demurrer, because B.'s personal representative (who was confessedly a necessary party) was not made a party to the bill, overruled, a sufficient excuse for not making him a party being suggested by the bill.—*Ryan v. Cambie*, 2 I. E. R. 328. (E.E.)

7. If the frame and prayer of a bill be essentially those of a creditor's bill, the omission of the usual introductory state-

ment—that it was filed on behalf of the plaintiff, and of the other creditors who should come in and contribute, &c., is immaterial, being only matter of form.

A creditor coming in under a decree cannot rely upon a will as creating a trust in his favour, unless it has been sufficiently put in issue for that purpose, by the pleadings, or by the charge or discharge.—*O'Kelly v. Bodkin*, 2 I. E. R. 361. (E.E.)

8. In the Court of E. E., a *puise* mortgagee need not, in a bill for foreclosure and sale, offer to redeem a prior mortgage. The *puise* mortgagee may insist on the sale. The prior mortgagee cannot resist it, but must be paid his debt and costs of suit first. If there be a judgment or other incumbrance prior to the first mortgage, such prior incumbrance must be paid out of the purchase-money, and that in priority even to the prior mortgagee. This rule holds good, even though such judgment or other prior incumbrance happens to be vested in the *puise* mortgagee who files the bill for foreclosure and sale. In the Court of Ch., the *puise* mortgagee must by his bill offer to redeem the prior mortgage.—*Perrott v. O'Halloran*, 2 I. E. R. 428. (E.E.)

9. When the assignee of a deceased insolvent files a bill to administer his after-acquired estate, on behalf of the dissatisfied creditors, he ought to specify in his bill the debts remaining unpaid.—*Byrne v. B.*, Fl. & K. 433. (R.)—[Affd.: 4 I. E. R. 621; 2 Dr. & War. 71; 1 Con. & L. 189. (C.)]

10. *Semble*—That when a bill is filed by two stockholders entitled to separate sums of stock, on behalf of themselves and all other holders of the same stock, praying relief; if it appears that one of the plaintiffs is not entitled to relief by reason of some equitable circumstances peculiar to himself, the Court may, nevertheless, in that suit, give the relief sought, and is not bound to dismiss the bill.—*Corballis v. Undertakers of the Grand Canal*, 3 I. E. R. 29. (E.E.)

11. A sequestrator appointed over a parish, at the suit of judgment creditors of the incumbent, presented a memorial, under the 1 & 2 Vic., c. 109, for arrears of tithe composition, due before the sequestration issued. A sum was accordingly lodged in the Treasury, on account of those arrears. Before payment the incumbent died, and the memorial having stated, by mistake (as alleged), that he was entitled to the arrears, his personal representative claimed the money against the sequestrator. The officer refused to pay either party without the order of this Court. A bill was filed in the names of the sequestrator, and the judgment creditor in whose behalf he was appointed, as co-plaintiffs, against the personal representative of the incumbent, stating the foregoing facts, and praying that the sequestrator might be decreed to be the person entitled to receive the money. *Held*, that a general demurrer should be allowed to the bill upon two grounds: first, that the seques-

tration was not retrospective, but attached the future accruing tithes only; and, therefore, did not entitle the plaintiffs to the money; secondly, that, at any rate, the sequestrator could have had no interest or title in this suit, and should not have been made a co-plaintiff. —*Egan v. Heenan*, 3 I. E. R. 50. (R.)

1. A bill for an injunction to restrain debts from disturbing ptf.'s possession of ferries cannot be sustained as a possessory bill, unless there be an averment of three years' possession. A statement that ptf. had recovered judgment against one of the debts in an action for disturbing him in the enjoyment of the ferries is not enough.

A ptf., in applying *ex parte* for an injunction, must state all the facts fairly. If any material fact be suppressed, that is ground for dissolving, with costs, the injunction in this Court, and in the Court below.—*Hemphill v. McKenna*, 3 Dr. & War. 183; 2 Con. & L. 76. (C.)

2. Letters or conversations relied upon by ptf. as taking the case out of the Statute of Limitations, should be stated in the bill.—*O'Hara v. Creagh*, 3 I. E. R. 179; Long. & T. 65. (E.E.)

3. The bill was for payment of a debt due by a banking company, formed pursuant to 6 G. 4, c. 42. It stated that the personal estate of the company was sufficient to pay their debts, and prayed for an account of the personal estate only. On demurrer, *Held* sufficient. The Bankers Act, 33 G. 2, c. 14, is not repealed by the 6 G. 4, c. 42. Upon the stoppage of payment by a joint-stock banking company formed under the latter statute, a trust is created—in favour of the creditors, and affecting all the property of the shareholders—under the Bankers Act, which may be administered by this Court, at the suit of any creditor, against the public officer of the company, instituted without making the other creditors of the shareholders parties; it being stated in the bill that the co-partnership assets are sufficient to discharge the liabilities of the company, and it not appearing that the shareholders have any liabilities other than those of their co-partnership.—*Fawcett v. Hodges*, 3 I. E. R. 232; Flan. & K. 100. (R.)

4. In a suit for an account of an intestate's personal estate, the bill sought to charge the administrator with wilful default, and contained charges to that effect. The decree directed only the ordinary accounts. *Held*, that the Court would, nevertheless, direct an enquiry as to wilful default, if there appeared on the Master's report facts to warrant enquiry. The 24th Rule does not take away the discretion of the Court respecting the rate of interest to be charged upon balances in the hands of executors, administrators, &c.—*Cuffe v. C.*, 3 I. E. R. 469. (C.)

5. In a suit for the administration of assets,

the report, but not the bill, made a case for charging the executor with the interest upon balances in his hands. *Held*, that the proper mode in which to bring the question before the Court was to present a petition stating the special matter, and praying that the cause might be set down to be heard for further directions.—*Cleary v. C.*, 3 I. E. R. 562. (E.E.)

6. A decretal order declared (amongst other things) that P. and C. were entitled to certain sums. To a bill filed to (amongst other purposes) set aside that order, P. and C. were not made parties. Demurrer for want of parties. *Held*, that, the interest of P. and C. not appearing on the order as set out in the bill, the debt. could not refer to the order itself.—*D'Arcy v. Beytagh*, Fl. & K. 481. (R.)

7. The Court will not allow a bill to be filed without the name of a solicitor affixed thereto.—*O'Shea v. —*, Flan. & K. 666. (R.)

8. Matters of title must be stated precisely, and not left to surmise, or to be spelled out by inference. From the statement that the ptf. "heard Mrs. O. died in or about the year 1830" (the time of the death being material), the Court would not infer that she died in that year.—*Cocking v. Golding*, 4 I. E. R. 169. (R.)

9. In an ordinary case, it is quite clear that it would be necessary to allege and prove an error in a settled account, in order to entitle the party to surcharge and falsify it.—*Lawless v. Mansfield*, 4 I. E. R. 192; 1 Dr. & War. 556. (C.)—[See *Blagrove v. Routh*, 2 Kaye & J. 509; 8 De Gex, M. & G. 620.]

10. The original bill had been filed by a ptf., who afterwards became insolvent; *Held*, that the title of the assignee appointed subsequently was good by relation.—*Cashell v. Kelly*, 1 Con. & L. 246; 2 Dr. & War. 181. (C.)

11. An allegation that "the trustees, or some them," are in collusion with the other debt., is an uncertain and imperfect averment.—*Cooke v. Lord Courtown*, 6 I. E. R. 266. (R.)

12. The rule of this Court respecting the opening of an account, requires errors to be charged in the bill as well as proved at the hearing, and it is founded on justice, to prevent a defendant being brought here in the dark and taken by surprise—to allow him an opportunity of explaining them by statement and evidence.—*Holland v. H.*, 6 I. E. R. 418. (C.)

13. Ptf. by bill, filed to establish a lease, alleged that one of them claimed under one of several lessees, not stating which; "that all the legal and equitable estate and interest of W., the original lessee, by mesne assignments or otherwise, duly came to and was vested in the ptf. and one C." (who was not a party to the suit), "and that they were equitably entitled to the portions of the lands in their possession respectively" *Held*, on de-

murrer; that the title of ptf. was not stated with sufficient certainty, the rule of Law and Equity being the same, that the ptf. must allege his own title particularly; that in a suit to establish the lease, all the tenants should be before the Court; and that there was not, therefore, a sufficient privity established between the ptf. and deft.

Tenant for life made a lease exceeding his power, with a covenant for quiet enjoyment for himself and those claiming under him. He and the remainderman subsequently conveyed the estate in fee subject to the tenants' leases; *Held*, that this did not amount to a confirmation of the lease by the remainderman, there being no contract between him and the tenants, nor any stipulation between the tenant for life and remainderman, that the latter should not impeach the lease.

*Quære*—Is the insanity of the ptf., at the time of the filing of the bill in his name, but without his authority, available on demurrer?—*Brangan v. Gorges*, 7 I. E. R. 283. (R.)

1. The omission in the prayer of a bill, that it may be taken as a cross-bill, is not material; nor a test to try the question whether it be a cross-bill or not, when the pleading is substantially that of a cross-bill.

If a bill have the properties of a cross-bill, though not professing to be such, it should not be filed without the affidavit and certificate required by the 60th G. O.—*Mahony v. M.*, 7 I. E. R. 629. (C.)

2. A judgment creditor, in applying for a receiver under the Judgment Acts, should state every material fact affecting his demand. If he withhold any he will not be allowed his costs.

In calculating the amount of his demand, the creditor is bound to deduct such interest as is barred by the Statute of Limitations.—*Lane v. Townsend*, 8 I. E. R. 53. (R.)

3. The Court will not suffer a party who has not relied on the Statute of Limitations by his discharge, to do so by a supplemental discharge.—*Kelly v. Rutledge*, 8 I. E. R. 378. (R.)

4. Plaintiff, claiming as assignee of F., sought an account of the real and personal estate of F., to which he was entitled under his father's will; and alleged by his bill that F., trading in Australia, was duly adjudged an insolvent according to the meaning and effect of the laws there with respect to insolvent debtors; that all his estate, &c., there and in this kingdom, thereupon became duly vested in H., and afterwards became duly vested in plaintiff "in manner as appears by the petition of plaintiff to C., Chief Justice; the fiat of C., the adjudication and vesting order signed by C., and the other orders in the matter, to which the ptf. refers," &c. F. was a minor at the time of the insolvency. His parents had previously resided and died in this country. *Held*, on demurrer, that the ptf.'s title, as assignee, was sufficiently stated; the profert of the proceedings in the

foreign Insolvent Court being sufficient proof of the preceding allegations that F. was duly adjudged, &c.

It does not seem contrary to natural justice, that if a minor may trade by the laws of a foreign country, he may also be made an insolvent there; and the Court, upon demurrer, will assume the law of the Colony to be so.

*Semble*—An infant trading in a foreign country may acquire a domicile there.—*Stephens v. M'Farland*, 8 I. E. R. 444. (R.)

5. J. bequeathed, amongst other property, a chattel real to his executors, in trust, after payment of two legacies, for H. for life, remainder to B. absolutely. H. paid off the legacies and debts, and died intestate. His personal representative, filing a bill against the executors to be repaid these sums out of the general assets of J., and for an account, did not make B. a defendant by subpoena; but served him with notice under the 15th G. O. A decree to account having been obtained, the ptf. filed the present bill, charging that the general assets were deficient; that the executors had, without consideration, given B. possession of the chattel real; and making him alone a defendant by subpoena, but serving the executors with notice under the 15th G. O.; and praying that the bill might be taken as an original bill in the nature of a supplemental bill in aid of the original decree; and for the same relief against B. in respect of the chattel real as was had against the executors in the original cause. *Held*, that the bill was demurrable, the executors not having been made parties to it.

*Semble*—The relief sought by the two bills was inconsistent, one seeking relief against parties against whom the other waived all relief.

*Quære*—Is the service of notice under the 15th G. O. a waiver of any right to seek relief against the party?—*Harpur v. Boyd*, 8 I. E. R. 456. (R.)

6. Conversations, containing admissions which go to the gist of the case, ought to be put in issue by the bill.—*Donohoe v. Cowrahy*, 8 I. E. R. 679; 2 Jon. & L. 688. (C.)

7. Plaintiff, by bill, stated that A., by deed, conveyed to trustees, to the use of B. for life, remainder to his issue male, lands which were held by A. "under and by virtue of certain leases or agreements for leases for lives renewable for ever, or certain terminable leases or agreements for terminable leases;" the dates and particulars of which plaintiff could not set forth, by reason of the same and the other muniments of the title being lost, or in defendant's possession, having been delivered to him by B. on a sale to him of B.'s interest. The plaintiff, as first tenant in tail, sought a discovery of the deeds, and that renewals obtained by B. in his own name might be decreed a graft on the original leases, and for an injunction to stay waste. *Held*, on demurrer, that the reasonable construction of the statement was, that the lands were held by A. at the

time of the execution of the deed; that the statement of the title of A. was not, under the circumstances, open to demurrer, inasmuch as the same principle which excuses a ptf. from setting out a deft.'s title ought to excuse him setting out the title of a party under whom ptf. derives, while the deft. wrongfully withholds the possession of the title deeds from him.

*Semble*—Such objection cannot be made upon a general demurrer for want of equity.

*Held also*, that the surviving trustee was not a necessary party.—*Hill v. Mill*, 9 I. E. R. 164. (R.)

1. Specific execution of a written agreement for a lease decreed at the suit of the tenant, with several additions contemporaneously agreed on by parol, set up by the answer, but omitted in the bill; the ptf. paying the costs of the suit.—*Warren v. Thunder*, 9 I. E. R. 371. (C.)

2. A judgment creditor, filing a bill to sell his deceased debtor's freehold estate, need not aver on the face of his bill that he has sued out an *elegit* on his judgment.—*Ryan v. Cambie*, 9 I. E. R. 378. (E.E.)

3. The ptf., by bill, filed in 1846, to raise the amount of a judgment of 1781, did not state that the judgment had been ever revived, or that payment had been made of any part of the principal or interest, or that there was any acknowledgment in writing of the right thereto; but stated a suit instituted for the same purpose in 1808, by the persons then entitled to the judgment, against the executors and devisees of the conuzor and others; which bill stated that the conuzor of the judgment died on the 8rd of March 1803, having first made his will, duly attested, and thereby charged his debts on his real estate, and created an express trust for payment of his debts. The date of the will was not stated. *Held*, on demurrer, that the Statute of Limitations was a bar to the ptf.'s demand, a devise for payment of debts not preventing the setting up the statute, where the time had run before the testator's death.

Even assuming the ptf. was entitled to the benefit of this suit of 1808, that nothing was stated on the bill to take the case out of the operation of the 8 G. 1, c. 4, the statute in force when the suit of 1808 was instituted.—*Young v. Wilton*, 10 I. E. R. 10. (R.)—[*Affd.*: *ibid*, 265. (C.)]

4. In a suit to raise the amount of a judgment after the death of the conuzor, seeking the usual accounts of his real and personal estates, it was never necessary, previous to the suit, to sue out an *elegit*.—*Foster v. M'Mahon*, 11 I. E. R. 287. (C.)

5. A statement or charge in a bill, though it relates to only one deft., puts the matter of it in issue as to all the defts.—*Sherlock v. Disney*, 18 I. E. R. 233. (R.)

## II. 2. a. What Facts must be stated, and what Allegations proved, under the Ct. of Chancery Regulation (Ireland) Act 1850.

[See 13 & 14 Vic., c. 89, ss. 11, 12, 13, 14, 15, and G. O. of July 1851.]

6. It is indispensable that in every petition under the Court of Ch. Reg. (Ir.) Act, s. 11, the documents relied on shall be fully set out; or that copies of them shall be furnished to the Court and to the parties.—*In re O'Reilly, petitioners*, 1 I. C. R. 208; 3 I. Jur. 205. (C.)

7. The petition should state such legal proceedings as, within the knowledge of the petitioner, have been taken respecting the subject matter of the petition.—*Bartlett v. O'Donnell*, 3 I. Jur. 37. (C.)

8. When a suit has been instituted and a cause petition subsequently presented for the same object, the petition should state the existence of the suit. It is no objection to a motion to discharge the order made by the Court that the respondent did not appear in the Master's office.—*M'Conkey v. Gwynne*, 3 I. Jur. 146. (C.)

9. An irregularity in the heading of a cause petition is waived by the filing of the affidavits in reply.—*Bell v. M'Carthy*, 3 I. Jur. 190. (C.)

10. A petition presented to obtain an order for the appointment of a person to convey to a purchaser an estate or right in law, belonging to a party to a suit, barred by a decree or order thereon, must be further entitled in the matter of the "Trustees Extension Act, 1852."—*Ex parte Conroy*, 6 I. Jur. 26. (R.)

11. A petition to appoint new trustees should be entitled in the matter of the trusts of the settlement and of the Act.—*Therry v. T.*, 6 I. Jur. 61. (R.)

12. In an administration suit the Court does not, before decree, order the executor or administrator to bring money into Court, unless on a distinct admission that he has assets in hands. In a case referred to the Master, under the Ch. Reg. (Ir.) Act, s. 15, an executor *de son tort* by his discharge stated that he had not any sum whatever of assets in his hands; but was in advance beyond any sum which had been realised out of the assets. *Held*, that the Master's order directing him to bring money into Court was irregular.

A man was discharged as an insolvent in 1848. In 1850 his wife became entitled, on the death of her brother, to a moiety of the personal estate, as one of the next-of-kin. The assignee of the insolvent filed a cause petition against the executor *de son tort* of the brother, stating that he sued "as such assignee," but without stating that he was a creditor of the insolvent, or that he had entered judgment against him pursuant to the 3 & 4 Vic., c. 107, ss. 78, 79, and without making the wife of the insolvent a party. *Held*, that the suit was unsustainable for want of title (the

property not being vested in the assignee), and for want of parties; and that the Master had no power, in a matter referred to him under the Ch. Reg. (Ir.) Act, s. 15, to make a decretal order directing the executor to bring a part of the assets into Court, and appointing a receiver to recover the residue.

A suit may, under particular circumstances, be sustained in the name of a schedule creditor of an insolvent, to make the property of the insolvent, acquired after his discharge, liable to his debt; but the assignee cannot maintain such a suit unless he be a creditor, or has entered up judgment against the insolvent, pursuant to the 78th & 79th secs. of the Insolvent Act.—*Glenny v. Woolsey*, 4 I. C. R. 636. (R.)

1. In a suit against a land agent, an account of what he might, without wilful default, have received, will not be directed by the decree, unless a special case be made by the petition, and proved.—*Brooke v. Elliott*, 6 I. C. R. 310; 2 I. Jur. N. S. 362. (R.)

2. Matters not put in issue by the petition, or by amendment thereof, cannot be relied on at the hearing of a cause petition. To put them in issue by an affidavit in reply is not sufficient.—*Murphy v. Jackson*, 7 I. C. R. 189; 3 I. Jur. N. S. 132 (R.).—[Affd.: 7 I. C. R. 502; 3 I. Jur. N. S. 288. (C.A.)]

3. A petitioner who means to rely upon the respondent's waiver of a right arising out of the contract, must, in the petition, put the waiver specifically in issue.—*Barry v. Burns*, 3 I. Jur. N. S. 97. (C.)

4. Waiver of a demand under the Tenantry Act, if the petitioner intends to rely upon it, should be put in issue by the petition; not by an affidavit in reply.—*Ex parte Bull*, 3 I. Jur. N. S. 332. (R.)

5. An executor lodged in Court the amount of a charitable legacy, and presented a petition praying a reference to obtain the Master's approval of a scheme. Held, that the petition ought to be entitled under the 52 G. 3, c. 101; and ought to be sent to the Att.-Gen.—*In re the Trusts of Kelly's Will*, 7 I. Jur. N. S. 273. (R.)

6. A testator described himself as of L. in Ireland, at present at St. D. in Grenada. Having died there, the Court assumed that Ireland was his domicile.

To raise the point, the question of domicile should be pleaded, as well as the law of Grenada, if different from that of Ireland.—*Kennedy v. Kelly*, 7 I. Jur. N. S. 326. (P.)

7. When an agreement is alleged in a petition for specific performance, it is not necessary to put in issue the written document as evidence of that agreement.

Lands were conveyed by a registered deed, "subject to existing leases and lettings." The vendor had previously contracted to grant a lease, and there was written evidence of that agreement. The vendee had no express no-

tice of it. Held, that the vendee was bound to execute a lease according to the terms of that agreement.—[Reversing Rolls decision: 11 I. C. R. 510.]—*Rice v. O'Connor*, 12 I. C. R. 424; 7 I. Jur. N. S. 109. (C.A.)

8. *Semble*—That a judgment creditor claiming against an assignee for value, should aver notice, to give himself any equity.—*In re Grady's Estate*, 13 I. C. R. 154. (L.E.C.)

9. General allegations of wilful neglect in a petition against a land agent, though supported by specific evidence of neglect in particular cases, are not sufficient to entitle the petitioner to an enquiry respecting wilful neglect.—*Bond v. M'Watty*, 13 I. C. R. 174; 7 I. Jur. N. S. 315. (C.)

10. A petition which makes unsustained charges of fraud, is not, on that account, to be dismissed, if there be in it facts properly pleaded and sustained in proof, which, if not connected with the charge of fraud, would confer a right to relief.—[*Wilde v. Gibson*, 1 H. Lds. Cas. 605, considered and explained.]—*Beale v. Billing*, 13 I. C. R. 250. (C.)

11. It is erroneous to describe a cause petition as under the 15th sec., until an order of reference has been made. — *v. Keogh*, 13 I. C. R. 495. (C.)

12. The rule of pleading, which, to justify the Court in decreeing an account for wilful default against a land agent, requires some instance of wilful default to be specified in the petition, and proved at the hearing, is not satisfied by the petition containing reference to accounts furnished by the agent which show remission of rents by him, though there is evidence establishing that the remission was wrongful.—*Pennefather v. Bolton*, 14 I. C. R. 335; 8 I. Jur. N. S. 221. (C.A.).—[Varying the Rolls order: 14 I. C. R. 234; 8 I. Jur. N. S. 45.]

13. H., tenant for life, with remainder to his children as he should appoint, in default of appointment to them equally, appointed to his eldest son, subject to charges for his adult younger children.

The tenant for life and the appointees joined in executing to the appellant a mortgage, to secure a debt of the tenant for life.

The eldest son afterwards filed a petition, alleging the appointment to have been made in pursuance of an agreement between the tenant for life and the appellant; and that the mortgage was a fraud on the power.

The petition also contained charges of actual fraud by the appellant upon the appointees.

The petition prayed that the mortgage might be set aside, as fraudulent, and as a fraud on the power. Held, that, at the hearing, the petition might be amended, by praying that the deed of appointment might be set aside.—*Stelton v. Flanagan*, 14 I. C. R. 484. (C.A.).—[See 15 I. C. R. 803.]



II. 2. b. *Mode of Statement.*

1. In pleading a will of real estate, it suffices to state it was made in such manner as the law requires for rendering valid devises of real estates, without stating the number of witnesses, or the mode of execution.—*Hutton v. Waddy*, H. & J. 601. (E.E.)

2. If the frame and prayer of a bill be essentially that of a creditor's bill, the omission of the usual introductory statement, that it was filed on behalf of the ptf. and the other creditors who should come in and contribute, &c., is immaterial; such averment being matter of form merely.—*O'Kelly v. Bodkin*, 2 I. E. R. 361. (E.E.)

3. An allegation that "the trustees, or some of them," are in collusion with the other debt., is an uncertain and imperfect averment.—*Cooke v. Lord Courtown*, 6 I. E. R. 266. (R.)

II. 2. c. *Offer to pay just Demands.*

4. The proviso in the 3 & 4 Vic., c. 105, s. 22, exempting from the operation of the Act purchasers who became such before its commencement, applies only to purchasers for value.

*Quere*—Whether a judgment creditor, made a respondent to a petition by a *puise* incumbrancer, can ever require an offer to redeem him in the petition.—*Gillichan v. McGusty*, 5 I. C. R. 348. (C.)

[See under Ch. Reg. Ir. Act, 1850:—*Carey v. Doyne*, 5 I. C. R. 104. (R.); *O'Brien v. Considine*, 7 I. Jur. N. S. 5; *Richardson v. Goodman*, 3 I. Jur. 317; *Irvin v. Frew*, 7 I. Jur. N. S. 72.—See 4th General Order 1857.]

II. 2. d. *Waiver of Penalties: Forfeiture.*II. 2. e. *Multifariousness.*

5. A., by will, devised his lands subject to his debts, to D. and H., in moieties, for life, with a power to each to charge £10,000 upon his moiety. D. by will appointed the £10,000 in different shares among his children. Upon demurrer to a bill filed by the appointees under that will, to raise that sum, and praying for an account of the real and personal estate of A., and, if necessary, of the personal estate of D.; *Held*, that the bill was not multifarious.—*D'Arcy v. Beytagh*, Fl. & K. 481. (R.)

6. *Quere*—When a bill contains statements made merely to prevent a demurrer for multifariousness, whether the objection may be taken at the hearing, if the statements are unproved?—*Nixon v. Robinson*, 7 I. E. R. 520; 2 Jon. & L. 4. (C.)

7. The administrator of the executor of a surviving trustee of money charged on real estate—*Held*, not to represent the trustee in a suit to raise money; and a demurrer for want of parties allowed on that ground.

*Semble*—A bill by same person to raise two sums charged on different estates vested in the same debt. is not multifarious, though some of the persons interested in the one estate are not interested in the other estate.—*Van Reitzenstein v. Magan*, 12 I. E. R. 415. (R.)

8. Bill by A., B., and C., against X. tenant for life, and Y. tenant in tail in remainder. Y. filed a bill against A., B., and C., and D., solicitor to the ptf. in the original cause; and prayed that the bill might be taken as a cross bill against A., B., and C., to set aside the mortgage and other deeds; an account against D. of the sums due to him on a judgment obtained by him after the mortgage; and that bills of costs, which formed part of the sum secured by the judgment, might be taxed. Demurrers for multifariousness by A., B., and C., and by D., were allowed.—*Crofts v. Allman*, 1 I. Jur. 118. (R.)—[Affirmed on appeal, 2 I. Jur. 9. (C.)]

9. By a mortgage deed, executed by a tenant for life and remainderman, the solicitor for the mortgagees was appointed receiver over the mortgaged lands at a percentage. He covenanted that he would apply the rents in payment of head rents and the interest of the mortgage, and pay the residue to the mortgagees.

A foreclosure bill having been filed, the remainderman filed a cross bill against the mortgagees and solicitor, impeaching the mortgage as fraudulent; praying that policies of assurance should be kept up out of the rents to indemnify the ptf. against the mortgage; a declaration that the mortgagees were bound to keep down the head rent; an account of the rents against them as mortgagees in possession; and an account against the solicitor of the sum for which a judgment was entered up as a collateral security. The bill did not pray costs against the solicitor. *Held*, on demurrer, that the solicitor having no interest with respect to any part of the relief sought, except the last, the bill was multifarious both as to him and the mortgagees.

In a suit to impeach a deed for fraud, a solicitor or agent concerned in procuring it may be made a party, but the bill must pray costs against him.—*Crofts v. Allman*, 12 I. E. R. 451. (R.)

10. All the parties to the original bill being dead, the cause was set down in the names of the parties to a supplemental bill only. *Held*, regular; that parts of the answer to the original bill could be read as of an answer in the cause at hearing; and that it was not to be treated as an answer in another cause.

The allegation made in a bill to prevent a demurrer for multifariousness was unproved; but it appeared that the accounts might be such as to render the suit not multifarious. *Held*, an objection for multifariousness, though made by the answer, could not be sustained.

*Quere*—If the objection should not be pleaded?—*Anderson v. Pratt*, 12 I. E. R. 603. (C.)

1. Bill to raise £1500, secured by marriage articles and also by mortgage, against J., tenant for life of the land charged, and trustee in whom the £1500 would vest. The bill stated that J. was insolvent, and should be removed from the trust, and the fund transferred; and as evidence thereof stated that he refused to transfer another sum to which plaintiff was entitled, but which did not form any part of the trust fund. The bill also prayed that the £1500 might be raised by a sale, and that J. might be removed from being such trustee; and the fund transferred. A demurrer for multifariousness was overruled. *Burke v. Jennings*, 2 I. Jur. 179. (R.)

2. When a bill would not be sustainable, a petition under the Ch. Reg. (fr.) Act 1850, cannot be supported. Such a petition is open to an objection for multifariousness.—*Cuming v. Taylor*, 1 I. C. R. 25; 3 I. Jur. 65. (C.)

3. A., tenant for life without a leasing power, made a lease in 1832 to F. for three lives or 31 years, G., the sister of E. and the petitioner in the suit, being one of the c. q. vies. F. left the country in 1834, and had not been since heard of. G. entered into possession of the demised premises. The rent having fallen into arrear, an ejectment was brought by A. Subsequently A. and G. arranged that G. should pay the arrear and give up possession; and should receive an annuity for life to the amount of the profit rent in the premises. There was no written agreement produced, except letters from A., and B. his son, to G. relative to the payment of the annuity. Upon the death of A., B., his heir-at-law, took possession, being also A.'s personal representative. Having refused to continue paying the annuity because A. had no power to create such a charge beyond his own life, G. filed a petition praying for an order that B. should pay what was due on account of the annuity; a decree that the annuity was an equitable charge upon the lands demised; and a receiver, and that the annuity should be payable out of the assets of A. *Held*, that G. was entitled to a personal annuity for life; and that the assets of A. were liable thereto.

That the real estate was not liable to the charge.

That the petition was not bad for multifariousness or misjoinder.—*Gibbon v. Cloncurry*, 7 I. Jur. 171. (C.)

## II. 2. f. What amounts to Scandal and Impertinence.

4. The statement in a bill of facts relevant and material to the equity of the case stated, and the relief prayed, is not scandalous, though it be such as the deft., whom it concerns, should not be obliged to answer. If it be libellous, the person affected thereby may have an action at Law.—*Everard v. —*, 1 I. E. R. 421. (R.)

## II. 2. g. Charging Part.

5. A petitioner claimed a legacy by her

petition and charge; and claimed priority for it over other legacies, by reason of a contract with the testatrix that the legacy should be bequeathed to her in consideration of her services as companion. The alleged contract was denied by the discharge, and no evidence was given to prove it. *Held*, that having claimed as legatee, by her petition and charge, she could not, on an appeal from the Master's decree, abandon the legacy and claim as creditor.

That she could not claim as a creditor, having given no evidence to support her claim as such.—*Dyer v. Bessonett*, 4 I. C. R. 382. (R.)

## II. 2. h. 1. Interrogatories.

*Before the Court of Chancery Regulation Ireland Act 1850.*

6. Plaintiff may read part of defendant's answer to a personal interrogatory.—*Sherrock v. Chartres*, 2 I. E. R. 230, n. (R.)

7. No prayer to remove trustees is necessary to give the Court jurisdiction to remove them.—*Att.-Gen. v. Drummond*, 3 Dr. & War. 162; 2 Con. & L. 98. (C.)

8. A bill, not containing a prayer for an answer or for subpoena, cannot be sustained as a common bill for injunction on title.—*Hemphill v. McKenna*, 6 I. E. R. 57; 3 Dr. & War. 183; 2 Con. & L. 76. (C.)

9. When a defendant, a merely formal party to a suit, resides out of the jurisdiction—*Semble*, the bill should merely pray against him the usual process of subpoena.—*Wallace v. Mitchell*, 6 I. E. R. 656. (E.E.)

10. The costs of a suit, to set aside a deed for fraud, will not be given against a solicitor, party to the fraud, and party in the suit, in respect of other liabilities, unless the bill prays them against him.—*Roddy v. Williams*, 3 Jon. & L. 1. (C.)

11. Plaintiff, by bill, stated, that having a charge affecting the lands of M., held by defendant under a lease, an arrangement was entered into between them; that defendant should, in lieu of plaintiff's charge, grant him an annuity for the lives of himself and his sister, charged on properties, including M., and an agreement for other security. Defendant having broken penal covenants in the lease of M., his interest was evicted by the landlord, C., between whom and defendant an agreement was then entered into to give defendant a new lease. The bill charged various acts to show that defendant evaded performing his agreement, and in order to extinguish plaintiff's claims on the lands, aided C. to evict the interest in them on a previous promise of a new lease, and prayed that the new lease might be decreed liable to plaintiff's demand. Defendant demurred to the relief and discovery, assigning as a cause, *inter alia*, that part of the discovery was immaterial, being in relation to the new lease, as to which plaintiff had no title to relief. *Held*, that the

demurrer in relation to this relief could not be sustained, and that the interrogatories being in part material, the plaintiff was entitled to the discovery; that the demurrer, so far as related to the relief of part performance, with indemnity and compensation, would, if so confined, be good; but the demurrer, being bad as to the former part, was bad altogether.—*Southwell v. Daly*, 9 I. E. R. 7. (R.)

1. When a bill seeks a discovery of necessary parties, an objection for want of parties will not in general be allowed.

A statement or charge in a bill, though it relates only to one defendant, puts the matter in issue as to all the defendants. They cannot therefore decline to answer an interrogatory founded on it.

A bill, that lands might be declared bound by marriage articles, stated that the defendant, A., pretended that neither he nor any person in trust for him was seized of any part of the lands bound by the articles, but at other times admitted the contrary, and refused to discover the particulars to the plaintiff; and contained interrogatories as to incumbrances and parties. Another defendant was required to answer the interrogatories, but he filed a plea of want of parties, which was overruled. *Sherlock v. Disney*, 13 I. E. R. 233. (R.)

## II. 2. h. 2. *Interrogatories under the Court of Chancery Regulation (Ireland) Act 1850.*

[See 13 & 14 Vic., c. 89, ss. 6, 7, & 8; General Order of 1851, No. 16, now repealed by The Chancery Act 1867.]

2. Interrogatories having been annexed to a cause petition without the leave of the Court, an order was made that they should be allowed to stand, reserving the costs occasioned by them until the hearing of the cause.—*O'Malley v. Denny*, 1 I. C. R. 118. (R.)

3. Practice as to annexing interrogatories to petitions under Chancery Regulation (Ir.) Act 1850.—*Sheridan v. Cannon*, 1 I. C. R. 245; 3 I. Jur. 250. (C.)

4. If interrogatories be annexed to the petition, and the respondent is required to answer them by the notice, he must move for security for costs before he takes a step in the cause, and before the time for answering has expired.

In England the motion may be made at any time before the defendant takes a step in the cause; in Ireland at any time before he has taken a step in the cause, unless he is in contempt.—*Long v. L.*, 1 I. C. R. 618. (R.)

5. *Semble*—That, when an interrogatory is leading, the Court will, at the hearing, suppress the deposition to that interrogatory. Where, however, only part of an interrogatory is leading, the Court will not suppress more of the deposition than replies to that part.—*Wright v. Griffith*, 1 I. C. R. 695; 3 I. Jur. 188. (C.)

[The mode of filing interrogatories under

The Chancery (Ireland) Act 1867, 30 & 31 Vic., c. 44, is regulated by secs. 63, 65, 72, and 87, and General Orders of 1867, Nos. 41-45.]

## II. 2. i. *Prayer.*

[*Subpoena abolished by 30 & 31 Vic., c. 44, s. 54.*]

6. When a bill is filed to raise the amount of a legacy given to a child of the testator, interest for maintenance will be decreed (if the case be a proper one therefor) although it is not specifically prayed for.—*Russell v. Dickson*, 1 Con. & L. 284; 2 Dr. & War. 133; 4 I. E. R. 339. (C.)

7. When parties, against whom no direct relief is sought by the bill, are resident out of the jurisdiction, the proper course is, to pray subpoena against them, with liberty to serve them with the notice under the 15th G. O. The Court may then give leave to serve the subpoena and the notice on the defendant, out of the jurisdiction, pursuant to the 22nd G. O. *Fulton v. D'Orsay*, 5 I. E. R. 279. (R.)

8. When a defendant, who is merely a formal party to a suit, resides out of the jurisdiction; *Semble*—The bill ought merely to pray the usual process of subpoena against him.—*Wallace v. Mitchell*, 6 I. E. R. 656. (E.E.)

9. It is not enough to state that persons who, in respect of interest, are necessary parties to a suit, are out of the jurisdiction; the bill must pray process against them when they come within the jurisdiction.—*Bayly v. Cumming*, 10 I. E. R. 405. (R.)

10. The replication should not be filed against persons against whom process is prayed, only when they come within the jurisdiction.—*Stephens v. O'Shaughnessy*, 11 I. E. R. 279. (R.)

11. A bill of discovery in aid of a defence at law will not lie against one who is not a party to the record at law.

If a bill prays relief and discovery, the plaintiff cannot waive the relief, and insist on the discovery.

A bill by the directors of an Insurance Company stated matters which amounted to a legal defence, and prayed a discovery; that a policy of assurance might be delivered up to be cancelled; and an injunction to stay an action at law brought on it. The bill was against A., administratrix of the assured, and B., assignee of the policy, in concert with whom, and by whose directions the bill charged the policy to have been effected; but who was not a party to the action. The Court refused the injunction on the bill as a bill of relief, because it stated facts amounting to a defence at law, or as a bill of discovery, because it prayed relief which the plaintiff could not waive.—*Anderson v. Dowling*, 11 I. E. R. 590. (R.)

12. An agreement "to sell the interest of A. in the lands of Whiteacre" does not absolve

A., the vendor, from the necessity of proving his lessor's title.

Nor is there any waiver of that necessity by the mere fact of the vendee having taken possession of the lands before production of the lessor's title.

When an agreement for sale of a leasehold is silent as to the production of the lessor's title, parol testimony is admissible in proof of facts and circumstances constituting a waiver by the vendee of production of the lessor's title.

*Semble*—That if such a waiver be proved, the Court will declare it to be established, although the bill contains no prayer to that effect.—*Wright v. Griffith*, 1 I. C. R. 695; 8 I. Jur. 138. (C.)

1. In and before 1853, J. was indebted to S. by simple contract. At that time J. was possessed of considerable farming stock and household furniture; of a judgment for £2500; and of leaseholds; he was also seized of a freehold interest in the lands of D. The leaseholds and freeholds were subject to a charge in favour of his sister H. J. being indebted to his sister M., in Jan. 1853, assigned to her his farming stock at a valuation, in part payment of the debt. By deed of the 25th May 1853, he conveyed to her his interest in D., for £600; and by another deed assigned the judgment. By deed of the 28th of June 1853, he mortgaged the leaseholds and household furniture to M. to secure £3200. This mortgage was to be redeemable on the 28th June 1856; and contained a provision that M. should not, when in possession of the lands, be charged with a greater sum than £150 per annum; and that if J. died before the period for redemption without paying the sum due, the right to redeem should be at an end.

By deed of 7th Jan. 1854, J., in consideration of the charge in favour of H., conveyed his equity of redemption to a trustee for her. This purported to be an absolute conveyance, but contained a provision, that it should not prejudice the charge. S. obtained a judgment against J. on foot of his demand, on the 29th April 1854, and registered an affidavit of ownership against J. S. afterwards filed a petition charging that those deeds were executed with intent to defeat and delay creditors; that the property of J., if duly applied, was sufficient to pay the claims of M. and H., and also the petitioner's debt; and that £3200 was not due from J. to M. The petition prayed that the assignments and conveyance might only stand as a security for so much as was actually due to M., and prayed redemption of the mortgage.

M. by her answering affidavit relied on accounts settled by J. on the 28th June 1853, and relied on the conveyance of D. as an absolute sale for £600.

Affidavits in reply were filed by the petitioner, alleging that D. was worth more than £3000. *Held*, that the petitioner was not, as claiming under J., bound by the accounts settled by him; but that, not having impeached them by his petition, they were to be treated as binding on him.

That the petition having been filed before the period for redemption arrived, the prayer for redemption of the mortgage could not be sustained.—*Staunton v. Donohoe*, 4 I. C. R. 554; 7 I. Jur. 37. (C.)

2. It is a sufficient compliance with the 6th G. O. of 1851, to name the respondent in the petition with the description of "respondent," and to refer to him in the prayer as "the said respondent."—*Nowlan v. Evans*, 5 I. C. R. 356. (C.)

3. The board of the College of Physicians resolved that B. should be accepted of as a tenant of a farm for 31 years, at a rent of £1. 10s. 0d. per acre, as the nominee of P., a former tenant, who had, by another resolution, been allowed to dispose of his interest. F., B.'s solicitor, acting under a general authority, wrote to the solicitor of the board that, in consequence of B.'s dangerous illness, he had not finally concluded with P., and could not take out the lease. After the death of B., P. filed a cause petition for specific performance of the agreement contained in the resolution. The solicitor for the College in his affidavit stated an agreement of 1846, for a lease for 21 years, at a rent of £1. 17s. 0d. per acre, with the brother of P., who had formerly been a tenant of the farm, and whose administrator and creditor P. was, of which agreement P. was ignorant. P. amended his petition, and as such administrator prayed in the alternative a specific performance of that agreement. *Held*, that, having regard to the 19th G. Order of May 1857, the misjoinder could be set right at the hearing, by amendment of the prayer.

*Quære*—Whether that Order applies to misjoinder of causes of suit as well as to misjoinder of parties?

On the authority of *Lindsay v. Lynch* (2 Sch. & Lef. 1) that the petition should be dismissed as praying relief in the alternative under two inconsistent agreements; the Court gave leave to amend the petition by abandoning the relief prayed by the original petition. *Power v. The College of Physicians*, 7 I. C. R. 104. (R.)

4. After an absolute order for the sale of lands in the I. E. Court, a petition was presented in the Court of Chancery, praying a sale of the same lands, and in the meantime a receiver. *Held*, that the receiver was ancillary only to the sale, and that the prayer for the sale being bad under 12 & 13 Vic., c. 77, s. 42, the petition must be amended by praying the receiver only, and this without prejudice to any question as to costs incurred in the Master's office on the petition before amendment.—*O'Beirne v. Reade*, 1 I. Jur. N. S. 403. (R.)

## II. 2. j. Affidavits annexed.

5. A., on behalf of herself and her infant children, filed a bill against B., tenant in common with her husband, C., alleging that at C.'s death, B. entered into receipt of the whole rent, claimed the whole, and kept possession of the title deeds, for want whereof ptfs. could not proceed at law. The bill prayed that the

ptfs. might be put into possession of C.'s moiety; an account of its rents since his death; and for the deeds. A. did not make an affidavit that the deeds were not in her possession. *Held*, that such an affidavit is not necessary in a case in which ptfs. have a right to sue in Equity *aliunde*, and that a demurrer for want of it was bad in substance.

The demurrer did not state specifically the parts of the relief or statement to which it applied. *Held*, bad in form.

The mother was a co-ptf. *Held*, not a misjoinder.—*M'Carthy v. Hatch*, 9 I. E. R. 206. (R.)

1. A petition under the Court of Chancery Regulation Ireland Act 1850 may be verified by the affidavit of the solicitor, when the short form prescribed by the Act cannot be used; but the facts must not be verified in that form.—*Bennett v. Cooper*, 3 I. Jur. 3. (C.)

2. No summary order can be made on a petition not verified pursuant to the 15th sec. of the Court of Chancery Regulation Ireland Act 1850. In such case it must be heard as a cause petition.—*Stackpoole v. Stott*, 3 I. Jur. 52. (C.)

3. In general cause, petitions should be verified by the petitioner.

Form of order on an application that a petition be received without the affidavit of the petitioner.—*Montgomery v. Eyre*, 1 I. C. R. 120; 3 I. Jur. 28. (R.)

## II. 2. k. *Suppression of Facts.*

4. In applying for a receiver under the Judgment Acts, the judgment creditor should state every material fact affecting his demand. If he withhold any, he will not be allowed his costs.—*Lane v. Townsend*, 8 I. E. R. 53. (R.)

5. A conditional order for the appointment of a receiver under the Sheriffs Act (5 & 6 W. 4, c. 55) having been obtained in the Court of Exchequer, the solicitor for another judgment creditor, who had knowledge of the Exchequer order, presented a petition for a receiver to the Lord Chancellor suppressing the fact of the Exchequer order. The Court dismissed the petition, and directed that the solicitor should not have the costs of the petition against his client.—*Daly v. D.*, 9 I. E. R. 461. (R.)

6. An order, for the appointment of a receiver, should state that the Court has been informed by the petitioner's solicitor that no order for a receiver has been made over any part of the lands of the respondent, either in this Court or the Court of Exchequer, unless a special case is made for the appointment of a second receiver.—*Clarke v. M'Mahan*, 9 I. E. R. 462. (R.)

## II. 3. *Supplemental Bill.*

7. Ptf., having charged C., named a deft., to be out of the jurisdiction, but having omitted to pray process against him on his coming within the jurisdiction—*Held*, entitled, never-

theless, to costs of a supplemental suit instituted to compel him to join as a conveying party in the deed to the purchaser under the decree.—*Oldham v. Willens*, 1 Dr. & Wal. 717. (C.)

8. *Semble*—That when a suit abates by the death of the personal representative, the administrator *de bonis non* of the deceased may be brought before the Court by bill of revivor; and a supplemental bill is not necessary.—*M'Tiernan v. Bell*, 3 I. E. R. 193. (E.E.)

9. Whenever an old interest is transmitted to, or a new interest vested in a new party, after the institution of the suit, strictly speaking, that is supplemental matter, although it occurs before issue joined. In some cases, the new party has been brought before the Court by amendment.—*Carnegie v. Johnson*, 3 I. E. R. 197. (E.E.)

10. If a party, who has been made a deft. as assignee of an insolvent debtor, dies pending the cause, a supplemental bill is necessary to bring the new assignee, appointed in place of the deceased, before the Court. The forty-first section of the late Insolvent Act (3 & 4 Vic. c. 107) applies only to the cases of plaintiffs, and not to defendants.—*Meagher v. O'Mara*, 3 I. E. R. 471; FL & K. 269. (R.)

11. When a plaintiff assigns his interest, the Court will not allow his assignee to come in by an amended bill, but will leave him to file a supplemental bill.—*Magrath v. Heron*, FL & K. 237; 3 I. E. R. 476. (R.)

12. When the cause abates by the death of a sole plaintiff, and it becomes necessary to file a bill of revivor and supplement, it may be done without the order of the Court first obtained.

But when the cause abates by the death of one of several defendants, and it becomes necessary to file a bill of revivor and supplement, the leave of the Court must be first obtained.—*Brown v. Allen*, 3 I. E. R. 503. (E.E.)

13. *Semble*—If no title is shown by the original bill to maintain the suit, the defect cannot be remedied by a supplemental bill stating supplemental matter which gives a title.—*Byrne v. B.*, 4 I. E. R. 621; 2 Dr. & War. 71; 1 Con. & L. 189.—[Affg. FL & K. 435. (R.)]

14. The plaintiff claiming under a judgment, sought by her bill to have the benefit of decrees in former suits by which real estates of the deceased debtor were decreed to be sold to pay the judgment and other incumbrances; and for a sale of other estates of the debtor which had not been included in those decrees. *Held*, that the bill was a supplemental bill, and not an original bill in the nature of a supplemental bill, the principle of the decrees being, that the real estates of the debtor which descended were liable to pay the judgment,

and this bill only supplying the omission in the former decrees.

Passage in *Mif. Pl.* 73, as to the right to make a new defence to an original bill in the nature of a supplemental bill, commented on and limited.—*Baylee v. Browne*, 10 I. E. R. 180. (R.)

1. A bill, filed in 1844, to raise a sum secured on a term created by a settlement of 1773, stated the proceedings in a suit of *A. v. B.* by a prior judgment creditor, and prayed the benefit of the decrees and accounts therein; that the decrees might be carried into execution, so far as necessary for the plaintiff's relief; and a sale of the term. The cause stood over at the hearing to make two minors parties by supplemental bill. One of them, *X.*, by answer, impeached the decrees in the suit of *A. v. B.*, and both claimed as purchasers for value, under a settlement of 1842, made by *W.* At the hearing of the supplemental cause in June 1847, plaintiff contended that *X.* could not impeach the decrees, as he claimed under *W.*, who had acquiesced in them; and an order was made that the further hearing of the cause should stand over, with liberty to the plaintiff in the meantime to bring before the Court the parties beneficially interested in the decrees in *A. v. B.* The plaintiff filed a supplemental bill, setting out the whole of the proceedings in *A. v. B.*, and the suit of 1844; assignments of the judgment and sum decreed in *A. v. B.* for the benefit of *W.*, charging that *W.* and *X.*, and the parties claiming under the assignment in *A.*'s right, could not object to have the decrees carried into execution; and praying that they might be carried into execution against them, and that the plaintiff might have the benefit thereof; or, if the Court should be of opinion that they could not be carried into execution according to the terms thereof, with such modification as to the Court should seem meet; and that plaintiff's claim, and all prior and contemporaneous charges, might be raised by a sale of the term of 1773. The Court refused to take the bill off the file as irregular; but—*Held*, on demurrer, that the order of June 1847, though it authorised the filing of a supplemental bill to bring new parties before the Court, did not warrant the making of a new case; and that the case of estoppel, and the prayer that the decrees might be modified and altered, was a new case and not warranted by the order.

*Semle*—The frame of the suit and relief prayed being altered, all the necessary parties to the suit of 1844 should be parties, particularly the party representing the term of 1773.—*M'Namara v. Blake*, 11 I. E. R. 527. (R.)—[*Affid.*: 12 I. E. R. 362. (C.)]

2. All the parties to the original bill being dead, the cause was set down in the names of the parties to a supplemental bill only.—*Held*, regular; that parts of the answer to the original bill could be read as of an answer in the cause at hearing; and that it was not to be treated as an answer in another cause.

The allegation made in a bill to prevent a

demurrer for multifariousness was unproved; but it appeared that the accounts might be such as to render the suit not multifarious. *Held*, that an objection for multifariousness, though made by the answer, could not be sustained.

*Quere*—If the objection should not be pleaded?—*Anderson v. Pratt*, 12 I. E. R. 603. (C.)

3. When a deft. becomes insolvent pending the suit, the provisional assignee is properly made a party thereto by supplemental bill.—*Roddy v. Molloy*, 13 I. E. R. 90. (R.)

4. Chattels real were mortgaged, and judgments were recovered by the mortgagee against the mortgagor, as collateral securities for the sums advanced on mortgage. The mortgagor having died, a bill was filed against his personal representative praying an account of the sums due in respect of the mortgages; a foreclosure and sale; and an account of the personal estate of the mortgagor. The personal representative, in her answer, stated her belief that the chattels real were adequate to discharge the sums due. A decree was then taken for an account of those sums, and of the incumbrances prior or contemporaneous therewith, but not directing any account of the personal estate of the mortgagor. A report pursuant to that decree having been made, a decree for sale of the chattels real was pronounced. The proceeds of the sale were insufficient to pay the sums due on the mortgages. *Held*, that a supplemental bill, afterwards filed by the mortgagee against the personal representative of the mortgagor, praying an account of the personal estate of the mortgagor, could not be maintained; such a bill was accordingly dismissed, with costs.—*Joly v. Leyden*, 13 I. E. R. 444. (C.)

5. In 1803 a pension was granted to *M.* for life. In 1811 he, by indenture, assigned it for value to *D.*, his heirs, executors, &c. *D.* effected two policies of insurance on the life of *M.*, and died intestate in 1813, leaving *W.* his heir, and seven next-of-kin, of whom *W.* was one, and *P.* was another. *W.* died in the same year, having devised and bequeathed to his son *N.* all his real and personal property, and having appointed testamentary guardians of *N.*, an infant. They appointed *X.*, a solicitor, son-in-law of *P.*, their general and law agent in the management of the property of *N.* The administrators of *D.*, treating the pension as personal property of *D.*, in 1818 authorised *M.* to receive it. He, until 1852, paid the premiums on the policies out of the pension, and equally distributed the surplus amongst the seven next-of-kin of *D.*, or their representatives or assigns. In 1820 *N.* attained age, and continued *X.* as his general and law agent until the latter's death, in 1825. *P.* died in 1824, and from her death until that of *X.*, in 1825, he, in right of his wife, received a moiety of *P.*'s supposed one-seventh of the pension. In 1821 *N.* obtained letters of administration *de bonis non* to *W.*, and in 1826 he obtained like letters to *D.* In 1842 *M.* repurchased, for value, their supposed shares of the pension and policies from some of the

next-of-kin of D., and in the same year re-purchased also, for value, from N., his supposed one-seventh of the policies and pension, which latter he had up to that time received from M., as residuary legatee of W., one of the seven next-of-kin of D. The deed by which N. assigned that one-seventh to M. was prepared by M., and in reciting the deed of 1811, by which M. had assigned the pension to D., his heirs, &c., it omitted the word "heirs." N. was executor and co-trustee with T. of the will of P., and in 1826 N. and T. filed a bill in Chancery to administer P.'s personal estate; and as she was entitled to one-seventh of the personal estate of D., as one of his seven next-of-kin, in 1828 N. and T. amended their bill by making all those next-of-kin and their representatives, &c., parties; and by praying an account and administration of the personal estate of D. also. In 1832 the usual decree to account was pronounced. O. was the solicitor of N. and T., as plaintiffs in the suit; but M. acted in it as solicitor for N. in his capacity as administrator of D. and W. The deed of 1811 was never produced before the Master. In a charge filed in 1850 by O., on behalf of the plaintiffs, the pension was treated as part of the personal estate of D., and, as such, divisible, together with the policies, amongst his seven next-of-kin. Their dealings (which had been numerous) with it since 1813 were specified in that charge (including the re-purchases by M.). Its devolution in the character of personalty, together with that of the policies, was traced from 1813 to 1850. In May 1851, the Master, by his report, also treated the pension as personalty, and allocated it and the policies amongst the seven next-of-kin of D., and their representatives; and (*inter eos*) to M., the shares which he had re-purchased. No exception having been taken to that report, it was confirmed by a final decree in July 1851. In Feb. 1851, a demand had been made, on behalf of the Revenue, of legacy duty upon the pension. N., being advised to resist it, for that purpose obtained a copy of the deed of 1811 from M., in whose custody it had always remained, and then first became aware of the limitation of the pension to D. and his heirs. N. then expressed his wish to O. and M. that the report should not be signed until the liability of the pension to legacy duty should be decided. The Master having set aside a sum to meet the amount of the legacy duty. O., thinking N. thereby sufficiently protected, and being pressed forward by other parties in the cause, caused the report to be signed, and set down the cause for hearing; and the final decree of July 1851 was then made. In Jan. 1852 the Court of Exchequer decided that the pension was not liable to legacy duty, inasmuch as, upon the death of D., it devolved, under the deed of 1811, upon his heir, W. Accordingly N., as devisee of all the real estate of W., presented a petition praying that the decree of July 1851 should be re-heard, the report reviewed, and all its findings with respect to the pension struck out, and that it should be declared that the premiums on the policies should have been borne by the personal estate

of D., and not by the pension; and that in taking the account of that personal estate, credit should be given to N. against it, for the premiums paid out of the pension, and that provision should be made for their future payment out of the personal estate of D. The cause came on for re-hearing simultaneously with a motion on behalf of N., that the report should be sent back to be reviewed. *Held*, that the mistake in supposing the pension to form part of the personal property of D., was common to all parties, and that there was not any fraudulent suppression of the deed of 1811, or of the nature and contents of it by X. or M., or any other person.

That the title of the next-of-kin of D., and their representatives, for so many years, followed by possession, and acquiesced in by N., ought not to be disturbed; and that even were the Court disposed to grant relief to N., no conditions which it could impose would sufficiently protect purchasers and others claiming under the next-of-kin of D.; and that the petition should be dismissed, and the motion refused, with costs.

That N. could not have obtained relief by a supplemental bill, in the nature of a bill of review, because he had become aware of the contents of the deed of 1811 before the report was signed, or the decree of July 1851 pronounced.

*Quære*—Whether it was not alone a fatal objection to the petition of re-hearing and the motion, that they were on behalf of N. only, and not joined in by his co-plaintiff, T.?—*White v. Mansergh*, 2 I. C. R. 393; 5 I. Jur. 73. (C.)

## II. 4. *Supplemental Bill in the Nature of a Bill of Review.*

1. A petition for the renewal of a lease was dismissed on the ground that the respondent was a purchaser of the reversion under a deed for valuable consideration, without notice of the lease. The petitioner afterwards discovered from the witness to this deed, who had been solicitor for the grantor, that the lease sought to be renewed had been handed over to the purchaser at the time of the execution of the deed. It not appearing whether the name of the witness could have been previously discovered from the memorial of registry—*Held*, that the petitioner should be at liberty to file a supplemental cause petition, in the nature of a petition of review, to have the cause reheard.

The practice of a solicitor voluntarily making an affidavit revealing circumstances connected with the business of his former client, whereby that client may be rendered liable to an action, disapproved of.—*Barton v. Sampson*, 2 I. Jur. N. S. 361. (R.)

## II. 5. *Supplemental Bill in the Nature of a Bill of Review.*

2. When, after decree, the interest of the principal defendant was assigned, the assignee was not permitted to intervene without being made a party by supplemental bill.—*Crofts v. Mitchell*, 6 I. E. R. 373. (R.)

1. The Court has authority, under the 5 & 6 Vic., c. 105, to permit the assignee of a judgment creditor to continue in his own name the proceedings of his assignor under the Judgment Creditors Acts.—*Daly v. Blake*, 10 I. E. R. 36. (R.)

2. When a personal representative sues or is sued, and dies, the administrator *de bonis non* may proceed or be proceeded against by bill of revivor, or by bill of revivor and supplement. But he is not bound so to frame his bill; he may at his election file an original bill. An administrator obtained a decree declaring a judgment to be held on trusts. The judgment was afterwards fraudulently assigned, and the administrator *de bonis non* filed a bill stating the proceedings in the original suit, making the assignee a party, and praying that he might be declared entitled to the benefit of the decree, and accounts and inquiries thereby directed, and to an assignment of the judgment or original relief, if he was not entitled to the benefit of the suit and decree. *Held*, on demurrer, that the bill, being an original bill as to the assignee, the ptf. could not have proceeded by bill of revivor; and although the bill might have been filed as a bill of revivor and supplement as against the representative of the deft. in the original suit, it was sustainable as against him either as an original bill, or as an original bill in the nature of a supplemental bill.

The 57th G. O. does not apply to an original bill in the nature of a supplemental bill.—*Bayfield v. O'Shaughnessy*, 12 I. E. R. 63. (R.)

3. A bill was filed to set aside a f. f. grant, and a subsequent sale to the grantee of the rent reserved thereby. The decree declared the f. f. grant void as against the ptf.; but that he was not entitled to impeach the sale of the rents; that W., and other defts., and all proper parties, should join in conveying the lands to the ptf.; that he and all proper parties should join in proper clauses and covenants in such conveyance, or by a separate deed, as the Master should approve of, to secure the rent; that W. and other defts. should pay the ptf. the costs of setting aside the f. f. grant; and further directions were reserved. W. died. The ptf. filed a bill of revivor and supplement against his personal representative, who demurred. *Held*, that the Court would not assume that nothing remained to be done under the decree by the deft., as the final decree might direct an account of the rents, or that the deft. should join in the conveyance, and therefore the case fell within the exception to the rule against revivor for untaxed costs.—*Fitzmaurice v. Sadler*, 12 I. E. R. 136. (R.)

4. When a deft. becomes insolvent pending the suit, the provisional assignee of the Insolvent Court is properly made a party to the suit by supplemental bill.—*Roddy v. Molloy*, 13 I. E. R. 90. (R.)

5. A supplemental bill in the nature of a bill of review, founded on newly discovered

facts, cannot be maintained when these facts, if known, would not have interfered with the decree.—*Nason v. Peard*, 10 I. C. R. 233. (C.)

II. 6. When a Bill of Review lies—necessary steps to bring it, by and against whom it may be brought.

6. K. devised a fee-simple estate to his eldest son, F., in tail male, with power to charge £200 each for his daughters; remainder to W., K.'s second son, in tail male; and left to each of his ten younger children, a legacy of £100 net, charged on the estate. On F.'s marriage, a portion of his wife's fortune was applied in discharge of these legacies. F. died without issue male, but leaving two daughters, who entered into possession, claiming under a prior will by which F. was made tenant in fee. An ejectment was brought by W. There was a reference to arbitration, a bill and cross bill; and a decree in 1816 establishing the later will; and declaring that whatever the Master should find had been paid by F. in exoneration of the estate should be charged on it. This decree was not enrolled. In 1820 the Master found that certain sums had been advanced by F. in payment of the legacies to his brothers, and in exoneration of the lands, and among others £100 paid to W., as a younger child. There was a final decree in 1831, by which the report was confirmed, and a sale ordered, to pay these sums. In 1840 a bill was filed to reverse the proceedings in the cause, and the decrees of 1816 and 1831. *Held*, that as the decrees did not declare the legacies a charge on the lands, and as it did not appear on what the Master's report was founded, there was no error apparent on the face of the record; and that as to W.'s £100 the decree was right.

Difference between a bill of review, and a bill in the nature of a bill of review; and doctrine of the Court respecting them. The time for filing a bill of review is regulated by analogy to the time limited by the 6 G. 1, c. 6, (*Ir.*) for bringing a writ of error, i.e., twenty years after the judgment, and five years after the disability of the ptf. in error, if any, has been removed.—*Kelly v. Lennon*, 1 Jon. & L. 305; 7 I. E. R. 98. (C.)

7. In a renewal suit against the defendant, tenant for life, and his eldest son, the question was, whether the denomination X. was included in the lease, or was part of an adjoining farm held by the plaintiff for a determinable interest? A decree was made for a renewal, referring it to the Master to enquire and ascertain the boundaries. The interest in the farm having afterwards expired, the defendant brought an ejectment for X., which the plaintiff defended, and obtained a verdict. Defendant's son having died, and his second son, a minor, become tenant in tail, a new bill was filed against the defendant and this son, which stated the ejectment, and that the question tried in it was identical with that involved in the reference; but the decree made in 1844, which accorded with the prayer, only directed the former decree to be carried



out between the parties. In 1845, the son, being of age, barred the entail, and conveyed the fee to the deft. A bill was then filed relying on the ejectment, and praying a declaration that it was unnecessary to carry on the reference, and that the former decrees might be in other respects carried out. *Held*, that such relief was a variation of the decree of 1844, which could not be given without rehearing the cause; and *Semble*, this was a bill of review, which should not have been filed without leave of the Court.—*Chute v. M'Gillcuddy*, 11 I. E. R. 312. (C.)

1. To sustain a bill of review, proceeding on facts discovered after the decree complained of was pronounced, it must be shown that leave to file it was regularly obtained from the Court.

To sustain a bill of review, for error apparent on the decree complained of, it is not enough that the bill contains allegations that the decree is erroneous; error on the face of the decree must be shown.—*Tommey v. White*, 1 H. L. Cas. 160.—[See 6 I. E. R. 303. (R.); 6 Cl. & F. 786; 3 H. L. Cas. 1; 5 I. Jur. 321. (H.L.)]

## II. 7. a. Bill of Revivor: Original Bill in the Nature of a Bill of Revivor.

2. *Semble*—A suit may be revived for costs, where the party to receive them, or the party to pay them, has died before taxation.—*Barry v. Stowell*, Flan. & K. 1; 3 I. E. R. 18. (R.)

3. It is not necessary to revive a cause, to enable the Court to discharge itself of the fund.—*Fetnam v. Kirby*, 4 I. E. R. 322. (E.E.)

4. Husband and wife file a bill respecting the real property of the wife. Husband dies before decree. Thereupon the deft. enters a rule that the wife surviving do revive or continue the cause within ten days, or in default that the bill be dismissed with costs. This rule is irregular, and will be set aside with costs.—*Johnson v. Biron*, 5 I. E. R. 154. (E.E.)

5. A cause abated by the death of a sole plaintiff. His executor filed a bill of revivor, not seeking an answer, and served subpoenas, but did not (although the defts. had appeared) enter the rule to revive. Motion that the bill of revivor be dismissed with costs for want of prosecution, pursuant to the 82nd G. O., refused with costs; that Order not being an authority for such an application. The defendant subsequently moved for an order that the plaintiff might enter the rule to revive within a limited time, and in default of his so doing, that his bill be dismissed with costs. The Court granted the motion.

*Semble*—*Lee v. L.*, 1 Hare, 617, was rightly decided.—*Power v. Davies*, 5 I. E. R. 448. (R.)

6. *Quære*—Whether a cause, in which there has been no subpoena served, and no appearance, can be revived by bill of revivor?—*Foster v. Thompson*, 2 Con. & L. 568; 6 I. E. R. 168. (C.)

7. The provisional assignee of the Insolvent Debtors' Court was made a deft. to the suit, and died. *Held*, that the new provisional assignee might be made party to the suit by bill of revivor merely.—*M'Colm v. Crawford*, 6 I. E. R. 217. (E.E.)

8. On the argument of a plea to a bill of revivor the Court is not at liberty to look into the original bill. The case must be decided on the facts stated in the bill of revivor and the plea. When the facts did not fully appear therein, the Court reserved to the deft. the benefit of the plea, and directed it to stand over until the hearing of the cause.

A suit may be revived as to part of the matter in litigation.—*Duggan v. Kelly*, 10 I. E. R. 295. (R.)

9. When matter of defence arises subsequently to a decree in a cause which afterwards becomes abated, it may be pleaded to the bill of revivor. It is not necessary to file a cross bill to get the advantage of it.—*Daly v. Kirwan*, 10 I. E. R. 312. (R.)

10. Under the decree to account in a suit instituted by A., a creditor on the inheritance, B. having a *puise* charge on a 500 years' term, proved it, and it was reported. The cause was brought to a final hearing, and a decree made for a sale of the inheritance, to pay A. and the other creditors. Supplemental suits were afterwards instituted by A.'s representatives, who were ultimately settled with, and no sale was had. B.'s representatives filed a bill praying the benefit of the former decree, and to have a sale of the term, making A's representative a notice party. *Held*, that as B. was not entitled to such a decree as was made in A.'s suit, it could not be carried out for the plaintiff, or cut down so as to be limited to the term, at least in the absence of A.'s representatives, who might still have rights under it.—*M'Namara v. Blake*, 11 I. E. R. 455. (C.)

## II. 7. b. Bill of Revivor under the Chancery Regulation (Ireland) Act 1850.

11. When a sole petitioner dies, the matter cannot be revived by suggestion under the 29th sec. of the Ch. Reg. (Ir.) Act 1850. An order must be obtained, authorising the petitioner to file a petition in the nature of a petition of revivor. Form of order in such a case.—*Wray v. Pollard*, 2 I. C. R. 78. (R.)

12. No order to revive is necessary after service of notice of a suggestion under the 29th sec. of the Ch. Reg. (Ir.) Act 1850, if the parties served are not under a disability.—*Wildridge v. M'Kane*, 2 I. C. R. 333. (R.)—[See also *Purcell v. Gibbings*, 2 I. C. R. 480. (C.); *Long v. L.*, 6 I. Jur. 194. (R.); *Nason v. Peard*, 2 I. C. R. 553, and 5 I. Jur. 347. (R.); *Bowes v. Watson*, 7 I. Jur. 138; *Ryall v. Farmer*, 5 I. Jur. 347; *Martley v. M.*, 4 I. Jur. 333; *Johnson v. Madden*, 6 I. Jur. 161. (R.); *M'Mahon v. O'Kelly*, 2 I. Jur. N. S. 251; *Corr v. C.*, 6 I. Jur. N. S. 211. (R.)

1. When an assignee in bankruptcy or insolvency has been changed, the leave of the Court of Chancery must be obtained for filing the suggestion to revive, pursuant to the 283rd sec. of the Bankruptcy and Insolvency Act.—*M'Conkey v. Gwynne*, 8 I. C. R. 33. (R.)

2. The assignee of an insolvent mortgagor filed a bill for an account and for redemption of a mortgage. Two cause petitions, for the same purpose, were afterwards filed, but were dismissed with costs. A new assignee having been appointed, he moved under the Bankrupt Act (20 & 21 Vic., c. 60), to be substituted by suggestion as ptf. Held, that the costs of the dismissed petitions must be paid before the suggestion could be entered.—[Affg. s. c., 8 I. C. R. 33. (R.)]—*M'Conkey v. Gwynne*, 10 I. C. R. 261. (C.A.)

3. A suit to revive a decree for payment of money must be brought within 20 years from the date of the decree, if there has been no payment or acknowledgment of payment in the meantime.—*Dunne v. Doyle*, 10 I. C. R. 502; 5 I. Jur. N. S. 208. (C.)

4. The Court cannot order service out of the jurisdiction of the notice of a suggestion to revive.—*Rosborough v. Boyse*, 3 I. C. R. 489. (C.)

5. When a petition under the Mortgage Acts has abated, it must be revived by petition and not by motion.—*Burke v. Mahony*, 5 I. C. R. 345. (R.)

[For Revivor under The Chancery (Ireland) Act 1867, see sec. 157 of 30 & 31 Vic., c. 44; and General Orders of 1867, Nos. 141 to 143 inclusive.]

## II. 8. Amended Bill.

6. A demurrer does not lie to an amended bill for referring throughout to the original bill, and repeating its entire contents and prayer.

*Semble*—A deft. may move for all costs unnecessarily occasioned by such an amended bill, or refer it for prolixity.

Ptf., in his original bill, made out title to an estate, and prayed relief as heir-at-law; but afterwards, and after all the defts. had answered, discovered a marriage settlement, which limited the estate to a trustee for the use of ptf., his brother, and sisters, in equal shares. Held, that ptf., in his amended bill, might vary his case so as to make out title, and pray relief according to his real rights.—*Peed v. Cussen*, S. & Sc. 161. (R.)

7. Ptf. and her younger children filed their original bill to raise a jointure and portions out of T. Deft., her eldest son, by answer, insisted that ptf.'s husband, tenant in tail of T., had not done any act to bar the entail; and claimed T. as issue in tail. Ptf. filed an amended bill, making her younger children defts., and claiming dower or jointure out of T. *Quere*—Was this an original, or an amended bill?—*Walsh v. W.*, Jon. & C. 52. (E.E.)

8. After the defts. had answered in a suit by

husband and wife, relating to the wife's separate estate, leave was given to amend the bill by striking out the name of the husband as a co-ptf., he having lately become insolvent, and by substituting in his stead the name of a party to sue as the wife's next friend; and also by inserting the names of the husband and his assignee, as parties defts., upon the terms of the proposed next friend giving security by recognizance, with sufficient sureties, for the costs already incurred; the Court declining to require such security for future costs.—*Ring v. Nettles*, 3 I. E. R. 53. (R.)

9. Before issue joined, an infant tenant in tail, born *pendente lite*, may be made a party by amendment.—*Greer v. Mercer*, 3 I. E. R. 385. (E.E.)—[Apportionment of the costs; *Greer v. Mercer*, 4 I. E. R. 705. (E.E.)]

10. A bill stating new matter, conformably to the 52nd G. O. of 1834, is to be considered as one record with the original bill. Therefore, a party brought before the Court by it cannot demur to it for want of equity, if there be sufficient in the two bills to sustain the case against him.—*Byrne v. B.*, 4 I. E. R. 621. (C.)

11. An order to amend without prejudice to process, is a side-bar rule which the ptf. takes at his peril.

A deft. who has answered cannot be struck out of the bill by amendment. — *v. Zwickerman*, 5 I. E. R. 22. (E.E.)

12. When a contract has been executed, a deft. cannot impeach it without a cross bill.—*Nash v. Flynn*, 6 I. E. R. 565; 1 Jon. & L. 162. (C.)

13. Under the 75th Rule the ptf. has six weeks to except to the answer to an amended bill for insufficiency.—*Garvey v. Hayes*, 11 I. E. R. 270. (R.)

14. A bill by an executor to carry into execution the trusts of a will, and for payment of an annuity thereby granted, stated that an agreement had been entered into by the deft. with one K. to pay the annuity, and that premises had been assigned to secure it; and that, after the death of K., R. procured an assignment of the premises. The answer stated that the ptf. had assigned the premises. The bill was amended, praying that the assignment might be declared fraudulent and void. Held, that the amended bill was not a departure from the original bill, nor was there any misjoinder.—*Tomlinson v. Cox*, 1 I. Jur. 17. (C.)

15. Striking a ptf.'s name out of the bill is not an amendment by side-bar rule within the 49th G. O. 1843.—*Vance v. Ranfurley*, 1 I. Jur. 284. (R.)

16. Amendments of cause petitions are to be made without alteration, erasure, or interlineation, by stating the matter of the amendment at the foot of the petition after the

A solicitor may be made a party to a bill to set aside a deed for fraud if he be a party to the fraud, and costs are prayed against him.—*Kelly v. Jackson*, 13 I. E. R. 129. (R.)

## II. 11. Bill for Discovery only.

1. The Commissioners of Ch. Don. filed a bill against A. and B., seeking a discovery of the estates in fee-simple, fee-tail, and other freehold and leasehold estates of the testatrix; and of all her personal estates and effects, &c. The bill set out the will, from which it appeared that the testatrix devised all her freehold and leasehold estates to A. for life, remainder to B. for life; remainder (except as to a certain rent) to the Commissioners, upon trust to renew leases and apply rents, &c.; and appointed A. and B. executors of her will. The bill prayed that an account might be taken of her freehold and leasehold estates, &c., and that the title-deeds relating thereto might be brought into Court; but did not state that the personal assets of the testatrix were insufficient for the payment of her debts. It, however, averred that the debts had paid a special bequest in her will mentioned. Demurrer to so much of the bill as sought discovery of the estates tail of the testatrix, and of her personal estate and effects (except chattels real), allowed.—*Commissioners of Ch. Don. v. Espinasse*, 3 I. E. R. 324; Fl. & K. 164. (R.)

2. When a bill seeks a discovery of necessary parties, an objection for want of parties will not generally be allowed.—*Sherlock v. Disney*, 13 I. E. R. 233. (R.)

## II. 12. Interpleader Bill.

3. On application for an injunction in a possessory suit, a conditional order for both injunctions to issue (to the party and the Sheriff) will be granted.—*Biddulph v. Molloy*, 2 I. E. R. 228. (R.)

4. Course of proceeding in possessory suits.—*Sherrock v. Chartres*, 2 I. E. R. 230. (C.)

5. It seems that a possessory bill is not a proper remedy when ptf.'s legal title to the possession is not clear, and matters of account touching ptf.'s claim are in dispute between the parties.—*Ball v. O'Grady*, 2 I. E. R. 235. (R.)

6. Two policies of insurance effected with the same company, one by the party insured in his own name, the other in the name of a trustee, were assigned by deed to the trustee in whose name the one had been effected, upon the trusts declared in a contemporaneous deed. Those trusts were, first, to pay debts due by the assignor, which were not specified, including advances made by the trustee himself, the amount of which was not fixed; and to hold the surplus as a provision for the daughters of the assignor, in such

shares as he should appoint. Neither of the deeds contained any declaration that the trustee's receipts should be good discharges. After the death of the insured, his administrator served a notice upon the company, requiring them to pay him the amount of both policies. Notices were served by one of the daughters of the insured and the husband of another daughter, cautioning the company not to pay the amount of the policies to the executor of the trustee. The company refused to pay the amount of either policy, without getting a release from the parties beneficially interested in the surplus after payment of the debts, as well as from the administrator; and filed a bill of interpleader. After the filing of the bill the administrator withdrew his notice. *Held*, that as to the policy effected in the name of the trustee, there was no case for interpleader, as the trustee's executor could have given a valid discharge for the amount of it; and as to that the bill was dismissed with costs against the trustee's executor; but the parties who served the notices got no costs.

That as to the policy effected in the name of the insured himself, the administrator's notice justified a bill of interpleader, but that when that was withdrawn the ptf's should have proceeded no farther, and were not entitled to costs after that date.

To support a bill of interpleader there must be a clear conflict of claims; and a claim by a trustee who has the legal title, and claims by various contingent trustees, who dispute one another's rights, do not constitute a case for an interpleader bill.—*Glynn v. Locke*, 2 Con. & L. 21; 3 Dr. & War. 11; 5 I. E. R. 61. (C.)

7. When an injunction and interpleader bill is filed, the Court will continue the injunction to the hearing, if there is a question to be disposed of on the hearing.—*Cochrane v. O'Brien*, 6 I. E. R. 312. (R.)

8. A. lodged B.'s money at a bank, and took a deposit receipt in B.'s name. Afterwards A. lodged another small sum; and, by B.'s authority, took a deposit receipt for the whole in the name of B.'s daughter, X., stating that it was a provision for her. After B.'s death A. refused to give X. this receipt; and, as B.'s administrator, claimed the money. The bank refusing to pay X. without the receipt, X. and A. each brought an action against the bank. *Held*, that the dealing conclusively constituted the bank debtor of X. only, and that they could not sustain an interpleader suit.

An interpleader bill cannot be sustained, unless the claim of at least one deft. is colourable.—*Cochrane v. O'Brien*, 8 I. E. R. 241; 2 Jon. & L. 380. (C.)

9. A bill of interpleader having been filed against husband and wife, separate subpoenas and notices were served under an order for the substitution of service, requiring them to appear and answer at different times. The husband appeared and filed a separate demurrer, which the ptf. set down to be argued, and

afterwards moved to set it aside for irregularity. The Court refused the motion, and made an order *nunc pro tunc* that the husband and wife should defend separately.

By a deed of separation, a husband and wife conveyed the wife's property in trust to pay an annuity to the husband, and the residue, after payment of her debts, to the wife; and the trustee covenanted to pay the annuity to the husband. The wife afterwards required the trustee not to pay the annuity to the husband; alleging, on the opinion of foreign counsel, that the marriage was void. The husband brought an action of covenant for the annuity against the trustee, who, having lodged the amount in bank, filed a bill of interpleader against the husband and wife. Demurrers to the bill by the husband allowed with costs.—*Doyle v. Dumoncel*, 11 I. E. R. 342. (R.)

1. To support an interpleader suit, there must be conflicting claims. Therefore, when a reversion subject to a lease for years was devised, and the testator's heir-at-law did not claim the rent, a petition of interpleader by the tenant against the heir-at-law was dismissed with costs, although there was a question whether the devise was not void for remoteness.

A., and a married woman and her husband were entitled to the reversion upon, and the rent reserved by a lease. A. was entitled to one moiety; but between the husband and wife arose the question, on a settlement, whether she was entitled to the other moiety to her separate use? All three brought ejectment for non-payment of rent, and the lessee filed a petition of interpleader. *Held*, that the petition, as against A., should be dismissed.

*Semble*—If several are entitled to rent, and all concur in demanding it, though there be conflicting claims between them, the tenant cannot maintain an interpleader suit.—*Elliott v. Kempston*, 15 I. C. R. 120. (R.)

2. L., agent at Belfast for the owner of a ship chartered to that port, had acquired equitable charges on the freight and cargo, and was also agent for the charterers and consignees. On the vessel's arrival he took possession of her; and in his name the cargo was landed, and stored with the harbour commissioners' wharfingers. Afterwards a company, claiming to be assignees of the ship under a bill of sale, served on them a notice purporting to be under the 25 & 26 Vic., c. 63, s. 68, cautioning them against allowing the cargo to be removed from their wharves or warehouses, until the company's lien for freight was discharged. The commissioners thereupon refused to deliver any portion of the cargo to L., who brought against them an action of trover and detainee to recover it. The commissioners applied for an order of interpleader, but no rule was made on the motion to show cause against their summoning order being made absolute. The commissioners then commenced this interpleader suit, and moved for an

injunction to stay the proceedings at law. *Held*, that, notwithstanding the provisions of the above-mentioned Act, the case properly formed the subject of an interpleader suit; and that this Court's jurisdiction was not affected by the decision of the Court of Law.—*Belfast Harbour Commrs. v. Lawther*, 16 I. C. R. 34. (C.)—[See s. c., 17 I. C. R. 54. (C.)]

## II. 13. Bill of Peace and Quia Timet.

3. Persons entitled, as executors, to a lease of ferries over the river Liffey, filed a bill, stating a patent by which the Crown had granted all the ferries on that river to the Corporation of D., and that the Corporation had granted a lease of them to their testator; that one of the defendants having been in the habit of ferrying passengers over the river for hire, they brought an action against him, and obtained a verdict in 1841; but that he and two other persons continued to carry passengers across the river for hire. They prayed that the defendants might be restrained from ferrying passengers across the river for hire, within the limits of their ferries. One of the defendants, who was not a party to the action, stated by affidavit that the right of the Corporation was repented to be confined within limits, within which he had not infringed upon their right; and that neither the Corporation, nor any one claiming under them, had, within the memory of living men, claimed or exercised any right outside those limits, or disturbed the ferries of other persons beyond them. He also stated that the plaintiffs had recently brought an action against him for the disturbance of their ferries, which was still pending. *Held*, that the plaintiffs were bound to show upon their bill an actual possession of the premises for three years at least before the filing of the bill, and that they had not done so in the present case.

That they should have stated their case fully in the first instance.

That the plaintiff has recovered judgment against the defendant, in an action on the case, brought for disturbing him in the enjoyment of the possession which the bill seeks to recover, is not a sufficient statement of title of plaintiff in a possessory bill.—*Hemphill v. McKenna*, 6 I. E. R. 57; 2 Con. & L. 153; 3 Dr. & War. 183. (C.)

## II. 14. To Perpetuate.

4. A bill to perpetuate testimony, stated that in 1838 L. made a will. In 1845 he made another, which he destroyed in 1846. L. died intestate in 1848. His heir-at-law entered into possession. The bill then stated a claim by the widow of L. under the will of 1838; and prayed that the testimony of the witnesses thereto, as well as of the witness who destroyed the second will, might be perpetuated. Plea: that there were tenants in possession of the real estate who had not paid rent to, or acknowledged the title of the plaintiff; and that she could have an immediate remedy at law. *Held*, a bad plea.—*Lindesay v. L.*, 1 I. Jur. 289. (C.)—[Rev. 12 I. E. R. 508. (R.)]

II. 15. *Bill for Partition, and other matters.*

1. The bill stated that the lands of B, part of which contained 159 acres, and part 46 acres, had been for many years before 1794 held by the same tenants, so that the boundaries became confused. That in 1804 A. was seized in fee of the 159 acres, and held the 46 acres under a lease from X. for a term. That the mearings and boundaries of the 46 acres had not since been ascertained, the entire of the lands having been since the lease, as they had been for 100 years before, held by the same persons, who were owners of the fee-simple lands. That they had been so mixed up that it was impossible to discover the boundaries, or to ascertain where the 46 acres were situated. The bill, after deducing the title of the ptf. from A., stated that the deft. claimed to be entitled to the 46 acres as assignee of X., and that the ptf.'s interest under the lease had determined; and prayed a partition, or a commission to ascertain the boundaries. *Held*, on demurrer, that the bill could not be sustained for a partition, as no title to a partition at law was shown; nor as a bill to ascertain boundaries, as the parties were independent proprietors; the inference being that the deft. was in possession of the 46 acres, and that the owner of the fee-simple lands, and not the deft., was responsible for the confusion of boundaries.

Confusion of boundaries, unless it arose from the deft.'s misconduct, is not *per se* a ground for a bill to ascertain boundaries.

A partition will be decreed in Equity only where the ptf. would be entitled to a partition at Law.—*O'Hara v. Strange*, 11 I. E. R. 262. (R.)

II. 16. *Discharge. See PRACTICE, CHARGE.*

2. The Court will not permit a discharge, sworn and filed, to be amended; but will, in a proper case, permit a further discharge to be filed.—*Fenton v. F.*, 8 I. E. R. 363. (R.)

II. 17. *Bill, Possessory.*

3. In cases between landlord and tenant a triennial possession is not necessary to sustain a possessory bill.

*Semble*—That the purchaser of a reversion expectant on a demise made by the vendor may, on its expiration, maintain a possessory bill on the vendor's possession, though the tenant has not acknowledged the purchaser as his landlord.

Triennial possession is necessary only in cases of forcible possession or detainer.—*Lefroy v. Lee*, H. & J. 721. (E.E.)

4. Injunction order in a possessory suit set aside, because the ptf. had not, in the first instance, fully and fairly stated his case.—*Dease v. Plunkett*, Dr. Rep. temp. Sugden, 255. (C.)

5. Commissioners appointed by a grand jury sold the materials of the old County Court-house; and in 1852, with the grand jury's approval, permitted the site to be used

as a market-place. In 1859 they gave permission to a committee to erect a statue upon a spot within that site; the committee gave C. permission to erect a house on the corner of the site. *Held*, that the commissioners had sufficient possession of the site to enable them to maintain a suit in the nature of a possessory bill.—*O'Brien v. Considine*, 6 I. Jur. N. S. 5. (C.A.)

6. A possessory petition should not rely on any title other than the triennial possession.

A possessory petition cannot be amended.—*O'Neill v. M'Eraine*, 16 I. C. R. 280. (R.)—[But see s. c., 17 I. C. R. 86. (C.A.)]

II. 18. *Petition under the Court of Chancery Regulation (Ireland) Act 1850.*

[See 13 & 14 Vic., c. 89, now repealed in part by the 30 & 31 Vic., c. 44, sch. A, save as to pending suits. Secs. 1 to 14 point out the mode of proceeding by petition under the Act of 1860, instead of by bill.—General Orders, and Orders of the Masters for regulating the practice under the Act of 1850, were made pursuant to the power given by the statute, on the 31st July 1851, 20th Oct. 1851, 1st Nov. 1851, 26th Jan. 1852, 2nd Feb. 1852, 17th April 1852, Nov. 1852, 25th April 1853, 13th Nov. 1854, 19th Jan. 1855, 23rd March 1855, 13th June 1856, 26th March 1857, 19th May 1857, 24th June 1857, 29th June 1857, 28th April 1858.—[See Gamble's Chancery Orders.]

Secs. 15, 16, 17, 18, 19, 20, of the Act of 1850, regulate the mode of referring cause petitions in a summary way to the Master of the Court for final decision.

By the 15th sec. of the Ct. of Ch. Reg. (Ir.) Act 1850, and the 9th G. O. of July 1851, certain classes of petitions were allowed to be referred summarily to the Masters of the Court for decision.

By the Act:—

- I. With respect to the Administration of the Real and Personal Estate, or the Personal Estate of a Deceased Person.
- II. With respect to the Foreclosure and Redemption of Mortgages.
- III. With respect to the Appointment of New Trustees under any Deed, Will, or other Instrument.
- IV. With respect to the Appointment of Guardians, and the Allowance of Maintenance to Infants.
- V. With respect to the taking of Partnership Accounts.

And under the General Order:—

1st. Petitions for payment of judgment debts, or debts by recognizance, by the sale of lands or otherwise.

2nd. Petitions for payment of the arrears of annuities, or tithe or other rentcharges.

3rd. Petitions for payment of any charge or incumbrance on land, whether by sale or out of the annual rents and profits.

7. A petition for payment of a legacy

charged on lands comes under that G. O.—*Kirk v. Edmonstone*, 1 I. C. R. 17. (C.)

1. When a bill would not be sustainable, a petition under the Ch. Reg. (Ir.) Act 1850, cannot be supported. Such a petition is open to an objection for multifariousness.

Upon a petition, plainly open to such an objection, the Court will not pronounce a summary order of reference, without notice.

Costs of proceedings before the Court in such a petition are within the jurisdiction of the Court only, and not of the Master. On petitions for the administration of assets, the Court in making an order of reference to the Master will include a direction that the ptr.'s costs already incurred shall be payable to him in the same order as his demand (if any), and out of the same fund or by the same party.—*Cuning v. Taylor*, 1 I. C. R. 25; 3 I. Jur. 65. (C.)

2. Practice as to making summary references.—*Murphy v. Keller*, 1 I. C. R. 104. (C.)

3. Though a bill has been filed on the authority of a reported decision, which is afterwards reversed, the Court has not jurisdiction, on a motion under G. O. 82, to order that it be dismissed without costs.—*Cronin v. Murphy*, 1 I. C. R. 233. (R.)

4. Practice as to setting down the petition in the list of causes under the 15th sec.—*Livesay v. Maxwell*, 1 I. C. R. 254; 3 I. Jur. 250. (C.)

5. As to petitions by several legatees.—*O'Brien v. Westropp*, 1 I. C. R. 371; 3 I. Jur. 367. (C.)

6. Petition, by an incumbrancer and annuitant, praying—not redemption, foreclosure, or sale—but the appointment of a receiver over lands, subject to his (the petitioner's) incumbrance and annuity, referred under sec. 15; although a petition for the sale of the same lands has been previously presented in the Incumbered Estates Court by the owner of the lands.—*Carter v. C.*, 1 I. C. R. 592. (C.)

7. When a petition is presented praying that the trusts of a will may be carried into execution, and the accounts of the real and personal estate taken under the direction of the Court, it will be referred under sec. 15.—*French v. Craig*, 1 I. C. R. 593. (C.)

8. Petition, praying merely a receiver over the lands referred.—*Bennett v. Briscoe*, 1 I. C. R. 594. (C.)

9. Petition, praying the extension, of a receiver, appointed in an annuity cause, to the petition referred.—*Puxley v. Hutchins*, 1 I. C. R. 595. (C.)

10. The 8th G. O. of the 31st July 1851 applies only to cause petitions presented with respect to the administration of real or personal estate, when a summary order is sought for under the Ch. Reg. (Ir.) Act 1850, sec. 15.—*Holmes v. Walker*, 1 I. C. R. 596. (C.)

11. A cause petition stated a mortgage of lands in 1815, for £600, containing a covenant by the mortgagor to insure his life for that sum, and to assign the policy to the mortgagee as a further security for the mortgage debt; and prayed the usual accounts on foot of the mortgage, a foreclosure, a sale of the lands, and that the petitioner might be declared entitled to such of the policies mentioned in the deed of 1845 as should appear to have been effected as a further security for the mortgage debt. *Held*, that notwithstanding the prayer for relief in respect of the policies, the Court had power, under the Ch. Reg. (Ir.) Act 1850, s. 15, to make a summary order of reference upon the petition.

That when such an order has been made, the Master has authority to deal with all objections to the petition on the ground of multifariousness, or of the absence of proper parties.—*Taylor v. Young*, 1 I. C. R. 650; 4 I. Jur. 88. (C.)

12. A cause petition presented by a legatee to administer the real and personal estate where some executors had proved but others had not. *Held*, a proper case for a summary order under the 15th sec.—*Agnew v. Connell*, 1 I. C. R. 716. (C.)

13. In making the order on summary petitions no special directions regarding priorities will be given, these being matter for the Master.—*Roche v. Keller*, 3 I. Jur. 3. (C.)

14. When from a cause petition presented under the 13 & 14 Vic., c. 89, s. 15, it appears that a sale of the realty was the only relief to be had, the Court would not make an order under that sec.—*Rigney v. Coppinger*, 3 I. Jur. 137. (C.)

15. When a cause petition, under the 13 & 14 Vic., c. 89, s. 15, is of such a nature as to be a general creditor's administration suit, the Court will make an order, though a sale of the realty be a portion of the relief prayed.—*Minz v. M.*, 3 I. Jur. 137. (C.)

16. The Court will not make a summary order of reference upon a petition under the Ch. Reg. (Ir.) Act 1850, to which interrogatories are annexed.—*Ryan v. Mulligan*, 1 I. C. R. 20; 3 I. Jur. 13. (C.)

17. The Court will, in order to save expense, refer in the first instance to the Receiver Master a cause petition under the 15th sec. of the Court of Ch. Reg. (Ir.) Act 1850.—*Murphy v. Harman*, 2 I. C. R. 39. (C.)

18. The Masters have not jurisdiction to hear and determine causes except in the absence of the Lord Chancellor, unless the case is within the 15th sec. of the Ch. Reg. (Ir.) Act 1850. Nor can the Lord Chancellor depute them to hear causes irrespectively of the Act. Therefore when a summary order was made under the 15th sec., and it turned out upon facts which appeared in the office, but were not stated in the petition, that the case was not within the 15th sec.; *Held*, that the Master had not juris-

diction to hear or to dismiss the petition. If the Court itself has not jurisdiction in a cause, it must be dismissed; but if the particular branch of the Court before which the cause is heard has not jurisdiction, it should be remitted to that branch of the Court which has jurisdiction.—*Wade v. Stewart*, 2 I. C. R. 166. (R.)

1. The summary order on petitions presented as within the Ch. Reg. (Ir.) Act 1850, s. 15, merely decides that the subject matter of the suit is within that sec.—*Graham v. M'Dermott*, 3 I. C. R. 488. (C.)

2. When a petition to administer the assets of a testator is filed by the executor, who thereby submits the construction of the will to the Court, such petition comes under the words of the Ch. Reg. (Ir.) Act 1850 s. 15.—*Spratt v. Dowling*, 5 I. Jur. 155. (M.O.)

3. A cause petition to raise money charged upon lands, alleging that the respondent pretended that he had paid the charge, was held within the 15th sec. of the Ch. Reg. (Ir.) Act 1850.—*Swan v. Urquhart*, 6 I. Jur. 237. (C.)

4. Dismissal of petition on payment of charge.—*Dwyer v. Baker*, 6 I. Jur. 341. (R.)

5. A petition, praying an account of the partnership, is within the 15th sec. of the Ch. Reg. (Ir.) Act 1850.—*Owens v. Oliver*, 6 I. Jur. 349. (C.)

6. A petition to sell lands for the vendor's lien.—*Anderson v. L. & E. Ry. Co.*, 4 I. C. R. 254. (C.)

7. A petition praying for the dissolution of a partnership, as ancillary to taking partnership accounts, comes within the jurisdiction conferred by the Ch. Reg. (Ir.) Act 1850, s. 15.—*Wright v. Perrin*, 4 I. C. R. 492. (C.)

[See also *Walsh v. Kinnelly*, 4 I. C. R. 510. (C.)]

8. The Masters have power, in cases referred to them under the 15th sec. of the Ch. Reg. (Ir.) Act 1850, to order, in administration suits, that a personal representative shall file a discharge setting forth an account of the assets; and to grant an attachment against him if he disobeys the order.

The practice in this respect certified by the five Masters.—*Glenney v. Woolsey*, 4 I. C. R. 615. (R.)

9. In an administration suit, the Court does not, before decree, order the executor or administrator to bring money into Court, unless on a distinct admission that he has assets in his hands. In a case referred to the Master under the 15th sec. of the Ch. Reg. (Ir.) Act 1850, an executor *de son tort*, by his discharge, stated that he had not any sum whatever of assets in his hands; but, on the contrary, was in advance beyond any sum which had been realised out of the assets. Held, that an order made

by the Master, directing him to bring money into Court, was irregular.

A. was discharged as an insolvent debtor in 1848. In 1850 his wife became entitled, as one of the next-of-kin, on the death of her brother, to a moiety of his personal estate. The assignee of the insolvent filed a cause petition against the executor *de son tort* of the brother, stating that he sued "as such assignee;" but without stating that he was a creditor of the insolvent, or that he had entered judgment against him pursuant to ss. 78 & 79 of the Insolvent Act (3 & 4 Vic., c. 107), and without making the wife a party. Held, that the suit was unsustainable for want of title, the property not being vested in the assignee, and for want of parties; and that the Master had not power, in a matter referred to him under the 15th sec. of the Ch. Reg. (Ir.) Act 1850, to make a decretal order directing the executor to bring part of the assets into Court, and appointing a receiver to recover the residue.

A suit may, under particular circumstances, be sustained in the name of a scheduled creditor of an insolvent, to make his property, acquired after his discharge, liable to his debt. The assignee cannot maintain such a suit, unless he be a creditor, or has entered up judgment against the insolvent, pursuant to ss. 78 & 79 of the Insolvent Act.—*Glenney v. Woolsey*, 4 I. C. R. 636. (R.)

10. The petition may, in certain cases, be verified by the solicitor.—*Byrne v. Coleman*, 7 I. Jur. 63. (C.)

11. *Semble*—A cause petition cannot be filed under the 15th sec. of the Ch. Reg. (Ir.) Act 1850, against a trustee for an account.—*Pounden v. Harvey*, 7 I. Jur. 284. (C.)

12. A cause petition may be presented under the 15th sec. of the Ch. Reg. (Ir.) Act 1850 for sale of a policy of insurance.—*Brahan v. Lawder*, 7 I. Jur. 283. (C.)

13. *Quære*—Whether a cause petition, praying for the administration of personal assets, for the purpose of obtaining the possession of a specific chattel, comes within the 15th sec. of the Ch. Reg. (Ir.) Act 1850?—*O'Flaherty v. O'F.*, 7 I. Jur. 283. (C.)

14. When a petition has been referred to the Master, under the Ch. Reg. (Ir.) Act 1850, sec. 15, the Master has power to direct the service of notice, under the 32nd G. O. of 1851, for the purpose of binding persons by the proceedings in the cause.—*Stanley v. S.*, 5 I. C. R. 416. (C.)

15. A cause petition, praying an account of the partnership profits, and for a dissolution of the partnership, is within the 15th sec. of the Ch. Reg. (Ir.) Act 1850, and should be adjudicated upon by the Master.—*Bolton v. Carmichael*, 1 I. Jur. N. S. 5. (C.)

16. Petition praying a dissolution of partnership and an account is within the 15th sec. of the Ch. Reg. (Ir.) Act 1850.

A partnership was entered into by deed between petitioner and respondent as solicitor and attorney, for the term of seven years, the petitioner advancing a sum of £250 to the respondent in consideration of the benefits to be derived from the partnership; the profits to be divided in the proportions of three-fourths to the respondent, and one-fourth to the petitioner; half-yearly accounts of the profits to be kept; the petitioner to be entitled to at least £150 per annum, whether the profits admitted of such proportion or not. After the partnership had continued for 14 months, during which no account of the partnership profits was rendered by respondent, the latter complained of offensive expressions of the petitioner, which were repeated to him by a third party; took steps to dissolve the partnership; and refused to account, or return the premium or any part of it. *Held*, that petitioner was entitled to a return of a proportion of the premium equal to the unexpired term of the partnership—the acts of the respondent having led to the dissolution before the expiration of the term.—*Bolton v. Carmichael*, 1 L. Jur. N. S. 298. (M.O.)

1. A., entitled to the lands of G., devised them to B. B. mortgaged G. and X. to C. A. was at the time of his death indebted to D. On a petition filed by D., praying for an administration of A.'s assets, and that C.'s mortgage might be thrown on X. in the first instance. *Held*, that the suit came within the jurisdiction conferred by the Ch. Reg. (Ir.) Act, s. 15.—*Murray v. Madden*, 6 I. C. R. 228. (C.)

2. The jurisdiction given by the 15th sec. of the Ch. Reg. (Ir.) Act does not extend to a petition for the appointment of a new trustee, when it prays the removal of an existing trustee.—*Mills v. O'Loghlin*, 6 I. C. R. 565. (C.)

3. In cases under the Ch. Reg. (Ir.) Act, s. 15, the M. R. acts ministerially only.—*Johnson v. Worthington*, 2 L. Jur. N. S. 75. (R.)

4. The jurisdiction of the Court to make a summary order of reference upon petition under the 15th sec. of the Ch. Reg. (Ir.) Act, praying the appointment of guardians, allowance of maintenance, settlement of a scheme of education, &c., in minor matters, will be exercised with great reluctance.

*Semble*—It is better to present a summary petition in the minor matter.—*Garnett v. G.*, 2 L. Jur. N. S. 314. (C.)

5. The jurisdiction of the Court to make a summary order of reference upon petitions under the Ch. Reg. (Ir.) Act, sec. 15, praying the appointment of guardians, allowance of maintenance, settlement of a scheme of education, &c., in minor matters will be exercised with great reluctance.

*Semble*—It is better to present a summary petition in the minor matter.—*Fetherstone v. Moore*, 2 L. Jur. N. S. 315. (C.)

6. When a tenant for life permits arrears of interest upon charges affecting the inheri-

ance to accrue due, the claim of the remainderman to impound the produce of the life estate is a fit subject for reference, under the Ch. Reg. Act, s. 15.—*Kilworth v. Mountcashel*, 7 I. C. R. 60. (C.)

7. A petition of supplement and revivor, where the original suit has been referred under the 15th sec. of the Ch. Reg. Act, may be referred under that sec.—*De Bury v. Cooke*, 7 I. C. R. 273. (C.)

8. On a petition presented under the Ch. Reg. Act, s. 15, for the appointment of a guardian of a minor, the Court does not in general make a simple order under that sec.

Proper form of order.—*Bagnall v. B.*, 7 I. C. R. 514. (C.)

9. The 15th sec. of the Ch. Reg. Act is not imperative. The power conferred by that section of summarily referring to the Master petitions for the appointment of guardians and the allowance of maintenance to infants ought not to be exercised.—*Charleville v. Tighe*, 9 I. C. R. 309; *Dr. Rep. temp. Napier*, 613. (C.)

10. The Masters have jurisdiction in cases referred to them under the Ch. Reg. Act, s. 15, to make orders for substitution of service. *Splaine v. S.*, 10 I. C. R. 49. (R.)

11. In 1828, a bill to raise a charge out of lands was filed in the Exchequer. A decree to account was made in 1830. *Held*, that a petition praying the benefit of the former proceedings could not be referred under the Ch. Reg. Act, s. 15.

Leave given to amend the petition to be referred on production of the certificate of amendment.—*Neary v. Callan*, 10 I. C. R. 285. (C.)

12. Under pressing circumstances, an order of reference, under sec. 15, was made, although the petition had not been set down in time.—*Ward v. W.*, 10 I. C. R. 465. (C.)

13. Time within which the final order on a petition under the 15th sec. should be made.—*Moore v. Keogh*, 10 I. C. R. 501; 5 L. Jur. N. S. 501. (C.)

14. The Masters have jurisdiction to re-hear causes referred to them under the Court of Ch. (Ir.) Reg. Act, sec. 15, but have only the same power and authority as the Court, and are bound in the same manner as the Court in respect to the period within which causes may be re-heard.

Observations on the practice in the Master's office in administration suits.—*Nason v. Peard*, 12 I. C. R. 30. (R.)

15. Summary order of reference of a suit for administration and a receiver, made without the three weeks' demand of account required by the G. O.—*Wales v. Grier*, 12 I. C. R. 88. (C.)



1. A petition by an executor, to administer the testator's personal estate, stated and relied on a deed, whereby a portion of the assets was assigned to petitioner. The petition having been referred to the Master, under the Ch. Reg. Act, s. 15, no charge or affidavit was filed impeaching the validity of the deed. *Held*, that the Master had no jurisdiction to decide, on oral evidence, and documents produced before him, whether the deed was or was not fraudulent and void against creditors, under the 10 Car. 1, c. 3 Ir. (13 Eliz., c. 5, Eng.)

That it was not necessary, to give the Master such jurisdiction, that a cross petition should be filed to set aside the deed.—*Carter v. Dickinson*, 13 I. C. R. 109. (R.)

2. A petition by a vicar of parish, to recover tithe rentcharge from the owner of the lands, is within the Ch. Reg. Act, s. 15, and the 9th G. O., 1851.—*Phunket v. Malley*, 8 I Jur. N. S. 83. (M.O.)

3. When a petition under the Ch. Reg. Act, has been verified by the solicitor and not by the petitioner, in the form given by the Act, the Court will not make a summary order under the 15th sec. Notice must be served of the petition, and it must be set down for hearing as a cause petition.—*Stackpole v. Stott*, 1 I. C. R. 22. (C.)

4. The jurisdiction created by the Court of Ch. Reg. Act, s. 11, is one to be exercised with the greatest possible caution. All facts material to the formation of a correct decision upon each case should be contained within the four corners of the petition.—*In re O'Reilly*, 1 I. C. R. 497. (C.)

5. The Court will not entertain a petition solely to appoint trustees under the Ch. Reg. Act.—*Gabbett v. Lloyd*, 3 I. Jur. 286. (C.)

6. When a petition, in the nature of a special case, is presented under the Court of Ch. Reg. Act, s. 11, it is not necessary to its maintenance that all the parties interested in the question for adjudication should concur in the statement of facts put forward in the petition.

Nor is the sanction of the Master necessary to such a petition when a party interested, but not a petitioner, is under any of the disabilities mentioned in that section.

Whether the rights of persons, under such disabilities, should be bound adversely, must be considered in each case.

It is indispensable in every petition under that sec. that the documents relied on should be fully set out in the petition, or that copies of them should be furnished to the Court and to the parties.

A petition under that sec. prayed a declaration of the invalidity of an appointment under a power, and of the validity of a subsequent appointment. *Held*, that the donee of the power and an appointee (a *feme covert*), whose hus-

band was a party, were necessary parties.—*In re O'Reilly*, 1 I. C. R. 208; 3 I. Jur. 205. (C.)

7. B.'s partner in trade died, bequeathing to his wife, whom he appointed sole executrix, his term of years in the business premises, and all other his property whatsoever, to be by her divided, at her death, or sooner, if she should think fit, amongst his children and grandchildren. She, for the purpose of continuing the business with B., entered into a partnership agreement with him, and raised money on the security of the leasehold interest. The petitioners, the lenders, had express notice of the purpose for which the money was borrowed; but relied on advances subsequently made to the children and grandchildren out of the profits of the business. The petition referred solely to the securities given by the borrower in her character of executrix. *Held*, that under such a petition advances subsequently made could not be relied on; and that the petition as framed should be dismissed, because the securities were originally void, the money having been lent for an improper purpose.—*In re Johnston's Estate*, 15 I. C. R. 260. (L.E.C.)

### III. DEMURRER.

[Under the Court of Chancery (Ireland) Regulation Act 1850, demurrers were abolished.

By The Chancery Ireland Act 1867, the Act of 1850, and the practice thereunder, was abolished; and, by sec. 64, demurrers again allowed. The practice as to filing demurrers is regulated by the 46th, 47th, 48th, 53rd, 54th, 55th & 64th General Orders of 1867.]

#### *Under the Old System.*

1. *The general Form.*

2. *Speaking.*

3. *When it lies.*

a. *In general.*

b. *For want or Misjoinder of Parties.*

c. *For Matter of Form, or Defective Statement.*

4. *When overruled by Answer or Plea. See PLEADING, ANSWER 7.*

5. *Amendment of.*

*Under The Chancery (Ir.) Act 1867.*

### III. 1. General Form of Demurrer.

8. The clerk, deft., demurred to so much of the bill as sought an account of the alleged waste, or any discovery relating thereto; and answered the residue, offering to account for the profits of the trees, the cutting of which was one of the alleged acts of waste. *Held*, that the demurrer should be overruled; because, being a demurrer to parts of a bill, it omitted to specify those parts; because the answer to one of the charges of waste had overruled the demurrer.—*Crompton v. The Bishop of Meath*, S. & Sc. 297. (R.)

9. A general demurrer will lie when one of several co-ptfs. has not any interest in the subject matter of the suit.

*Quere*—Should this objection prevail if made only at the hearing?—*Egan v. Heenan*, 3 I. E. R. 50; Fl. & K. 39. (R.)

1. A creditor of a Banking Company formed under the 6 G. 4, c. 42, after the Co. stopped payment, filed a bill on behalf of himself and all other creditors, &c., against one of the public officers, as sole deft. The bill prayed that in pursuance of the 38 G. 2, c. 14, their demand might be paid out of the society's personal estate, and by the society, if the estate proved insufficient. It prayed an account of the personal estate. Demurrer for want of equity and want of parties. *Held*, that the 38 G. 2, applied to Companies formed under the 6 G. 4; that deft. sufficiently represented the shareholders; that the prayer for an account of the personal estate of the partnership was sufficient, since the bill stated it was sufficient to pay the debts.—*Fawcett v. Hodges*, 3 I. E. R. 232; Fl. & K. 100. (R.)—[Overruled: *O'Flaherty v. M'Dowell*, 6 H. L. Cas. 142; 2 I. Jur. N. S. 469.]

2. Demurrer to so much of the ptf.'s bill as seeks any discovery from the deft. whether the deceased was possessed of any, and what property, at the time of her death (except leasehold estates, or chattels real, and shares in the Dublin Cemetery Company), and of the profits thereof; and whether deft. possessed himself of all, or any and what part of such personal estate. *Held*, sufficiently specific.—*Commissioners of Charitable Donations v. Espinasse*, Fl. & K. 164; 3 I. E. R. 324. (R.)

3. The 8 G. 1, c. 4 (Statute of Limitations), does not extend to Crown bonds or recognizances, though in them the Crown is but a trustee for a subject. A demurrer to a plea of payment founded on that statute, put in to a *sci. fa.* on a receiver's recognizance, was therefore allowed.—*Reg. v. Bayley*, 4 I. E. R. 142; 1 Dr. & War. 213. (C.)

4. A demurrer, in form to the part of the bill not covered by plea, but in fact to the whole bill, is bad. The 66th G. R. does not extend to a plea and demurrer.—*Bayley v. Browne*, 10 I. E. R. 180. (R.)

5. A., on behalf of herself and her infant children, filed a bill against B., tenant in common with her husband, C., alleging that, on C.'s death, B., entered into receipt of the entire rents, claimed the whole, and kept possession of the title deeds, for want of which the ptf.s. could not proceed at law; and praying that they might be put in possession of C.'s moiety; and an account of the rents of it since his death; and the title deeds. A. did not make affidavit that the deeds were not in her possession. *Held*, that such affidavit is not necessary in a case where the ptf.s. have a right to sue in Equity *alivide*, and that a demurrer for want of it was bad in substance; that the demurrer, not stating specifically the parts of the statement or relief to which it applied, was bad in form; that though the bill could not be sustained for an account between tenants in common, yet the infant ptf.s. were entitled

to such account against the deft.; and that the mother being a co-ptf. was no misjoinder.

A demurrer *ore tenus* cannot be more extensive than the demurrer on the record.

The uncertainty of a statement is ground of special demurrer, and cannot be relied on upon a general demurrer.—*M'Carthy v. Hatch*, 9 I. E. R. 206. (R.)

6. The Statute of Limitations is a good defence on general demurrer.—*Dunne v. Doran*, 13 I. E. R. 545. (E.E.)

### III. 2. *Speaking Demurrer.*

7. A decretal order in another cause declared, that persons had interests in the subject matter of the present suit, in which the bill did not state those interests, or make those persons parties. *Held*, on demurrer, for want of parties, that the defts. were not at liberty to refer in support of their demurrer to the decretal order, to show the interests of the parties; and that as the demurrer stated, and relied upon facts not appearing upon the bill, it was a speaking demurrer, and as such should be overruled.—*D'Arcy v. Beytagh*, Fl. & K. 481, 500. (R.)

### III. 3. *When it lies.*

a. *Generally.*

b. *For Want or Misjoinder of Parties.*

c. *For Matter of Form or Defective Statement.*

#### III. 3. a. *When it lies generally.*

8. An allegation of a grant made in the reign of Edward III, in Ireland, for the improvement of a city and the support of public buildings, bridges, highways, and establishments therein—*Held*, a sufficient statement of a charitable use, and of a use which, though made to a civil corporation, will be enforced in this Court as a trust.

Such a gift from the Crown is sufficient to create a condition; and the Crown might insist on the forfeiture, or waive it on the performance of the condition, so as to give this Court jurisdiction on an information.

An information against a corporation, and also against an individual officer of it, making a case in which he would be personally liable, is not demurrable.—*The Att.-Gen. v. The Corp. of Limerick*, Beat. Rep. 563. (C.)

9. In a tithe suit—*Held*, that the bill might have been demurred to, or would have been dismissed at the hearing, on account of the smallness of the demand; the proper remedy in such a case being by civil-bill in the county wherein deft. resided, though the lands were situate in another county.

In a suit in Ireland for £6. 1s. 5d. for tithes—*Held*, that the bill might have been demurred to, since it did not allege any special circumstances, arising from combination or any right to be ascertained, or any difficulty in the way of proceeding at law.—*Disney v. Taaffe*, 1 Dr. & Wal. 94; S. & Sc. 105, 113, n. (C.)

1. The clerk of a patron, who had recovered in *quare impedit*, filed a bill under the 1 G. 2, c. 23, against the presenting bishop and his clerk, for an account of the intermediate profits. The bill charged acts of interference with the profits, and of waste by cutting trees and otherwise, "by the defts., or one of them," and of a conversion of a portion of the profits "to their own use." A general demurrer by the bishop was allowed.—*Crompton v. The Bishop of Meath*, S. & Sc. 297. (R.)

2. When a bill is filed for relief, which the plaintiff may obtain under a decree in another cause; *Semble*—A demurrer for want of equity on that ground cannot be supported. The proper course is, to obtain a restraining order.—*D'Arcy v. Beytagh*, Fl. & K. 481. (R.)

3. To a bill by the heir-at-law against a mortgagor's devisee, C., stating (*inter alia*) the outstanding mortgage in fee, and praying that ptf. should be declared entitled to the mortgagor's real estate, notwithstanding the will; and that C. should deliver up possession thereof, and of the title deeds, and should account as trustee for the rents already received; a demurrer for want of parties was filed. *Held*, that the mortgagee was not a necessary party, since his rights were admitted, and not affected by the suit.

The bill stated that in 1822, C. married D., a deft., and that C., knowing D. to be alive, but concealing her marriage, and bearing her maiden name, in 1826 married the testator, who never discovered the prior marriage; but, believing C. to be his lawful wife, devised to C. as his "dear wife C. M." all his real estate, &c. The bill charged that testator's belief, that C. was his lawful wife, was the sole motive of the devise; and insisted that it was therefore void. Demurrer for want of equity. *Held*, that since it might be inferred, though not conclusively, from the statement, that C.'s supposed character was the sole motive of the devise, ptf. had a right to rely upon the charge, as part of the case made by his bill.—*M'Dermott v. Everitt*, 1 I. E. R. 96. (R.)

4. Deft. demurred to the bill, on five grounds, one of which suggested a fact *dehors* the bill, and another contained an inadmissible averment. Demurrer overruled. *Held*, that, nevertheless, at the hearing, deft. was entitled to demur *ore tenus*, and newly assign some of the original causes; but, if he did so, should pay the costs of the hearing.—*Daly v. Kirwan*, 1 I. E. R. 156. (R.)

5. A bill stated several distinct matters of agreement, all of which might be described as "partnership" matters. In the statement, charges, and interrogatories, the bill applied the term "partnership" exclusively to one which embraced several transactions; and prayed an account of all the "several co-partnership transactions, &c., and that the deft. might be decreed to pay the sum found to be due," &c. The deft. demurred to so

much of the bill as related to the agreement therein called the "partnership," and to the prayer for an account of all the co-partnership transactions, &c. As to the other matters of complaint, deft. fully answered the bill. The prayer being single—*Held*, that the words "all and every the said co-partnership transactions" must be construed to include all the matters of complaint, and that therefore the answer overruled the demurrer.

Since the Court would not enforce any discovery respecting the contract, called the partnership, it being against the policy of the law, and ptf. being *particeps criminis*, it was ordered that deft. might file another demurrer, confined to so much of the bill as sought discovery or relief touching that partnership.—*Fitzgerald v. Arthur*, 1 I. E. R. 184. (R.)

6. In 1772, V. devised real estates on trust to pay an annuity to his daughter, C., and apply the surplus rents in paying debts; after her death, in trust for her second son and the heirs male of his body; it being V.'s intention that such second son should take till he became an eldest son, and "so shall each and every second and younger son or sons enjoy the estates according to seniority, and the heirs male of the body of such second son;" in default of such issue, the estates were devised to C.'s daughters as tenants in common in tail. C. had four sons, W., J., D., and B. In 1793, J. joined his father and C. in suffering a recovery to C.'s use for life; then to himself for life; remainder to his sons in tail; remainder to D. and B. successively for life; remainder to their issue in tail male. J., dying without issue, pre-deceased C., on whose death D. filed a bill against his own son and B., claiming as tenant in tail under the will of 1772, or as tenant for life under the deed of 1793. On D.'s death, the ptf., D.'s son, filed a bill against B. and B.'s three sons, to have the benefit of the former proceedings, and suggesting that deft. claimed an interest in the estates. Demurrer for want of equity: because this, being in the nature of a supplemental suit, could not be maintained against the defts., who were not parties to the former suit. *Held*, too wide; it should have been applied only to the part asking the benefit of the former proceedings.

2nd. Because, if ptf.'s title be under the will, the three defts., sons of D., were not necessary parties, as having no interest; and, if ptf.'s title was under the deed, their interest was too remote. *Held*, that the deed showed, under the shifting clause, such an interest as made them necessary parties; though, *Semble*, a general allegation, that defts. claim some interest, would be insufficient.

3rd. Because ptf. showed no title to the estates.—*Marquis of Ormonde v. Wandesforde*, 1 I. E. R. 238. (R.)

7. To an amended bill (filed before answer) stating matters some of which appeared prior, and others after the filing of the original bill, but not re-stating ptf.'s whole case as he intended it to appear on the record, deft.

demurred, specially, because it violated G. Os. 51 & 52. The demurrer was allowed.—*Mowatt v. Fetherston*, 2 I. E. R. 220. (R.)

1. It is irregular to introduce in a supplemental bill, filed after issue joined, and before hearing, charges contained in the original bill. Demurrer on that ground allowed.—*Richards v. Page*, 2 I. E. R. 223. (R.)

2. That one of several co-ptfs. has no interest in the suit, is a ground of general demurrer.—*Egan v. Heenan*, Fl. & K. 39. (R.)

3. *Quare*—Is ptf.'s insanity, at the time of filing a bill in his name, but without his authority, available on demurrer?—*Brangan v. Gorges*, 7 I. E. R. 238. (R.)

4. Ptf. and deft. agreed that deft. should grant an annuity for lives, charged on the lands of B., and others, including D., on which ptf. had a charge; and that deft. should assign to ptf. a judgment affecting B. Dft. was unable to do so; and, having broken covenants in the lease of D., was evicted by C., who agreed with deft. for a new lease. Ptf. alleged that deft. evaded performing his agreement, and aided C. in evicting himself on a previous promise of a new lease; prayed specific performance; that the new lease might be declared liable to ptf.'s demand, and charged with the annuity; that if, by reason of the incumbrances on B., deft. could not fully perform the agreements, then he might do so as far as possible, and indemnify ptf. against incumbrances; for a reference or issue to ascertain ptf.'s loss by deft.'s inability to perform his agreement fully; and that deft. should pay the amount. Dft. demurred to the relief and discovery, assigning as causes that part of the discovery sought, being in relation to the new lease, was immaterial, as respecting it ptf. had not any title to relief; and that, since the bill prayed specific performance, ptf. could not seek part performance, with indemnity and compensation. *Held*, that the demurrer respecting the relief, seeking to make the new lease liable was unsustainable, and that ptf. was entitled to discovery, the interrogatories being in part material; that the demurrer, so far as it related to the relief of part performance, with indemnity and compensation, would, if so confined, be good, but that the demurrer, being bad as to the former part, was bad altogether.—*Southwell v. Daly*, 9 I. E. R. 7. (R.)

5. Ptf., by bill, stated that A., by deed, conveyed lands to trustees to the use of B. for life, remainder to his issue male; and that the lands so conveyed were held by A. "under and by virtue of certain leases or agreements for leases for lives renewable for ever, or certain terminable leases or agreements for terminable leases;" the dates and particulars of which ptf. could not set forth, by reason of the same and the other muniments of the title being lost, or in defendant's possession, having been delivered to him by B. on a sale to him

of B.'s interest. The ptf., as first tenant in tail, sought a discovery of the deeds; that renewals obtained by B. in his own name might be decreed a graft on the original leases; and for an injunction to stay waste. *Held*, on demurrer, that the reasonable construction of the statement was, that the lands were held by A. at the time of the execution of the deed; that the statement of the title of A. was not open to demurrer, inasmuch as the principle, which excuses a ptf. from setting out a deft.'s title, ought to excuse him from setting out the title of a party under whom ptf. derives, while the deft. wrongfully withholds the possession of the title deeds.

*Semble*—Such objection cannot be made upon a general demurrer for want of equity.

*Held also*, that the surviving trustee was not a necessary party.—*Hill v. Mill*, 9 I. E. R. 164. (R.)

6. When, on the bill's face, the time, which operates as a statutable bar, appears to have lapsed, the Statute of Limitations may be relied on by demurrer.—*Ferguson v. Livingston*, 9 I. E. R. 202. (R.)

7. *Semble*—A deft., who has answered the original bill, may demur to the whole of the amended bill, if the objection appears for the first time on the bill as amended.—*Bayly v. Cumming*, 10 I. E. R. 405. (R.)

8. A notice party to a bill did not enter a common, or a special appearance, and a memorandum of service on him was entered. At the hearing the cause was ordered to stand over to amend the bill by adding parties. The same party was required to answer by the amended bill. *Held*, that he might demur to the amended bill.—*Rowland v. M'Donnell*, 13 I. E. R. 365. (R.)

9. A bill, filed by the owner of a leasehold, stated that a Railway Co., whose railway was intended to intersect the ptf.'s lands, served upon her the usual notice to treat: that no agreement having been come to between the parties, the company issued their precept; that the jury awarded her a sum for purchase-money, and a sum for compensation; that the ptf., offering to perform her part of the contract, made frequent applications to the company to complete their part, which they failed to do; that the ptf. could have adequate relief in Equity only; and prayed specific performance, payment of the sums awarded by the inquisition, and interest thereupon from the date of the inquisition. A demurrer, for want of Equity, and on the ground that the ptf.'s remedy was at Law, was overruled.—*Doherty v. Wat. & Linc. Ry. Co.*, 13 I. E. R. 538. (C.)

10. The Statute of Limitations is a good defence on general demurrer.

The right of simple contract creditors to proceed against real estates, devised by the debtor under the 3 & 4 W. 4, c. 100, is barred by the Statute of Limitations in six years from the death of the debtor.

A *devastavit* by an administrator only creates a simple contract debt to the next-of-kin.—*Dunne v. Doran and Doyle*, 13 I. E. R. 545. (E.E.)

### III. 3. b. *Demurrer for Want or Misjoinder of Parties.*

[But see 30 & 40 *Vic.*, c. 44, ss. 66, 67.]

1. A suit by a married woman, suing for her separate estate, with her husband a co-ptf., is, upon demurrer, a misjoinder.

*Seemle*—An objection could be sustained at the hearing.—*Sweeney v. Hall*, 1 I. E. R. 22; S. & Sc. 662. (R.)

2. The bill charged "that A., the surviving executor of B., was long since dead, intestate; although ptf. has made enquiry, he cannot now set forth the name of the person who, ptf. is informed, administered to the said B., with his will annexed, since the death of the said executors; and ptf. has applied to the several confederates herein named for discovery of the name of such administrator, but which, although well known to them, they refuse to discover." Demurrer, because B.'s personal representative, confessedly a necessary party, was not made a party. *Held*, that the demurrer should be overruled, as the bill suggested a sufficient excuse for not making him a party.—*Ryan v. Cambie*, 2 I. E. R. 328. (E.E.)

3. A decretal order in another cause declared that parties had interests in the subject matter of the present suit, in which the bill did not set forth those interests. *Held*, on demurrer taken to the bill for want of those parties, that the defendants were not at liberty to refer to the decretal order to show the interests of those persons.

A demurrer, which states and relies upon facts not appearing on the face of the bill, is a speaking demurrer, and must be overruled on that ground.—*D'Arcy v. Beytagh*, Fl. & K. 481. (R.)

4. J. bequeathed, amongst other property, a chattel real to his executors, in trust, after paying two legacies, for H. for life; remainder to B. absolutely. H. paid the legacies and some debts, and died intestate. His personal representative filed against J.'s executors a bill to be repaid those sums out of J.'s general assets, and for an account; but did not make B. a deft. by subpoena, though he served B. with notice under G. O. 15. A decree to account having been obtained, ptf. filed the present bill, charging that the general assets were deficient, and that the executors had, without consideration, given B. possession of the chattel real. Ptf. made him alone a deft. by subpoena, but served the executors with notice under G. O. 15, and prayed that the bill might be taken as an original bill in the nature of a supplemental bill in aid of the original decree; and for the same relief against B., respecting the chattel real, as was had against the executors in the original cause. *Held*, that the bill was demurrable, the executors not having been made parties.

*Seemle*—The relief sought by the two bills was inconsistent, one seeking relief against parties against whom the other waives all relief.

*Quere*—Is service of notice under G. O. 15 a waiver of any right to seek relief against the party?—*Harper v. Boyd*, 8 I. E. R. 456. (R.)

5. Under her father's will, and an appointment by her mother, his executrix, ptf. was entitled; and, being in embarrassment, without professional advice, and ignorant of the amount of her claims, G., her solicitor, induced her, in 1833, to convey to him all her rights (which he represented to be only one-half of their actual amount), for a rentcharge on the lands thus conveyed to him, payment to be personally secured by him. G. drew the deed, which did not contain any clause of re-entry, or any covenant by him to pay. A non-alienation clause was inserted, fraudulently, as was alleged. In 1836 G. ceased to pay. In 1845 the bill was filed to set aside the deed; to carry the trusts of the will into execution; for an account of testator's property, so far as was necessary to ascertain ptf.'s rights; and, if necessary, of the mother's personal estate. B. the mother's executor and the father's administrator *de bonis non*, was made a party. The trustee of the will was not. *Held*, that there was not any misjoinder or multifariousness; that, if, as to B., the bill was multifarious, G. could not raise the objection; that the surviving trustee was not a necessary party.—*O'Kelly v. Glenny*, 9 I. E. R. 25. (R.)

6. A bill filed by the owner of a charge on a term stated certain settlements of the estate, and a former incumbrancers suit, in which decrees for sale of the inheritance for payment of charges, including those on the term, were made; and prayed the benefit of the decrees, and to have them carried out by a sale of the term. The cause, being defective for want of the parties interested under the former decrees, was ordered to stand over, with liberty to amend; under which order a supplemental bill was filed, making parties persons stated to be all those interested under the decrees; and praying to have them carried out or executed with such modifications as should be fit; and stating new matters intended to bind the defts. by the former proceedings, and which might affect the parties to the former suits, or their representatives deriving under the settlement. *Held*, that the bill was not sustainable without making the latter persons parties; and *Seemle*, a suit so framed, praying to correct a former decree if erroneous, and have the benefit of it if not, is on that ground demurrable.

[*M'Namara v. Blake*, 11 I. E. R., affirmed on appeal.]

On an appeal from an order allowing a demurrer, counsel for the ptf. begins.—*M'Namara v. Blake*, 12 I. E. R. 362. (C.)

7. The administrator of the executor of the surviving trustee of money charged on real estate—*Held*, not to represent the trustee in a suit to raise the money. A demurrer, for

want of parties, was allowed on that ground.—*Van Reizenstein v. Magan*, 12 I. E. R. 415. (R.)

1. A judgment debtor, C., was possessed of A., for a term, and seized of B. By two contemporaneous deeds, C. conveyed A. & B., subject to terms for paying his debts, to his own use for life; remainder to E. for life; remainder over; and X. to Z. and his heirs. Z. died after devising X. to his wife, who married S. After C.'s death, the judgment creditor proceeded by *elegit* against X. Against him, S. and his wife filed a bill for an injunction, and to carry the trusts of the deeds into execution; but were compelled to pay the amount due on the judgment. The decree ordered that C. should pay S. and his wife the amount due by them, with interest, or, in default, that A. and B. should be sold for the terms; and that S. and his wife should, out of the produce, be paid the sum decreed them. S. assigned the benefit of the decree to R., who filed a bill to carry it into execution. On demurrer—*Held*, that the personal representative of C. was not a necessary party to the latter bill, nor was it necessary to revive the former suit against him.—*Rowland v. M'Donnell*, 13 I. E. R. 365. (R.)

### III. 3. c. Demurrer for Matter of Form or Defective Statement.

2. In 1837, a bill was filed stating that in 1773 C. devised estates for sale to pay charges; subject thereto, to his wife for life; after her death, to "The Incorporated Society in Dublin for promoting English Protestant Schools in Ireland," and their successors, for ever; that the wife paid the charges, and in 1801 assigned all her title in the estates to J., subject to the charges after her decease; that she died in 1801; that afterwards ptfs. got into possession of part of the estates, but that J., and the defts. as his devisees, retained possession of the greater portion of the estates, and also of all the common title deeds, which they refused to deliver up. The bill charged that defts. alleged that the charges remained unpaid; and that, after the wife's death, J. never denied ptf.'s right to the estates subject to J.'s own lien for the charges, but merely professed to hold the lands until the account on foot thereof should be closed; and even offered to refer to arbitration all questions touching such account as the only matters in dispute between him and ptfs. Demurrer: that by the laws of Ireland, no corporation or body politic can take by devise any estates of inheritance in lands. Demurrer, *ore tenus*, relying on the 3 & 4 W. 4, c. 27. *Held*, that independently of the question upon the Irish enactments, the demurrer on record was too extensive; ptfs. being entitled to a discovery of the common title deeds, and to have them brought into Court, and to be informed whether the sum was due on foot of the charges affecting all the estates; and also because defts., who claimed under C.'s will, had not any right to resist that part of the

bill which sought to establish the will against the heir.—*Incorporated Society v. Richards*, 8. & Sc. 559. (R.)

3. To a *sci. fa.* upon a receiver's recognition, the sureties pleaded performance of its condition. Replication: that, after the making of and entering into the recognizance, the receiver was directed to account; and that on passing his account a balance was certified as being in his hands; that an order to lodge that balance was made, but that the receiver had refused to do so. On demurrer, *Held*, that the record sufficiently alleged that the receiver had notice of the order.

*Quere*—Is an averment of notice necessary?—*The King v. Lidwell*, 1 Dr. & Wal. 26. (C.)

4. Ptf. must, by his bill, show that he has a good title at the time of filing it. An after-acquired title, put forward by supplemental or amended bill, will not support his case.—*Byrne v. B.*, Fl. & K. 433. (R.)—[Confirmed on appeal: 2 Dr. & War. 71; 1 Con. & L. 189; 4 I. E. R. 621. See *Magrath v. Heron*, 3 I. E. R. 476; Fl. & K. 237. (R.)]

5. A legatee's assignee filed a bill against the administrator, pending a suit to establish an alleged will, to preserve the assets; for a receiver, and an account of the personal estate; to compel the administrator to bring in the assets received by him, and to restrain him from further receiving them; and praying that ptf.'s rights under the will might be ascertained. Demurrer thereto. *Held*, that the demurrer embraced the former as well as the latter relief, and was therefore bad as covering too much.—[*Phipps v. Steward*, 1 Atk. 286, observed on.]—*Tom v. Deane*, 8 I. E. R. 39. (R.)

6. A judgment creditor filed a bill against the conuzor and prior incumbrancers, without having issued an *elegit*, or showing that he was entitled to issue it, but charging that the lands of the conuzor were an ample fund for satisfying all incumbrances; and praying a sale, and payment, of his own and all prior charges, or that the lands might be sold, subject to prior incumbrances; but did not offer to redeem the prior incumbrances. Demurrer, by a creditor made a deft., whose incumbrance was prior to the 3 & 4 Vic., c. 105, allowed.

*Semble*—Where several co-trustees are made deft., one of them may demur alone.—*Kirwan v. Earl of Portarlington*, 8 I. E. R. 593. (E.E.)

7. A demurrer *ore tenus* must not be more extensive than that on the record.

Uncertainty of statement is ground of special demurrer, and cannot be relied on upon a general demurrer.—*M'Carthy v. Hatch*, 9 I. E. R. 206. (R.)

8. It is no objection to a replication in *sci. fa.* on a recognizance, that it purports to be pleaded by the Queen, and not by her Attorney-General.

An allegation in pleading a breach of a recognizance, that a receiver did not, nor would not, account, but on the contrary refused to do so, though ungrammatical, is not open to demurrer. A statement that the receiver received moneys while he was receiver, and afterwards was required to account, is also sufficiently certain without stating that he was receiver when required to account, or showing how he was required.—*Reg. v. Bowen*, 13 L. E. R. 241. (C.)

#### III. 4. When Demurrer is overruled by Answer or Plea.

1. A demurrer does not lie to an amended bill for referring throughout to the original bill, and repeating its entire contents and prayer.—*Feed v. Cussen*, S. & Sc. 161. (R.)

2. A clerk of a patron, who had recovered in *quare impedit*, filed a bill against the presenting bishop and his clerk, for an account of the intermediate profits; and charged waste by cutting trees, &c. Deft. demurred to so much of the bill as sought an account of the waste, &c., or discovery relating thereto; and put in to the residue an answer offering to account for the profits of the trees cut. *Held*, that the demurrer should be overruled, because it did not distinctly specify the parts of the bill demurred to; and because the answer to one of the charges of waste had overruled the demurrer.—*Crompton v. Bishop of Meath*, S. & Sc. 297. (R.)

3. This Court will not enforce a discovery respecting a contract made in evasion of, and contrary to, the meaning and policy of a statute.

The bill stated several distinct matters of agreement, all of which might be described as "partnership" matters. The prayer was for an account of all the co-partnership transactions, and that deft. might be decreed to pay the sum due. Deft. demurred to the prayer "for an account of all and every the said co-partnership transactions," &c., to several of which deft. had fully answered. He did not pretend that an account should be refused. *Held*, that the demurrer covered too much, and was overruled by the answer.—*Fitzgerald v. Arthur*, 1 L. E. R. 184. (R.)

4. Demurrer to the whole relief. Answer to part of the discovery.

*Quere*—Does the answer overrule the demurrer?—*Fitzmaurice v. Sadlier*, 12 L. E. R. 186. (R.)

5. A deft. by his answer objected to an interrogatory, because by answering it he might subject himself to pains, penalties, and forfeitures; and, by a plea, he declined to answer a part of the same interrogatory, because the subject of it came to his knowledge in the character of solicitor to the other deft. *Held*, that the answer being equivalent to a demurrer, the case did not fall within the 66th G. R., and that the answer overruled the plea.

A bill to set aside leases for fraud made the solicitor who had prepared them a deft.,

charging him with being a party to the fraud, and praying costs against him, and interrogating him as to his being privy to the fraud, and as to transactions regarding the preparation of the leases. The solicitor pleaded that he knew nothing as to the matters, save as the attorney of the other deft., and therefore was privileged from giving discovery. The plea did not deny the fraud or the facts stated in the bill as evidence of it.

*Held*, that the ptf. being entitled to relief, was entitled to the discovery as incidental to the relief.

The privilege of a solicitor is confined to confidential communications with his client, and does not extend to his own acts, though done in the character of solicitor.

A solicitor may be made a party to a bill to set aside a deed for fraud, if he be a party to the fraud, and costs are prayed against him.—*Kelly v. Jackson*, 13 L. E. R. 129. (R.)

#### III. 5. Amendment of Demurrer.

6. An order made *ex parte* to amend a demurrer, a copy of which had been ordered and signed by the officer, set aside, it being doubtful whether the copy had been actually taken out, and the order being founded on a statement that it had not.—*Keatings v. Garde*, 12 L. E. R. 310. (R.)

7. *Quere*—Whether the 19th G. O. of May 1857, under the Ch. Reg. (Ireland) Act 1850, applies to misjoinder of causes of suit, as well as to misjoinder of parties?—*Power v. The College of Physicians*, 7 L. C. R. 104. (R.)

#### Under The Chancery (Ir.) Act 1867.

[See 30 & 31 Vic., c. 44, ss. 64, 100; G. O. (1867), 46-48, 53-55, 58, 62, 64, 265-267.]

#### IV. INFORMATION.

8. An information against a corporation and also against an individual officer of it, making a case in which he would be personally liable, is not demurrable.—*The Att. Gen. v. The Corporation of Limerick*, Beat. Rep. 563. (C.)

9. An information against distillers charged them with distilling large quantities of spirits for which they had not paid duty; they having evaded payment by concealing the distillation, and pretending that their distillery had been silent during the time when the spirits were distilled. It required the defts. to discover the actual quantities of wort fermented in the distillery, and prayed an account of the duties payable to the Crown on spirits distilled by the defts. The Attorney-General waived all penalties and forfeitures. *Held*, that the defts. were bound to answer the charges fully; and could not protect themselves on the ground, that the facts charged, if coupled with other facts, would show that they had been guilty of a conspiracy to defraud the Crown.—*The Attorney-General v. Conroy*, 2 Jon. 791. (E.E.)

10. Relators refused to proceed further. New relators were substituted, who offered

an indemnity for all past and future costs.—*Att.-Gen. v. The Corporation of Cashel, S. & Sc. 333. (R.)*

1. A cause petition, by way of information and bill, should state, and proof should be given of, the individual interest of the person named as relator.

*Quere*—Whether in the title of the petition, and in the verifying affidavit, it suffices to describe the relator as “a ratepayer”?—*Att.-Gen. v. Le Hunte, 8 L. C. R. 437. (R.)*

#### V. PARTIES TO A SUIT.

[See PRACTICE, PARTIES.]

[As to parties under the Ct. of Ch. (Ir.) Regulation Act 1850, see No. 26; and under The Chancery (Ir.) Act 1867, see No. 27, post.]

1. *Generally; Effect of Want or Misjoinder of Parties: how to be taken advantage of.*
  - a. *In general.*
  - b. *Misjoinder.*
2. *Assignors and Assignees.*
3. *Att.-General or Solr.-General.*
4. *Bank of England: other Banks: Shareholders.*
5. *Bankrupts and Insolvents: their Assignees.*
6. *Co-obligors: Parties having Joint Interests or Liabilities.*
7. *Debtor to Testator's Estate.*
8. *Debtor and Creditor.*
9. *Ecclesiastical Persons.*
10. *Executors and Administrators.*
  - a. *In general.*
  - b. *Of Deceased Personal Representative.*
11. *Heir-at-Law: Next-of-kin.*
12. *Husband and Wife.*
13. *Legatees and Devisees generally: Residuary Legatees (V. 26, Ch. Regulation Act 1850; and V. 27 under Chancery Ireland Act 1867.*
14. *Lessor, Lessee, Sub-lessee.*
15. *Lord of the Manor.*
16. *Incumbrancers; Mortgagor and Mortgagee, &c.*
17. *When Parties are very numerous.*
18. *Partners and Part Owners; Joint Tenants: Tenants in Common.*
19. *Parties not interested: Witnesses: Agents, &c.*
20. *Tenants for Life and in Tail: Remaindermen.*
21. *In Tithe Causes.*
22. *Trustees and Cestuis que Trusts: Guardian and Infant; Lunatic and Committee.*
23. *Vendor and Purchaser.*
24. *When one or more of several are made Parties on behalf of themselves and all others interested.*
25. *When Leave will be given at the Hearing to Amend by adding Parties.*
26. *Parties under the Court of Chancery (Ireland) Regulation Act 1850.*
27. *Parties under The Chancery (Ireland) Act 1867.*

#### V. PARTIES TO SUIT.

1. *Generally: Effect of Want or Misjoinder of Parties: how to be taken advantage of.*
  - a. *Generally.*
  - b. *Misjoinder.*

##### V. 1. a. *General Effect of Want or Misjoinder of Parties: how to be taken advantage of.*

2. *Quere*—Whether the owner of the inheritance is a necessary party to a suit against a tenant for life for specific performance of an agreement for a lease for lives renewable for ever?—*Lowry v. Dufferin, 1 I. E. R. 281. (C.)*

3. Sequestrators in possession of a benefice, and who have been appointed merely for the purpose of paying curates, &c., are not necessary parties to a bill by an annuitant whose annuity is charged upon the benefice.—*Stannus v. Robinson, 2 Jones, 498. (E.E.)*

4. In a suit to renew a lease, a person entitled to part of the interest sought to be renewed may be made a deft.—*Butler v. Earl of Portarlington, 4 I. E. R. 1; 1 Dr. & War. 20; 1 Con. & L. 1. (C.)*

5. On a mere question as to the construction of an instrument, no persons should be made parties except those who claim under the instrument. It is better to leave other parties who may turn out to be necessary parties, to be brought before the Court by supplemental bill.—*Alloway v. A., 2 Con. & L. 509; 4 Dr. & War. 376. (C.)*

6. When the objection for want of parties is clearly untenable, the ptf. should not set down the cause under the 47th G. O.—*Whittle v. Halliday, 2 Con & L. 430. (C.)*

7. Deft., by his answer, insisted that he was entitled to relief against A. for whatever amount deft. should be decreed to pay ptf. Between A. and ptf. there was not any priority. *Held*, that A. was not a necessary party to the suit.—*Att.-Gen. v. Trimleston, 5 I. E. R. 511. (Rev. E.)*

8. The ptf. in the original suit is a proper party to the bill of review, although no relief is prayed against him.

The trustee of a term of twenty years was improperly made a party, the term having expired before the institution of the suit.

If the ptf., or a person standing in the situation of a ptf., purchases under the decree, the transaction is to be examined with the utmost strictness; and if the decree be reversed for error, the sale cannot be upheld.—*Talbott v. Minnett, 6 I. E. R. 83. (E.E.)*

9. The 15th and 23rd G. O. of March 1843, have a prospective, and not a retrospective operation. Their meaning is to bind, by the future adjudication of rights in the cause, a party who, having been duly served with the prescribed notice, has had the option of



becoming a defendant, or having notice of the proceedings, with the right of interfering, if necessary, to protect his interests. After decree in a mortgage cause, judgment creditors were, by supplemental bill, made parties in the mode prescribed by the 15th G. O. of March 1843, and being served with the notice under that order, some of them entered special appearances, and the others did not appear. The Court refused the ptf.'s motion for an order, binding them by the proceedings in the original cause; holding, that they could not be bound by these proceedings otherwise than by a decree in the supplemental cause.—*O'Brien v. Creagh*, 6 I. E. R. 129. (R.)

1. The receiver in the cause is the proper person to present the petition, and to make the verifying affidavit, for a receiver under the 4 & 5 W. 4, c. 55, upon a tenant's recognition.—*Daly v. Lynch*, 9 I. E. R. 2. (R.)

2. *Semble*—A defendant who has answered the original bill may take a demurrer applying to the whole of the amended bill, if the objection for the first time appears on the bill as amended.

*Semble*—Legatees, whose legacies are charged on real estate, are necessary parties to a bill for a sale of such estate in cases not provided for by the 24th, 25th, and 26th General Orders.

A testator directed three trustees named in his will, out of the residue of his real and freehold estates, in aid of his personal estate, by sale, mortgage, or perception of the rents and profits, to levy legacies for his children, A., B., and C. One of the trustees renounced. A bill was filed for the administration of the real and personal estates of the testator, and to make them liable for a breach of trust, to which the two acting trustees were parties, and which charged A., B., and C. to be out of the jurisdiction, but did not pray process against them. On a demurrer for want of parties—*Held*, that the legal estate being in the two acting trustees, the case was within the 24th G. O., and A., B., and C. were not necessary parties to the suit.

It is not enough to state that persons who, in respect of interest, are necessary parties to a suit, are out of the jurisdiction; the bill must pray process against them when they come within the jurisdiction.—*Bayly v. Cumming*, 10 I. E. R. 405. (R.)

3. A bill, filed in 1844, to raise a sum secured on a term created by a settlement of 1773, stated the proceedings in a suit of *A. v. B.* by a prior judgment creditor, and prayed the benefit of the decrees and accounts therein; that the decrees might be carried into execution, so far as necessary for the plaintiff's relief, and a sale of the term. The cause stood over at the hearing to make two minors parties by supplemental bill. One of them, X., by answer, impeached the decrees in the suit of *A. v. B.*, and both claimed as purchasers for value under a settlement of 1842, made by W. At the hearing of the

supplemental cause, in June 1847, plaintiff's counsel contended that X. could not impeach the decrees, as he claimed under W., who had acquiesced in them, and an order was made that the further hearing of the cause should stand over, with liberty to the ptf. to bring before the Court the parties beneficially interested in the decrees in *A. v. B.* The ptf. filed a supplemental bill, setting out the whole of the proceedings in *A. v. B.*, and the suit of 1844; assignments of the judgment and sum decreed in *A. v. B.* for the benefit of W., charging that W. and X., and the parties claiming under the assignment in A.'s right, could not object to have the decrees carried into execution; and praying that they might be carried into execution against them, and that the plaintiff might have the benefit thereof; or if the Court should be of opinion that they could not be carried into execution, according to the terms thereof, with such modification as to the Court should seem meet; and that ptf.'s claim and all prior and contemporaneous charges might be raised by a sale of the term of 1773. The Court refused to take the bill off the file as irregular; but *Held*, on demurrer, that the order of June 1847, though it authorised the filing of a supplemental bill to bring new parties before the Court, did not warrant the making of a new case; and that the case of estoppel, and the prayer that the decrees might be modified and altered, was a new case, and not warranted by the order.

*Semble*—The frame of the suit and the relief prayed having been altered, all the parties necessary to the suit of 1844 should be parties, particularly the party representing the term of 1773.—*M'Namaru v. Blake*, 11 I. E. R. 527. (R.)—[*Affid.*: 12 I. E. R. 362. (C.)]

4. Estates A. and B. were subject to an ancient rent. A. being sold, the vendor (T.'s ancestor) covenanted to indemnify the purchaser (C.'s ancestor), and paid the entire rent since 1776. A suit against T. decided that so much only of the rent as was payable out of B. could be recovered, and a decree was made for so much, the amount of which was defined. In a subsequent suit against T. and C., to recover the remainder of the rent payable out of A.; *Held*, that the former suit afforded no defence to T., and that he was a proper party to the new suit, either as claiming a part of the lands charged, or in respect of the remedy over against him.

In a suit to recover a rent stated by the bill to be payable out of lands named, "with others," the evidence as to the precise lands charged with it being very indefinite—*Held*, that an objection for want of parties could not be sustained on the suggestion, unproved, that there were other lands contributory, the owners of which were not before the Court.—*Archbishop of Dublin v. Lord Trimleston*, 12 I. E. R. 251. (C.)

5. The administrator of the executor of a surviving trustee of money charged on real

estate—*Held*, not to represent the trustee in a suit to raise the money, and a demurrer for want of parties allowed on that ground.

*Semble*—A bill by the same person to raise two sums charged on different estates vested in the same defendant is not multifarious, though some of the persons interested in the one estate are not interested in the other estate.—*Van Reitzenstein v. Magan*, 12 I. E. R. 415. (R.)

1. By a mortgage deed executed by a tenant for life and remainderman, the solicitor for the mortgagees was appointed receiver over the mortgaged lands at a percentage, and covenanted that he would apply the rents in payment of head rents, and the interest of the mortgage, and pay the residue to the mortgagees. A foreclosure bill having been filed, the remainderman filed a cross bill against the mortgagees and solicitor, impeaching the mortgage as fraudulent; praying that policies of assurance should be kept up out of the rents to indemnify the ptf. against the mortgage; a declaration that the mortgagees were bound to keep down the head rent; and an account of the rents against them as mortgagees in possession; and, lastly, an account against the solicitor of the sum for which a judgment was entered up as a collateral security. The bill did not pray costs against the solicitor. *Held*, on demurrer, that the solicitor having no interest with respect to any part of the relief sought, except the last, the bill was multifarious, both as to him and the mortgagees.

In a suit to impeach a deed for fraud, a solicitor or agent concerned in procuring it may be made a party, but the bill must pray costs against him.—*Crofts v. Allan*, 12 I. E. R. 451. (R.)

2. A decree against several, for payment of costs, is joint and several; and a receiver may be appointed over the lands of one of them, under the 3 & 4 Vic., c. 105, without having the others parties to the petition.

The costs given by a joint and several decree for payment of costs are in the nature of a debt. Therefore, there must be contribution between the parties liable.—*Archbishop of Dublin v. Lord Trimleston*, 13 I. E. R. 98. (R.)

3. Executors, legatees, and heirs, who should be parties on rehearing.—*White v. Mansergh*, 2 I. C. R. 893; 5 I. Jur. 73. (C.)

#### V. 1. b. Misjoinder.

4. R., by will, directed his executors to invest £1500, and pay the interest thereof to his wife during her life; then, to divide the £1500 equally among his five children. Only one executor proved the will. He possessed himself of the assets; set apart the £1500; paid the interest to R.'s wife during her life; and made some payments to the children. Upwards of thirty years after their right accrued to the children, their representatives instituted a suit to recover the children's respective

shares, and prayed that the executor might be declared to have been a trustee of the £1500 for the children. *Held*, that those executors who had not proved R.'s will were not necessary parties.—*Daly v. Kirwan*, 1 I. E. R. 156. (R.)

5. *Semble*—The objection, that a husband has been made a co-ptf. with his wife in a suit for her separate estate, though ground of demurrer, cannot be sustained at the hearing.—*Sweeny v. Hall*, 1 I. E. R. 22; S. & Sc. 662. (R.)

6. *Semble*—That, when a bill is filed by two stockholders, each entitled to separate sums of stock, on behalf of themselves and of all other holders of the same stock, praying relief, if it should appear that one ptf., by reason of some equitable circumstances peculiar to himself, is not entitled to relief, the Court may, nevertheless, in that suit, give the relief sought; and need not dismiss the bill.—*Corballis v. Undertakers of the Grand Canal*, 3 I. E. R. 29. (E.E.)

7. When one of several co-ptfs. has no interest in the suit, a general demurrer lies.

*Quære*—Whether this objection can be made at the hearing?—*Egan v. Heenan*, 3 I. E. R. 50; Fl. & K. 39. (R.)

8. A bill, for a renewal, stated a conveyance to have been made to one ptf. in trust for another, and no evidence of the existence of the trust was given. *Held*, that it was not a misjoinder to make them co-ptfs.—*Butler v. The Earl of Portarlington*, 4 I. E. R. 1; 1 Con. & L. 1; 1 Dr. & War. 20. (C.)

9. An objection to the suit for misjoinder of parties must be taken by demurrer.—*Cashell v. Kelly*, 1 Con. & L. 246; 2 Dr. & War. 181. (C.)

10. The equitable mortgagee of a leasehold estate, which had been by settlement vested in a trustee, joined the *c. q. trusts*, as ptfs. with him in a bill to redeem after eviction under the Ejectment Statutes, for non-payment of rent. *Held*, not to be a misjoinder of parties.

If a bill for redemption is filed within the time prescribed by the statutes, by the parties entitled to redeem, the Court clearly has jurisdiction to allow the cause to stand over in order that formal parties may be added.—*Malone v. Geraghty*, 5 I. E. R. 549; 3 Dr. & War. 239. (C.)

11. In a bill for redemption, after eviction, a leasehold interest vested by settlement in a trustee who had died, the equitable mortgagee of the interest and the *c. q. trusts* were co-ptfs.; and the landlord and the personal representatives of the deceased trustee (who had refused to join as co-ptf.) were defts.; *Held*, that the suit was properly constituted.—*Malone v. Geraghty*, 3 Dr. & War. 271. (C.)

12. Some of several persons had been made ptf. in a suit without their authority. Their names were struck out of the suit, upon motion and before the hearing. If the defts. shall be awarded costs, they will be ordered them against the solicitor filing the bill, he to have them over against the ptf. who employed him.

If there be a contest between a party to a suit and the solicitor, as to the authority given to the latter, the Court will decide against the solicitor unless he has a written authority.—*Beddy v. Smith*, 8 I. E. R. 667. (R.)

1. Plaintiff was entitled under her father's will, and an appointment by her mother, his executrix. She being in embarrassed circumstances and without professional advice, and ignorant of the amount of her claims, G., her solicitor, induced her in 1833 to convey to him all her rights, which he represented to be only half what they amounted to, for a rentcharge on the lands so conveyed to him, the payment to be personally secured by him. The deed was drawn by G. and contained no clause of re-entry or covenant by him to pay; but a non-alienation clause was inserted; fraudulently, as alleged. G. ceased to pay in 1836, and the bill was filed in 1845, to set aside the deed and carry the trusts of the will into execution, and for an account of the testator's property, so far as to ascertain ptf.'s rights; and, if necessary, of the personal estate of her mother. B., executor of the mother and administrator *de bonis non* of the father, was made a party, but the trustee of the father's will was not. *Held*, on demurrer by G., that the time since the execution of the deed, falling short of twenty years, could not be set up by him on demurrer; that if it could, the case was one of actual fraud, and time would not bar; that there was no misjoinder or multifariousness; that if multifarious as to B., G. could not raise the objection; that the surviving trustee was not a necessary party.—*O'Kelly v. Glenny*, 9 I. E. R. 25. (R.)

2. A., on behalf of herself and her infant children, filed a bill against B., tenant in common with her late husband, C., alleging that on his death B. entered into receipt of the entire rents, claiming the whole, and kept possession of the title deeds, for want of which the ptf. could not proceed at law; praying that they might be put in possession of C.'s moiety; an account of the rents of it since his death; and for the title deeds. A. did not make affidavit that the deeds were not in her possession. *Held*, that such affidavit is not necessary in a case where the ptf. have a right to sue in Equity *aliunde*, and that a demurrer for want of it was bad in substance. That the demurrer not stating specifically the parts of the statement or relief to which it applied, was bad in form. That, though the bill could not be sustained for an account between tenants in common, yet, that the infant ptf. were entitled to such account against the deft.; and that the mother being a co-ptf. was no misjoinder.

A demurrer *ore tenus* cannot be more extensive than the demurrer on the record.

The uncertainty of a statement is ground of special demurrer, and cannot be relied on upon a general demurrer.—*M'Carthy v. Hatch*, 9 I. E. R. 206. (R.)

3. Parties, having adverse or inconsistent rights in the subject matter of a suit, cannot be joined as co-ptfs., nor can one who has not any interest be joined as a ptf. with one who has.—*Fulham v. M'Carthy*, 1 H. L. Cas. 708; 12 Jur. 757.—[Affg. (but on the ground of misjoinder of co-ptfs.) 9 I. E. R. 620. (C.)]

4. T., a trustee, lent trust-money on mortgage to M. By an arrangement, on the marriage of M.'s daughter, a valuable leasehold interest was granted by M. out of the mortgaged premises, and put in settlement, T. being the person who managed it, and the solicitor who prepared the lease and settlement. The daughter or her husband was not informed of the mortgage. T., afterwards, with his co-trustee and their *c. q. trusts*, filed a bill to foreclose the mortgage and sell discharged of the lease, if necessary. *Held*, that the parties deriving under the settlement must be fixed with notice of the mortgage and trust, and could not rely on T.'s conduct as a defence even against him, and therefore could not object to T.'s being a co-ptf.

*Quare*—Whether, if notice were not shown, such an equity against a trustee would be a defence?—*Twycross v. Moore*, 13 I. E. R. 250. (C.)

5. An objection for want of parties, though it would be ground of demurrer to a bill, will not be an answer to a motion for an injunction in a cause petition.

*Semle*—The Court has authority to allow an amendment in a cause petition, so as to get rid of the objection of misjoinder.—*Foster v. Hornsby*, 2 I. C. R. 426; 5 I. Jur. 279. (R.)

6. R., and M. his wife, representatives of a sub-lessor's interest in a sub-lease for lives renewable for ever, assigned that interest to D. This deed was duly acknowledged by M. Subsequently, R., M., and D. filed against the representatives of the sub-lessor's interest a bill for a renewal of the sub-lease for the same life as had been inserted in the head-lease by a renewal thereof before the assignment to D.; but of which renewal R. and M. were, when they assigned, unaware.

*Semle*—That making R., M., and D., co-ptfs. amounted to a misjoinder.—*M'Birney v. Allen*, 2 I. Jur. N. S. 169. (C.)

7. The Board of the College of Physicians resolved that B. should be accepted of as a tenant of a farm for thirty-one years, at a rent of £1. 10s. an acre, as the nominee of F., a former tenant, who had by another resolution been allowed to dispose of his interest. F., the solicitor of B., acting under a general authority, wrote to the solicitor of the col-

lege, that, in consequence of the dangerous illness of B., he had not finally concluded with P., and could not take out the lease. *Held*, that the letter amounted to a waiver of B.'s right to the lease.

*Quære*—Whether, if there had been no waiver, P. could have compelled the execution of a lease to the representative of B., who was a banker, and would not have resided on the farm?

P., after the death of B., filed a cause petition for a specific performance of the agreement contained in the resolution. The solicitor for the college, in his affidavit, stated an agreement, made in 1846, for a lease for twenty-one years, at a rent of £1. 17s. an acre, with the brother of P., who had formerly been a tenant of the farm, and whose administrator and creditor P. was; of which agreement P. was ignorant. P. amended his petition, and, as such administrator, prayed in the alternative a specific performance of that agreement. *Held*, having regard to the 19th Order of May 1857, that the misjoinder could set be right, by amendment of the prayer at the hearing.

*Quære*—Whether the 19th Order of May 1857 applies to misjoinder of causes of suit, as well as to misjoinder of parties?

*Held*, on the authority of *Lindsay v. Lynch* (2 Sch. & Lef. 1), that the petition should be dismissed, as praying relief in the alternative, under two inconsistent agreements. But the Court gave leave to amend the petition by abandoning the relief prayed by the original petition.

The petitioner had paid the rent of £1. 10s. an acre up to March 1856, and receipts were given by the respondents for each gale. *Held*, that the petitioner was entitled to a specific performance of the agreement of 1846, on the terms of paying all rent from the 25th of March 1856, at the rate of £1. 17s.; without prejudice to the respondents bringing such action, as they might be advised, for the arrears alleged to be due up to March 1856.—*Power v. College of Physicians*, 7 I. C. R. 104. (R.)

#### V. 2. Assignors and Assignees, as Parties.

1. Unless some act is required to be done by them, it is not necessary to bring purchasers, *pendente lite*, before the Court.—*Higgins v. Shaw*, 2 Dr. & War. 356; 1 Con. & L. 400. (C.)

2. By marriage settlement, lands belonging to the husband were conveyed in trust for him until he should be declared a bankrupt, or should become insolvent, or compromise with his creditors, or take the benefit of the Insolvent Act; and after his decease, or other determination of the trust, during the joint lives of husband and wife, in trust to permit the wife to receive the rents, &c., for her sole use and benefit. The husband took the benefit of the Insolvent Act. *Held*, on a petition filed by his assignee, that the Court had

jurisdiction to make a decree declaring the limitation to the separate use of the wife, on the husband's insolvency, fraudulent and void, although it might be void at law, and although the legal estate should be in the wife, and not in the trustees.—*Clarke v. Chambers*, 8 I. C. R. 26. (R.)

#### V. 3. Att.-General, or Solr.-General, as Party.

3. *Semble*—That the Att.-General, without taking out administration, sufficiently represents, for the purposes of a suit, a bastard's estate.—*McKiernan v. Kernan*, 4 I. E. R. 269; Fl. & K. 352. (R.)

4. A principal, after selling part of his property to an agent, devised his property generally to his wife, an alien, for life; remainder to his children, who filed a bill to set aside the sale. *Held*, that the Att.-General was properly made a deft. in respect of the wife's interest, though no office was found.—*Murphy v. O'Shea*, 8 I. E. R. 322; 2 Jon. & L. 422. (C.)

5. A person of weak mind, but not either lunatic or idiot, filed a bill by his next friend to recover the arrears of an annuity. *Held*, that the Att.-General was not a necessary party, the plaintiff not having been found to be a lunatic by commission.—*Carr v. Osborne*, 1 I. Jur. 2. (R.)

6. The Att.-General should be fully apprised of all the proceedings relating to charities. Pleadings and briefs must be sent to his counsel.—*Potts v. Turnly*, 1 I. Jur. 57. (C.)

7. The Att.-General was made a notice party in respect of a recognizance by a receiver, as if within the 15th and 23rd G. O. 1843, when he should have been an answering party. His counsel appeared at the hearing, and consented to be bound. The Court made a decree.—*Abbott v. A.*, 1 I. Jur. 155. (R.)

8. In incumbrancers' suits the Att.-General, made a party in respect of a recognizance, sufficiently represents the parties interested in it for all purposes; and it should be reported an incumbrance, though the condition be not broken.—*Delany v. Kirwan*, 12 I. E. R. 304. (C.)

9. The Att.-General made a party, in respect of a recognizance or otherwise, cannot be made a notice party, but must be required to answer.—*Faucett v. Biggs*, 12 I. E. R. 305. (C.)

10. If any corporate or other body usurps, without express authority, the power of granting degrees, proceedings are properly taken in the Att.-General's name.

*Quære*—Can one body, to whom the privilege has been granted, file a bill against another body, which has usurped that privilege,

without having first established its right at law.—*The Att.-Gen. v. The K. & Q. Coll. of Phys. in Ireland*, 9 I. Jur. N. S. 362. (C.)

#### V. 4. *Banks; Shareholders therein.*

1. The depositors (in a savings' bank) have not a common interest in the funds, but have each severally a legal debt due to them by the trustees. They cannot, therefore, sue as co-ptfs., or on behalf of themselves and other depositors.—*Cooke v. Lord Courtown*, 6 I. E. R. 266. (R.)

#### V. 5. *Bankrupts and Insolvents; their Assignees.*

2. The 53 G. 3, c. 138, does not oust the jurisdiction of the Court of Chancery to entertain a bill, by the assignee of a deceased insolvent, to administer his after-acquired property on behalf of the unsatisfied creditors in the insolvent matter.—*Byrne v. B.*, Fl. & K. 433. (R.)—[Confirmed on appeal, 2 Dr. & War. 71; 1 Con. & L. 189; 4 I. E. R. 621. (C.)]

3. An insolvent is not a necessary party to a suit by his assignee.

*Quere*—Is it a misjoinder to make an insolvent a party to suit by his assignee?—*Cashell v. Kelly*, 1 Con. & L. 246; 2 Dr. & War. 181. (C.)

4. The grantor of a rentcharge, though discharged as an insolvent, continued in possession of the lands. *Held*, that his assignee ought to be made an answering party to the grantee's bill to raise arrears by means of a receiver.—*Curtin v. Darcy*, 2 Jon. & L. 718. (C.)

5. A plaintiff may rely on a title acquired in point of form after he filed the bill, if it be not inconsistent with his original claim, and is capable of having relation back. The devisee of an insolvent debtor filed a bill to renew; and the objection being raised, afterwards procured himself to be appointed assignee, and amended the bill, stating that fact. *Held*, that he could sustain the bill.—*Doyle v. Callow*, 12 I. E. R. 241. (C.)

6. When a debt. becomes insolvent pending the suit, the provisional assignee of the Insolvent Court is properly made a party to the suit by supplemental bill.—*Roddy v. Molloy*, 13 I. E. R. 90. (R.)

7. W. owned in Ireland fee-simple estates, which, on his marriage, he charged with a jointure. There was issue, one son, H. After W.'s death, the jointure fell into arrear for some years. Under the settlement, the jointress entered into possession of the estates, and received the rents. H. becoming insolvent, the customary assignments were executed. Afterwards, H. mortgaged his interest in the estates to B., without giving B. notice of the insolvency. As a further security, H. gave a bond and warrant of attorney, providing that B., on redemption, should reconvey the lands, and sign satisfaction on any judgment which might have been entered up on the warrant.

The mortgage, having been duly registered, took priority over the unregistered assignments, under the Irish acts. B. filed a bill for foreclosure or redemption, and made the jointress, H., and the assignees, parties. The jointure was decreed to be the first charge on the estates; and the mortgage to be the second. Accounts were directed to be taken accordingly. The assignees did not appeal against this decree. H. died. *Held*, that H. ought not to have been made a party to the suit, and therefore could not appeal against the decree.—*Rockfort v. Battersby*, 2 H. L. Cas. 388; 14 Jur. 229.—[See *Battersby v. Rockfort*, 9 I. E. R. 191. (C.)—*Rev.*, on re-hearing, 8 I. E. R. 284. (C.)]

#### V. 6. *Co-obligors, and others having Joint Interests and Liabilities.*

8. A bill, filed on behalf of himself and all other creditors, by a creditor of a banking company, formed pursuant to the 6 G. 4, c. 42, stated that the society's personal estate was sufficient to pay all their debts; and prayed for an account of that personal estate; that the demands of ptf. and the other creditors might be paid thereout: and that, if it proved insufficient, the society should pay them. On demurrer—*Held*, that the company's public officer sufficiently represented their interests for the purposes of the suit; and that the shareholders need not be made parties.—*Fawcett v. Hodges*, 3 I. E. R. 232; Fl. & K. 100. (R.)—[Overruled by *O'Flaherty v. M'Dowell*, 6 H. L. Cas. 142; 2 I. Jur. N. S. 469.]

#### V. 7. *Debtor to Testator's Estate.*

9. In a legatee's administration suit against an intestate's personal representative, ptf. made deft., a third person, whose real estate had been charged under a power with a sum payable to the intestate, charging that the personal representative was insolvent, but not charging collusion with the debtor. The answer denied the insolvency, which was not proved by ptf. *Held*, that the debtor was improperly made a party to the suit. As against him, the bill was dismissed with costs.—*Philips v. P.*, 6 I. E. R. 509. (R.)

#### V. 8. *Debtor and Creditor.*

10. B. and his eldest son C., being embarrassed, executed in 1818 a trust deed, to which the scheduled creditors were parties of the fourth part. Ptf., a creditor of B., refused to execute the deed, and proceeded at law against B., to recover his demand. That action having abated by B.'s death, ptf., with the trustee's assent, submitted his claim to arbitration. The amount due to ptf. having been then ascertained, the trustee permitted him to subscribe the deed. In a suit by ptf. to carry into execution the trusts of that deed—*Held*, that the other subscribing creditors were not necessary parties.—*Field v. Lord Donoughmore*, 2 Dr. & Wal. 630; 1 Dr. & War. 227. (C.)

11. Creditors by judgment and recognizance, though scheduled to a trust deed executed

for their payment, are within the G. O. of 22nd June 1842, when a suit in this Court is instituted to carry the trusts into execution by a sale.—*Harvey v. Lawlor*, 3 Dr. & War. 168. (C.)

1. When a judgment creditor, served with notice under the 15th G. O., entered a common appearance under the 18th G. O., he is a deft. in the cause, as if he had been served with subpoena to appear and answer. *Aliter*, if the appearance entered be a special one under the 19th G. O.—*Bryson v. M'Cluskin*, 6 I. E. R. 77. (R.)

2. After the G. Rules of March 1843 came into operation, ptf. filed a supplemental bill against judgment creditors of the inheritor, to have the benefit of a decree for sale made in 1839. *Held*, that creditors by judgment, obtained before the original bill was filed, were properly made notice parties. They were given a time within which to surcharge and falsify the accounts taken in the original cause; and it was further decreed that they, if they did not do so, should be bound by the decree and proceedings in the original cause. *Held*, that creditors by judgments obtained *pendente lite*, which affected the legal estate in the lands, were not unnecessary parties in the suit, and were properly made notice parties.

That a creditor by judgment, obtained before the original bill was filed, who in another right had been made a party to the original suit, was an unnecessary party to the supplemental bill.—*Rutledge v. R.*, 8 I. E. R. 84; 3 Jon. & L. 307. (C.)

3. A judgment creditor filed a bill against the conuzor and prior incumbrancers, without having issued an *elegit*, or shown that he was entitled to issue it, but charging that the conuzor's lands were an ample fund to satisfy all incumbrances, and praying a sale, and payment out of the proceeds of his own and all prior charges, or that the lands might be sold subject to prior incumbrances. He did not offer to redeem those incumbrances. Demurrer, by a creditor, a deft., whose incumbrance was prior to the 3 & 4 Vic., c. 105, allowed.—*Kirwan v. Earl of Portarlington*, 8 I. E. R. 593.

4. The Sheriff ought not to be made a party to a cause petition for an injunction to restrain the sale by him of chattels which, after seizure, have been found to be the property of the execution debtor.—*Jackson v. Rossiter*, 2 I. Jur. N. S. 411. (R.)

#### V. 9. Ecclesiastical Persons.

##### V. 10. Executors or Administrators as Parties.

###### a. In general.

###### b. Of Deceased Personal Representative.

##### V. 10. a. Executors or Administrators generally.

5. When, upon a renunciation of a sole executor, administration *cum t. a.* is granted,

the renouncing executor is not a necessary party.—*Houston v. O'Connor*, H. & J., 718. (E.E.)

6. After appointment of a receiver under the 3 & 4 W. 4, c. 55, the petitioner died, having appointed two executors, of whom only one proved the will. The proceedings in the petition matter must be continued in the names of both executors.—*Anon.*, 2 Jon. 731. (E.E.)

7. M. having granted an annuity of £300, charged on all his property, to A. and her assigns for ever, devised his estates, upon trust to pay debts, &c.; and as to the residue, to the use of his illegitimate daughter, E., for life; remainder to K. and his heirs. A. now filed her bill, after nineteen years from M.'s death, and shortly after the death of E., against K., the executor and trustee of the will, and the Att.-Gen., stating facts, whereby it appeared that no demand on account of the annuity was ever made upon E.; that during E.'s life A. was ignorant of her rights, and that E. also was ignorant of them.—[It did not appear that E. was ever in receipt of the rents for her own use.]—Further stating that E. was a bastard, and died intestate, unmarried, and without issue; and that upon her death all her property vested in the Crown; and praying that the arrears of the annuity from the time of M.'s death might be raised, &c. Upon demurrer to this bill, *Held*, that the personal representative of E. was not a necessary party. That supposing her personal estate should have been represented, the Att.-Gen. should, in right of the Crown, and without any grant of administration, have sufficiently represented it.—*M'Kiernan v. Kernan*, 4 I. E. R. 269; Flan. & K. 353 (R.)

8. An ejectment was brought to impeach a lease, as contrary to the powers of the lessor under a settlement; and a bill was filed by a tenant to restrain proceedings, on the ground that the ptf. at law had confirmed the lease. *Held*, that the personal representative of the lessor was not a necessary party in the cause, although the lease contained a covenant for quiet enjoyment by the lessor.—*Stoughton v. Crosbie*, 5 I. E. R. 451. (E.E.)

9. In an administration suit by a legatee against the personal representative of an intestate, the ptf. made deft. a third person, whose real estate had been charged under a power with a sum of money payable to the intestate, charging that the personal representative was insolvent, but not charging collusion with the debtor. The insolvency was denied by the answer of the personal representative, and not proved by the ptf. *Held*, that the debtor was improperly made a party to the suit; and the bill, as against him, was dismissed with costs.—*Philips v. P.*, 6 I. E. R. 509. (R.)

10. K. bequeathed, amongst other property, a chattel real to his executors, in trust, after

payment of two legacies, for H. for life, remainder to B. absolutely. H. paid the legacies and debts, and died intestate. His personal representative filed a bill against the executors to be repaid these sums out of the general assets of K., and for an account. He did not make B. a defendant by subpoena, but served him with notice under the 15th G. O. A decree to account having been obtained, the ptf. filed the present bill, charging that the general assets were deficient, and that the executors had, without consideration, given B. possession of the chattel real; making him alone a deft. by subpoena, but serving the executors with notice under the 15th G. O., and praying that the bill might be taken as an original bill in the nature of a supplemental bill in aid of the original decree, and for the same relief against B. in respect of the chattel real as was had against the executors in the original cause. *Held*, that the bill was demurrable, the executors not having been made parties to it.

*Semble*—The relief sought by the two bills was inconsistent, one seeking relief against parties against whom the other waived all relief.—*Harpur v. Boyd*, 8 I. E. R. 456. (R.)

1. To a legatee's bill the executor admitted assets sufficient to pay the legacies; but relied on his right to retain them as an indemnity for the contingent liability on the testator's covenants, and did not set out the amount of the assets. *Held*, the answer was insufficient, and that the executor was bound to set out the amount of the assets.—*M'Auley v. M'A.*, 9 I. E. R. 142. (R.)

2. The resp't. in a petition matter under the Judgment Acts died. *Held*, that, before the Court distributed the funds, his personal representative should be made a party.—*Lord Cloncurry v. Piers*, 9 I. E. R. 407; 3 Jon. & L. 578. (C.)

3. A. bequeathed a life estate in £2000 to B.; remainder to X. for life; remainder over. B.'s executor was personal representative of A., and as such entitled to funds realised in the I. E. Court. A creditor of B. obtained judgment for his debt, and got liberty to transfer the fund there realised to the credit of this suit. A petition was then filed by the legatees entitled in remainder to the corpus of the £2000, and an order was made in the I. E. Court that the fund should remain in Court until the rights of the last-mentioned petitioners were decided; but allowing B.'s creditor to apply to have the fund transferred to the credit of this matter, unless the petitioners in the other matter made him a party to their suit. A conditional order was granted for the service of a notice under the Act and Rule for this purpose; and on motion to show cause against it—*Held*, that the creditor of B. could not be made a party to a suit instituted by the legatees in remainder to administer the estate by such notice.

The fund was directed to be transferred to the credit of both matters, and a reference

granted to the Master to ascertain the rights of all the parties. The question of costs was reserved.—*Going v. Harding*, 6 I. Jur. 17. (R.)

#### V. 10. b. *Executor or Administrator of Deceased Personal Representatives.*

4. R., by will, directed his executors to invest £1500, and pay his wife the interest for life; then to divide the £1500 equally amongst his children. Only one, C., of the executors proved the will. C.'s two executors proved C.'s will. One of them died. Afterwards, all but one of R.'s children instituted a suit to recover their respective shares of the £1500, against C.'s surviving executor. *Held*, that the personal representative of C.'s deceased executor was not a necessary party.—*Daly v. Kirwan*, 1 I. E. R. 156. (R.)

5. In a suit for an account and to administer the personal estate of a testatrix, the personal representative of a deceased executor of the testatrix may be properly made a co-def't. with the surviving executor, only where it distinctly appears that the deceased executor possessed himself of assets. From the statement in the bill, that the executors, A. and G., both proved the will, &c., but that G., who was dead, alone acted as executor, the Court will not infer that G. possessed himself of assets, so as to justify the ptf. in making his personal representative a co-def't. with the surviving executor.—*Cocking v. Golding*, 4 I. E. R. 169. (R.)

6. A person acting in the management of assets, though there be an executor who afterwards proves the will, is liable as an executor *de son tort*, unless it clearly appears that he was only an agent. When the evidence left this in doubt an enquiry on the subject was directed.

An executrix and A., who was not named an executor, acted, and died without proving the will, which was proved by the surviving executor named in the will. The latter and A. afterwards obtained a release from the parties interested in the assets. In a suit to set it aside, and for an account—*Held*, that the personal representative of the deceased executrix was a necessary party, especially as A. set up a defence that he was only her agent.

The cases, in which the personal representative of a deceased executor may be dispensed with in suits against a surviving executor, considered.—*Kelly v. Murphy*, 12 I. E. R. 614. (C.)

7. A., being liable under a covenant to B. and C., bequeathed legacies, and appointed B. and C. his executors. They both proved the will. B. died, leaving C. surviving him. C. died, having bequeathed legacies, and appointed E. executor. A suit was instituted against E., and a final decree made to administer the assets of C., no claim being made in that suit on foot of the covenant. A suit against E. alone, for an account of the assets of A., by the parties claiming the money secured by the covenant, was dismissed, without

prejudice to their proceeding against the legatees of C.—*Clarke v. Pope*, 13 I. C. R. 91. (R.)

V. 11. *Heir-at-law; Next-of-kin.*

1. To a bill filed by the devisee of a vendor, to impeach the sale on grounds of fraud, the heir-at-law of the vendor is not a necessary party.—*Uppington v. Bullen*, 1 Con. & L. 291; 2 Dr. & War. 184. (C.)

2. The devisee of the equity of redemption in trust for other persons is a necessary party to a foreclosure suit.—*Scully v. S.*, 8 I. E. R. 494. (E.E.)

3. It being doubtful, upon the construction of a settlement, whether ptf., his brother, and sister, were entitled to vested or merely to contingent interests—*Held*, that, the estate being limited to the settlor's heir if the supposed emergency should never arise, and the trustees having refused to become ptf.s., the ptf. might, in the character of heir-at-law, maintain a suit to protect the property.—*Peed v. Cussen*, S. & Sc., 10. (R.)

4. In a prior mortgagee's suit for foreclosure and sale, the heir of the mortgagee of the equity of redemption is not a necessary party.—*Whila v. Halliday*, 4 Dr. & War. 267; 2 Con. & L. 430. (C.)

5. The inheritor is a proper party to a supplemental bill filed to make incumbrancers parties, when there has been a decree for a sale in the original cause.—*Rutledge v. R.*, 8 I. E. R. 84; 3 Jon. & L. 307. (C.)

V. 12. *Husband and Wife.*

6. Modern cases have decided that the husband should not be a co-ptf. to a suit instituted in respect of the separate estate of the wife.—*Hackett v. Farrell*, Fl. & K. 553; 4 I. E. R. 519. (R.)

7. When a married woman is living apart from her husband, who resides out of the jurisdiction, and has no interest in the subject of the suit, the Court will, upon the motion of the ptf., and her assent, permit her to file a separate answer.—*O'Brien v. Bernard*, 7 I. E. R. 180. (R.)

8. In a suit instituted to set aside securities entered into by the ptf. to trustees for the separate use of one of the defts., as the ptf.'s wife, the ptf. alleged that she had been previously married to A.; and examined A., who proved the fact of the marriage—*Held*, that A. was not a necessary party to the suit.—*Scott v. S.*, 11 I. E. R. 74. (C.)—[See 13 I. E. R. 212; 4 H. Lds. Cas. 1065.]

9. A bill of interpleader having been filed against husband and wife, separate subpoenas and notices were served under an order for the substitution of service, requiring them to appear and answer at different times. The

husband appeared and filed a separate demurrer, which the ptf. set down to be argued, and afterwards moved to set aside for irregularity. The Court refused the motion, and made an order *nunc pro tunc*, that the husband and wife should defend separately.

By a deed of separation a husband and wife conveyed the wife's property to a trustee, in trust to pay an annuity to the husband, and the residue, after payment of her debts, to the wife. The trustee covenanted to pay the annuity to the husband. The wife afterwards required the trustee not to pay the annuity to the husband; alleging, on the opinion of foreign counsel, that the marriage was void. The husband brought an action of covenant for the annuity against the trustee, who, having lodged the amount in bank, filed a bill of interpleader against the husband and wife. Demurrer to the bill by the husband allowed with costs.—*Doyle v. Dumoncel*, 11 I. E. R. 342. (R.)

10. Bill to set aside a transfer of stock to the deft., as having been obtained by undue influence and imposition. The deft. by answer insisted that he was entitled to the stock, but intended giving it to Mrs. B. The ptf. gave in evidence declarations by the deft. that he took the stock in trust for Mrs. B. *Held*, that Mrs. B. and her husband were necessary parties.—*Ahern v. Daly*, 2 I. Jur. 83. (C.)

11. Husband and wife were joined as co-ptfs., the rights of the husband being those of a specialty creditor; the wife's those of a legatee. *Held*, that the wife was improperly joined as ptf.

The Court allowed the husband to amend by making the wife a deft. to be sued by her next friend.—*Evans v. Holton*, 4 I. Jur. 18. (C.)

12. A married woman, residing with her husband abroad, filed a cause/petition in the name of a next friend, a person of no substance. The respondent having required security to be given for the costs, the petition was allowed to be amended by inserting the name of the husband, who returned home, as a petitioner, instead of the next friend; the petition to be re-sworn, but not taken out of the office.—*Dunne v. Roche*, 1 I. Jur. N. S. 7. (R.)

13. A petition under the Ch. Reg. (Ir.) Act 1850, s. 11, prayed a declaration of the invalidity of an appointment under a power, and of the validity of a subsequent appointment. *Held*, that the donee of the power, and an appointee (a *femecover*), whose husband was a party, were necessary parties.—*In re O'Reilly*, 1 I. C. R. 497; 3 I. Jur. 205. (C.)

14. *Semble*—In administration suits, brought by married women, their husbands should be parties.—*In Mahony's Goods*, 7 I. Jur. N. S. 107. (P.)

V. 13. *Legatees and Devisees generally: Residuary Legatees.*

[See under Court of Ch. Ireland Reg. Act, 1850 *post*, and under Ch. Ir. Act 1867, *post*.]



1. J., by will, devised all his estates, real and personal, to trustees, to pay debts, &c.; next to the use of his son, C., for life, remainder to C.'s issue; if C. died without issue, to W. for life, remainder to such of W.'s children as should be living at her death, in equal shares. C. died without issue. W. had several children living. In a suit by J.'s creditors to have the trusts of his will executed, and praying a sale of the real estate, *Held*, that all W.'s children were necessary parties.—*Oldham v. Wilkins*, 1 I. E. R. 59. (R.)

2. C., the executor who proved R.'s will, &c., died. Both C.'s executors proved C.'s will, and possessed themselves of assets more than sufficient to pay his debts. One of C.'s executors died; the survivor admitted assets. All but one, of R.'s children instituted against that survivor a suit to recover their shares of £1500 which R. had directed C. to invest, and pay the interest thereof to R.'s wife for life; then to divide the £1500 equally amongst R.'s children. *Held*, that the omission of one child made the suit defective.—*Daly v. Kirwan*, 1 I. E. R. 156. (R.)

3. The devisee of the equity of redemption in trust for other persons is a necessary party to a foreclosure suit. — *Scully v. S.*, 3 I. E. R. 494. (E.E.)

4. When there is a devise of a fee-simple, and an absolute power to raise, by sale or mortgage, moneys for specified purposes; and that devise enables the trustee to give receipts to the purchasers; he sufficiently represents the estate in a suit for sale, though the person who was entitled, subject to that power, to the first estate of inheritance in the lands, was not a party thereto. — *Keon v. Magawly*, 1 Dr. & War. 401. (C.)

5. When one deft. died after answer, the Court would not permit his devisee to be made a party by amendment.—*Listowel v. Callaghan*, 8 I. E. R. 472. (R.)

6. Suit by husband and wife against the sole executor, and against the residuary legatee, to recover the balance of a legacy to the wife. The executor allowed the bill to be taken *pro confesso* against him, and did not controvert the statement in the bill, that the testator's personal estate and effects had come to his possession. The other deft. demurred, alleging that he was not a necessary party. As against him the bill was dismissed; his costs to be paid eventually by the executor.—*Brooke v. Stewart & Wade*, 2 I. Jur. 211. (C.)

#### V. 14. Lessor: Lessees: Sub-lessee.

7. If a mortgagee desires to impeach a lease, made after the execution of the mortgage, he must make the tenant a party to the foreclosure suit.—*Martin v. Walker*, S. & Sc. 139. (R.)

8. A landlord filed against his immediate tenant a bill to restrain him from cutting

turf for sale on a valuable bog appurtenant to the demised lands. The tenant answered that he had never been in actual occupation of any part of the lands; that he never, by himself or any agent, committed the waste charged; and that, if his sub-tenants had cut turf for sale or otherwise, he was unable to restrain them from doing so, the practice having existed before the lands came into his possession. It did not appear whether those sub-tenants held merely from year to year, or had a greater interest. *Held*, that since they were not before the Court, the injunction could not issue.—*Lord Norbury v. Alleyne*, 1 Dr. & Wal. 337. (C.)

9. In a suit to establish a lease, all the tenants should be before the Court.—*Brangan v. Gorges*, 7 I. E. R. 283. (R.)

10. All the persons entitled to the lessee's interest should be made parties in suits for renewal of a lease.

One of the lives in a renewal was described as "B. C., the younger, son of B. C., of Sion, aged fifteen years, or thereabout." There were two persons of the name of B. C.; one, the eldest son of H. C., of Sion, who was fifteen years old; the other, the fourth son of B. C., of K., who was nine years old. *Held*, on the evidence, that the latter was the *c. q. vic.*

The tenant having tendered the renewal fine and interest from the death of the former, without objection on that ground on the part of the landlord — *Held*, that the tender was sufficient to save a forfeiture, under the Tenantry Act.

There is no general rule as to what shall be deemed reasonable time for payment of the renewal fines. But the Court granted a renewal when a tender had been made within six months of the demand, there being no fraud on the part of the tenant, and no circumstance to establish default, except the lapse of time.

Advertisements in the "Gazette," &c., under the 2nd sec. of the Tenantry Act, are not a sufficient demand where the head rent is paid to the landlord by an agent for the tenants. Such agent ought to be served with notice, if the landlord shall find any difficulty in discovering his tenants, or their assigns.

*Semble*—When a demand of a renewal fine has been inserted in the "Gazette," under the 2nd sec. of the Tenantry Act, the demand shall not be deemed to have been made on the day of the publication of the first advertisement.

Costs given to a respondent in a decree for the renewal of a lease, under the circumstances of the case.—*Colclough v. Smyth*, 14 I. C. R. 127. (R.)

#### V. 15. Lord of Manor.

V. 16. Incumbrancers; Mortgagor and Mortgagee, &c.

[See under the Court of Ch. Reg. (Ireland) Act 1850, *post*.]

1. The conuzor of a judgment being seized only of an equity of redemption upon a mortgage in fee—*Held*, upon demurrer, that the mortgagee was not a necessary party to a bill filed by the judgment creditor to raise the amount of his judgment.—*Handley v. Lord Langford*, 2 Jon. 421. (E.E.)

2. Sequestrators in possession of a benefice, who have been appointed merely to pay curates, &c., are not necessary parties to an annuitant's bill whose annuity is charged on the benefice.—*Stannus v. Robinson*, 2 Jon. 498. (E.E.)

3. A purchaser under a decree will not be held to his purchase, unless all parties having judgments, &c., appearing on record against the vendor, whether before or after the claim to raise which the bill was filed, are brought before the Court so as to bind their rights.—*Piers v. P.*, 1 Dr. & War. 265. (C.)—[*Affg. S. & Sc.* 379. (R.)]

4. A bill by the heir against a mortgagor's devisee, stated, *inter alia*, the outstanding mortgage in fee, and prayed that ptf. should be declared entitled to mortgagor's real estate, notwithstanding the will; that the devisee should deliver up possession thereof, and of the title deeds, and account as trustee for the rents received. Demurrer for want of parties. *Held*, that the mortgagee was not a necessary party, since his rights were admitted, and not affected by the suit.—*M'Dermott v. Everitt*, 1 I. E. R. 96. (R.)

5. If a mortgagee of lands subject to an annuity files a foreclosure bill, and makes the annuitant a party, the bill will be dismissed, without costs, as to the annuitant, who is an unnecessary party.—*Paynes v. Creagh*, 2 I. E. R. 190. (C.)

6. In a bill for a foreclosure and sale of mortgaged lands all the judgment creditors of the mortgagor are necessary parties, whether such judgments are prior or *puiene* to the ptf.'s demand, and whether they are a lien upon legal or equitable estates. This has been decided on principles independent of the operation of the 3 & 4 Vic., c. 105, s. 22.—*Rolleston v. Morton*, 1 Dr. & War. 171; 1 Con. & L. 352; 4 I. E. R. 149. (C.)

7. Judgment creditors of trustees are never parties to suits for administration of trust estates; and in execution of those trusts, sales take place to purchasers who never object, nor would be allowed to do so, that the legal estate is incumbered by the judgments of the trustee, from whom it is to be conveyed to them. The principle is not confined in its application to cases of direct and express trust, it applies, to every species of trust, embracing those which, although they are termed constructive, are by the settled rules of equity as firmly established, and as clearly liable to be enforced and protected, as those which are created by express contract.—*Leake v. L.*, 5 I. E. R. 366. (R.)

8. Judgments entered pending suit against a person who is a party to the cause, are not objections to the title.—*Massy v. Batwell*, 5 I. E. R. 382; 4 Dr. & War. 56; 2 Con. & L. 413. (C.)

9. In a bill for redemption after eviction of a leasehold interest, vested by settlement in a trustee who had died, the equitable mortgagee of the interest, and the c. q. t. were co-ptfs., and the landlord and the personal representative of the deceased trustee (who had refused to join as co-ptf.) were defendants—*Held*, that the suit was properly constituted.—*Malone v. Geraghty*, 3 Dr. & War. 271; 5 I. E. R. 549; 2 Con. & L. 235. (C.)—[*Affd.*: 1 H. L. Cas. 89.]

10. Creditors by judgment and recognition, although scheduled to a trust deed executed for their payment, are within the 23rd G. O. of the Court of Ch., and may be made parties by notice to a suit instituted for the purpose of carrying such deed into execution by sale.—*Harvey v. Lawler*, 3 Dr. & War. 168. (C.)

11. Incumbrancers, who have become such *pendente lite*, need not be made parties to the suit unless some conveyance is required from them.—*Massey v. Batwell*, 2 Con. & L. 421; *Higgins v. Shaw*, 1 Con. & L. 400; 2 Dr. & War. 356. (C.)

12. The Court having decided that the ptf. was entitled to an annuity on the lands of G., on which persons not parties to the suit were entitled to a charge; and a question of priority having arisen between the ptf. and them, the cause stood over to make them parties. *Held*, that they must be made answering parties, and that it was not sufficient to serve them with notice under the 15th G. R. of March 1843.

Leave given to the ptf. to move for a receiver in a suit defective for want of parties, under particular circumstances.—*Sullivan v. S.*, 8 I. E. R. 72. (C.)

13. W. mortgaged leaseholds to the plaintiff. The deed contained a clause of redemption on payment of the principal and interest on the 1st of May 1842. By a deed of even date, reciting an agreement on the treaty for the mortgage, that the principal should not be called in until after the death of W., and that by mistake it was stated in the mortgage deed that it might be called in after the 1st of May 1842, the plaintiff covenanted that the principal should not be called in until after the decease of W. W. became insolvent, and the interest of the mortgage fell in arrear. The plaintiff paid an arrear of head rent, in order to save the premises from eviction by the head landlord. *Held*, that the plaintiff was not entitled to foreclose the mortgage during the life of W., but was entitled to a receiver to keep down the interest on the mortgage, and the advances.

The premises were subject to an annuity prior to the plaintiff's mortgage, and the an-

nuitant was made a party to the suit in respect of the salvage claim. *Held*, that he was not a proper party to the suit, and the bill was dismissed as against him with costs.—*Burrows v. Molloy*, 8 I. E. R. 482; 2 Jon. & L. 521. (C.)

1. Under the decree to account in a suit instituted by A., a creditor on the inheritance, B. having a *puise* charge on a 500 years' term, proved it, and it was reported. The cause was brought to a final hearing, and a decree made for a sale of the inheritance to pay A. and the other creditors. Supplemental suits were afterwards instituted by A.'s representatives, who were ultimately settled with; and no sale was had. B.'s representatives filed a bill praying the benefit of the former decree, and to have a sale of the term, making A.'s representative a notice party. *Held*, that as B. was not entitled to such a decree as was made in A.'s suit, it could not be carried out for the plaintiff, or cut down so as to be limited to the term, at least in the absence of A.'s representatives, who might still have rights under it.—*M'Namara v. Blake*, 11 I. E. R. 455. (C.)

V. 17. *When they are very numerous.*

V. 18. *Partners and Part Owners: Joint Tenants: Tenants in Common.*

2. In 1790, V. entered into possession of lands as assignee of incumbrances and as purchaser from A., B., C., and D., each of whom was tenant for life of one-fourth. A. died in 1819, and B. in 1836. The next remaindermen (tenants in tail) of their shares filed a bill against V.'s devisees to redeem. *Held*, that the suit was imperfect for want of parties, as C. and D., still alive, were not before the Court.—*Browne v. Bishop of Cork*, 1 Dr. & Wal. 700. (C.)

3. A bill, filed on behalf of himself and all other creditors, by a creditor of a banking company, formed pursuant to 6 G. 4, c. 42, stated that the personal estate of the society was sufficient for the payment of all their debts; and prayed an account of the personal estate of the society, and that the demands of the plaintiff and the other creditors might be paid thereout; and if that should prove insufficient, that they should be paid by the society. *Held*, on demurrer, that the public officer of the company sufficiently represented their interests for the purposes of the suit, and that it was not necessary to make the shareholders parties.—*Fawcett v. Hodges*, Fl. & K. 100; 3 I. E. R. 232. (R.)—[Overruled: *O'Flaherty v. McDowell*, 2 I. Jur. N. S. 469. (H.L.); 6 H. Lds. Cas. 142.]

4. Four tenants in common, entitled to the first estate tail in X. under a deed, were before the Court in a suit instituted to establish a will devising Y. The validity of the will depended upon the deed; but in a cross cause impeaching it only two of them were made parties. Both causes having been heard together, a decree was made, on a compromise, setting aside the deed as to X., and directing

a reconveyance by all proper parties. A person, who would have been entitled to a prior estate tail in X. under the deed was born. In pursuance of the decree, a conveyance was afterwards executed in which the four tenants in common joined. *Held*, that, the inheritance having been imperfectly represented in the cross cause, a good title could not be made derived through the decree.—*Pasley v. Lord Clanmorris*, 7 I. E. R. 442. (C.)

5. A suit was instituted by two members of a joint-stock company, on behalf of a class of scrip-holders who dissented from the acts of the provisional committee, against whom, as representing the scrip-holders assenting to these acts, the bill was brought. It did not appear that there was identity of interest between the plaintiffs and the class of shareholders whom they professed to represent. *Held*, that the bill was bad upon demurrer.—*Dawson v. Tabor*, 3 I. Jur. 297. (C.)

V. 19. *Parties not interested, as Witnesses, Agents, &c.*

V. 20. *Tenants for Life and in Tail: Remaindermen.*

6. When there is a devise of a fee-simple estate, with an absolute power to raise, by sale or mortgage, moneys for specified purposes, and the same devise enables the trustee to give receipts to purchasers; he sufficiently represents the estate in a suit for sale, though the person entitled, subject to the power, to the first estate of inheritance, is not a party in the cause.—*Keon v. Magawley*, 1 Dr. & War. 401. (C.)

7. In 1790, V. entered into possession of lands as assignee of incumbrances, and as purchaser from A., B., C., and D., each of whom was tenant for life of one-fourth. A. died in 1819, and B. in 1836. The next remaindermen (tenants in tail) of their shares filed against V.'s devisees a redemption bill. *Held*, that the suit was imperfect for want of parties, since C. and D., still alive, were not before the Court, nor was the mortgagee's personal representative.—*Browne v. Bishop of Cork*, 1 Dr. & Wal. 700. (C.)

8. Part of the interest under a lease for lives renewable for ever was assigned to A. in trust for B. There was not any declaration of trust in the assignment, or endorsed on it. To a suit for renewal A. and B. were made parties. The bill alleged that the assignment was made in trust for B. *Held*, that there was not any misjoinder, and that B. had properly been made a party.—*Butler v. Earl of Portarlington*, 4 I. E. R. 1; 1 Dr. & War. 20; 1 Con. & L. 1. (C.)

9. The reversioner is a necessary party to a suit respecting registered timber, between a middleman and the sub-tenant, when equities

arise out of the contracts made between the middleman and sub-lessee.—*Jebb v. Hardman*, 1 L. Jur. N. S. 417. (C.)

#### V. 21. Tithe Causes.

#### V. 22. Trustees and C. Q. Trusts: Guardian and Infant: Lunatic and Committee.

1. When there is a devise of a fee-simple estate, and an absolute power to raise, by sale or mortgage, sums of money for specified purposes, and in the same devise are contained provisions enabling the trustee to give receipts to the purchasers, such trustee sufficiently represents the estate in a suit for a sale, though the person who was, subject to that power, entitled to the first estate of inheritance in the lands was not a party to the suit.—*Keon v. Magawley*, 1 Dr. & War. 402. (C.)

2. In a bill for redemption, after eviction, of a leasehold interest, vested by settlement in a trustee, who had died, the equitable mortgagee of the interest and the c. q. t. were co-ptfs., and the landlord and the personal representative of the deceased trustee (who had refused to join as co-ptfs.) were defts.; *Held*, that the suit was properly constituted.

An equitable mortgagee of a tenant's interest is entitled to file a bill to redeem within six months after execution of the *habere*.—*Malone v. Geraghty*, 3 Dr. & War. 271; 5 I. E. R. 549; 2 Con. & L. 235. (C.)—[*Affd.*: 1 H. Lds. Cas. 81.]

3. This Court will not appoint a married woman guardian *ad litem* of an infant; but if her husband join, will appoint them both.—*Jones v. Geale*, 8 I. E. R. 239. (R.)

4. To a bill to raise a demand out of property vested in trustees for the separate use of a *feme covert*, the trustees ought to be made answering parties.—*Pepper v. Kelly*, 8 I. E. R. 502; 2 Jon. & L. 558. (C.)

5. Trustees to preserve contingent remainders are not necessary parties in a suit to raise a charge affecting the inheritance.—*Stewart v. Marquis of Donegal*, 8 I. E. R. 621; 2 Jon. & L. 636. (C.)

6. A., tenant for life, mortgaged under power the inheritance for £500 and £1000, and afterwards paid the first mortgage, and took an assignment to a trustee. After his death B. became entitled to the mortgages. C., the tenant in tail, being a minor, covenanted by marriage articles in 1827 to convey the lands in trust to sell and pay off the debts then affecting them, and subject thereto for herself for life, remainder to her children; and a recovery was suffered on her majority. B. filed a bill, and obtained a report finding in 1835 that arrears of rent and fines, due in the life of A. and after, were paid off by loan on mortgage; and found this sum and the two mortgages, with interest on them all from before the death of A. to the time of the report, to be due, and a sale was decreed to pay them.

In 1840 B.'s assignee filed a bill, not making the trustee of C.'s settlement a party, and obtained a decree to carry the former decree into execution. *Held*, that the trustee was a necessary party, as representing the inheritance. That the first decree was erroneous, declaring the inheritance liable for interest payable by the life estates of A. and C., and that a purchaser under the second decree, in which the inheritance was not represented, could not be held to his purchase.

A report of good title, ptf.'s solicitor undertaking to procure a signature, is informal.—*Magawley v. Brady*, 9 I. E. R. 59. (R.)

7. Ptf., by bill stated, that A. by deed conveyed lands to trustees to the use of B. for life, remainder to his issue male; and that the lands so conveyed were held by A. "under and by virtue of certain leases or agreements for leases for lives renewable for ever, or certain terminable leases or agreements for terminable leases;" the dates and particulars of which ptf. could not set forth, by reason of the same and the other muniments of the title being lost, or in deft.'s possession, having been delivered to deft. by B. on a sale to him of B.'s interest. The ptf., as first tenant in tail, sought a discovery of the deeds, and that renewals obtained by B. in his own name might be decreed a graft on the original leases, and for an injunction to stay waste. *Held*, on demurrer, that the reasonable construction of the statement was, that the lands were held by A. at the time of the execution of the deed; that the statement of the title of A. was not under the circumstances open to demurrer, inasmuch as the same principle which excuses a ptf. from setting out a deft.'s title ought to excuse him setting out the title of a party under whom ptf. derives, while the deft. wrongfully withholds the possession of the title deeds from him. *Seem*, such objection cannot be made upon a general demurrer for want of equity.

*Held also*, that the surviving trustee was not a necessary party.—*Hill v. Mill*, 9 I. E. R. 164. (R.)

8. A bill may be filed by the next friend on behalf of a person of weak mind, and the fit subject for a commission of lunacy, his property being too small to bear the expense of a commission.—*Carr v. Boyce*, 18 I. E. R. 102. (R.)

9. A term of years was created and vested in trustees for the purpose of raising portions. A person entitled to part of the sum secured by the term filed his petition for a sale of the lands, without making the trustees parties. *Held*, that they were not necessary parties in the first instance.—*Townsend v. O'Callaghan*, 4 I. C. R. 511. (C.)

10. A cause petition for the distribution of assets had been filed, in which B., a minor, and others were respondents. The minor had come of age, and a side-bar rule had been entered to proceed against him. A notice under the Act and Rules, according to the annexed form, was directed to be served,

binding him with all the proceedings already had.

The minor had been served with notice of filing the petition, and an appearance had been entered for him. The notice directed to be served did not contain a copy of the prayer of the petition, as in the case of *M'Cormick v. Murphy*, 5 I. Jur. 220.—*Geraghty v. Rorke*, 6 I. Jur. 106. (R.)—[Overruled by *Naughten v. N.*, 6 I. Jur. 309. (R.)]

1. Liberty was given to amend a cause petition, by annexing a statement to the effect that there were six younger children of a marriage, instead of five.

The sole respondent was a minor at the time of filing the petition, and had subsequently attained age. The usual sidebar rule for liberty to proceed had been entered. The Court refused to give liberty to serve him with notice under the 32nd G. O. of 1851, as that order did not apply to a minor who was named a respondent in the petition.—*Naughten v. N.*, 6 I. Jur. 309. (R.)

2. When the report of the Master has found a respondent insane, and that none of his family will act for him, the Court will appoint the Solicitor for Lunatics and Minors guardian *ad litem* to the respondent, though he has not been found insane by a commission.—*Callaghan v. C.*, 6 I. Jur. 194. (C.)

3. Form of notice and order to bind third parties under the 1st. sec. of the Ch. Reg. (Ir.) Act 1850, and the 32nd G. O. of 1851.—*M'Cormick v. Murphy*, 2 I. C. R. 321; 5 I. Jur. 220. (R.)

4. A fund was vested in trust for A. for life; and after his death in trust for his son, B. The trustees allowed A. to receive it. A. died, leaving assets, and bequeathing personal property, far exceeding in value the trust fund, to B., subject nevertheless to life interests, and having devised to B. real property expressly in satisfaction of the trust fund claimed by him. B. filed a petition against the trustees to compel them to replace the fund, and claiming a right to elect to take it against the devise. *Held*, that A.'s personal representative was a necessary party to the suit.

In a suit to compel trustees to replace a fund wrongfully paid to a person entitled to a life interest in it, he or his personal representative is a necessary party, notwithstanding the 28th G. O. of the 27th March 1843.—*Burrows v. O'Brien*, 15 I. C. R. 423. (R.)]

#### V. 23. *Vendor and Purchaser.*

5. A purchaser under a decree will not be held to his purchase, unless all parties having judgments, &c., appearing on record against the vendor, whether before or after the claim, to raise which the bill was filed, are brought before the Court so as to bind their rights.—*Piers v. P.*, 1 Dr. & Wal. 265. (C.)—[*Affg. S. & Sc.* 379. (R.)]

6. Purchasers, who have become such *pendente lite*, are not necessary parties to the suit, unless the ptf. requires some act to be done by them.—*Higgins v. Shaw*, 1 Con. & L. 400; 2 Dr. & War. 356; and see *Massey v. Batwell*, 2 Con. & L. 421. (C.)

V. 24. *When one or more of several are made Parties on behalf of themselves and all others interested.*

7. The depositors in a Savings' Bank have not a common interest in the funds, but have each, severally, a legal debt due to them by the trustees. The depositors cannot therefore sue as co-ptfs., or on behalf of themselves and other depositors.—*Cooke v. Lord Courtown*, 6 I. E. R. 266. (R.)

8. A petition under the 33 G. 2, c. 14 (Ir.), on behalf of the petitioner and all the creditors of an Irish joint-stock bank, to have assets administered under the trusts of that statute is informal. The petition, if maintainable, should be on behalf of all the creditors of the persons constituting the bank; because the statute affords a remedy not confined to debts due by those persons in respect of the bank, but for their debts generally.—*O'Flaherty v. M'Dowell*, 2 I. Jur. N. S. 469. H. L.; 6 H. Lds. Cas. 142.

V. 25. *When leave will be given at the hearing to Amend by adding Parties.*

9. If a bill for redemption is filed within the time prescribed by the statutes, by the parties entitled to redeem. The Court clearly has jurisdiction to allow the cause to stand over, in order that formal parties may be added.—*Malone v. Geraghty*, 5 I. E. R. 549; 3 Dr. & War. 239; 2 Con. & L. 235.—(C.)—[*Affirmed*: 1 H. Lds. Cas. 81.]

10. In a suit to recover a rent stated by the bill to be payable out of the lands named "with others," the evidence respecting the precise lands charged therewith was very indefinite. *Held*, that an objection for want of parties could not be sustained on the unproved suggestion, that there were other lands which should contribute, but the owners of which were not before the Court.—*Archbishop of Dublin v. Trimleston*, 12 I. E. R. 251. (C.)

#### *Under the Court of Chancery Ireland Regulation Act 1850.*

[The practice as to who should be made parties to suits under this Act was regulated by the 6th 10th, 11th, and 14th General Orders of July 1851—(See Gamble's Ch. Orders, p. 115),—and subsequently by the 16th, 17th, and 18 General Orders of May 1857; the practice under which latter Orders was introduced into The Chancery Ireland Act 1867.]

11. A prior mortgagee having the legal estate is not an "owner of land" within the 11th and 12th Orders, and may be served with

notice under the 82nd Rule in the Master's Office.—*Cleland v. Montgomery*, 4 I. Jur. 90. (R.)

1. If a person, who could not be made a notice party under the Rules, is only made a notice party, he will not be bound by the proceedings.—*Bristow v. Millar*, 6 I. Jur. 285. (R.)

2. A. bequeathed a life estate in £2000 to B.; remainder to X. for life; remainder over. B.'s executor was personal representative of A., and as such entitled to funds realised in the I. E. Court. A creditor of B. obtained judgment for his debt, and got liberty to transfer the fund there realised to the credit of the suit. A petition was then filed by the legatees entitled in remainder to the corpus of the £2000; and an order was made in the I. E. Court that the fund remain in Court until the rights of the last mentioned petitioners were decided, but allowing B.'s creditor to apply to have the fund transferred to the credit of this matter, unless the petitioners in the other matter made him a party to their suit. A conditional order was granted for the service of a notice under the Act and Rule for this purpose. On motion to show cause against it, *Held*, that the creditor of B. could not be made a party to a suit instituted by the legatees in remainder to administer the estate by such notice.

The fund was directed to be transferred to the credit of both matters, and a reference granted to the Master to decide the rights of all the parties. The question of costs was reserved.—*Going v. Harding*, 6 I. Jur. 17. (R.)

[See *Le Grand v. O'Neil*, 2 I. C. R. 571; *O'Grady v. Brady*, 3 I. C. R. 439 (R.); *Hendrie v. Thompson*, 1 I. C. R. 278 (R.); *Foster v. Hornsby*, 2 I. C. R. 426; s. c. 5 I. Jur. 297; *McMahon v. O'Kelly*, 2 I. Jur. N. S. 281 (C.); s. c. 5 I. C. R. 218; *Brown v. O'Donnell*, 6 I. Jur. 158 (C.); *Persse v. P.*, 3 I. C. R. 196 (C.); *Dill v. Brown*, 3 I. C. R. 127 (C.)]

3. When a sole petitioner dies after the petition has been filed, and notice thereof has been served, leave will be granted to file a petition in the nature of a petition of revivor, referring to the original petition, and to be annexed thereto.—*Long v. L.*, 6 I. Jur. 194. (R.)

4. In a suit to charge with interest, a rentcharge charged upon lands, the trustees in whom the lands vested—*Held*, not necessary parties.—*Newcomen v. Hassard*, 4 I. C. R. 268. (R.); *Townsend v. O'Callaghan*, 4 I. C. R. 511. (C.)

5. A person had been named in the prayer of a cause petition as respondent, but had not been served with notice of the petition; and did not appear at the hearing, although aware of the proceedings. His name did not appear in the docket for setting down the petition for hearing; and, a decree having been made in

the cause by consent, his name did not appear in the decree. He applied for a re-hearing. *Held*, that he was not entitled to have the cause re-heard, not being a party to the proceedings.—*Handcock v. Delacour*, 7 I. Jur. 252. (C.)

6. A lease for 17 years contained a covenant by the lessors to renew, as often as they should obtain a lease of the lands, on the terms of the lessees paying all rent and arrears of rent then due to the lessors, and reimbursing the lessors the renewal fines, payable and paid by the lessors to their immediate lessors, with interest thereon from the time or times the several fines should be paid. After the term expired, rent and fines accrued due, and the lessors' interest was sold in the I. E. Court. On a petition for renewal, filed against the purchaser alone—*Held*, that the lessee was entitled to a renewal, on the terms only of paying all the arrears of rent and fines due to the lessors and the purchaser.

That the suit was defective, inasmuch as the surviving lessor had not been made a party to it.

The Court decreed a renewal, on payment into Court of the arrears of rent, renewal fines, and interest; and ordered the petitioner in the I. E. Court and the surviving lessor to be served with notice of the proceedings, on a reference directed by the decree to ascertain the amount of the rent and fines.

*Quere*—Whether the surviving lessor or the purchaser was entitled to the fines which accrued due before the sale and conveyance? —*Steele v. McCall*, 7 I. C. R. 122. (R.)

7. A., entitled to a portion of lands held for lives renewable for ever, under a lease of 1715, which had been renewed in 1787, made a lease for lives, with a covenant for perpetual renewal, to B., in 1795. A. afterwards assigned his interest to C. B. granted a rentcharge, and in 1816 devised his interest to his eldest son E., for life, remainder over. An ejectment was brought for non-payment of rent, in 1848. E. and his under-tenants were served with the ejectment; but none of the persons in remainder. E. gave a consent for judgment. The last life in the renewal of 1787 died in 1835. A cause petition was filed in 1856, by the person entitled to the rentcharge, praying that the ejectment might be declared to be invalid, and for a renewal of the lease of 1795, against C.'s heir-at-law. *Held*, that E., and those entitled in remainder after him to the interest under the lease of 1795, were necessary parties to the suit.

*Semble*—That as E., during his life, represented the entire interest in the lease of 1795, and had given a consent for judgment, the eviction was valid.

But as the question as to the service of the ejectment was a legal question of difficulty, on which two Courts of Law had differed, the Court directed an ejectment to be brought, notwithstanding the 22nd G. O. of 1857. *Held*, that if the eviction was valid at law

the petition should be dismissed. — *Phibbs v. Cooper*, 7 I. C. R. 422. (R.)—[See *Cleary v. C.*, 8 I. C. R. 264; *Codd v. Trood*, 8 I. C. R. 265.]

1. *Semble*—In a special case under the Ch. Reg. (Ir.) Act 1850, parties having conflicting rights should not be made co-petitioners.—*In re Charleville*, 13 I. C. R. 6. (R.)

2. *Semble*—A suit will not lie to restrain the respondent from proceeding for an injunction against third persons, who are not parties to the suit.—*Oldham v. James*, 13 I. C. R. 393. (R.)—[Decision affd.: 14 I. C. R. 81. (C.A.)]

3. Parties moved to have their names removed from the record because they had been used by the solicitor without their authority. He was unable to produce any written authority. *Held*, that the motion should be refused, since the facts and documents established that the parties had been aware of the use of their names, and had allowed a long space of time to elapse without taking any steps.—*McNally v. Knox*, 6 I. Jur. N. S. 120. (R.)

4. An agreement recited that A. desired to purchase, and that B. desired to sell to A., for £200, one-half of a schooner; and that B. had agreed to lend A. £370 upon repayment thereof, with interest, being secured on specified property. It was witnessed, that B. agreed to dispose of the schooner to A., and to execute the necessary deed; that the £200 should be part of the £370; that A. should mortgage the schooner to B. as a further security for the £370, which sum, with interest, A. was to repay by annual instalments of £50. If A. neglected to pay off all or any of the instalments, with interest, B. was empowered to call in the £370, or whatever part thereof then remained due. The schooner, proving unseaworthy, was by mutual consent returned to B. Afterwards, A. assigned the other property specified in the agreement to C., who had notice of the agreement. *Held*, that A. was not a necessary party to a suit against C. for an account of what remained due on foot of the £170, and for a sale; but might be bound by notice under the 32nd G. O. 1851.—*Murphy v. Moorehead*, 16 I. C. R. 454. (R.)

5. A lease contained a covenant by the lessee, on the decease of any of the lives, to put in another person's life, the lessee, his heirs or assigns, giving notice in twelve months of the decease of the life. The lessee was the last surviving life; and his son and heir-at-law had been abroad for many years, and, having had no communication with his family, was supposed to be dead. He did not hear of his father's death until after twelve months had expired, and did not serve any notice to renew. *Held*, that there was no ignorance or unavoidable accident which would excuse the non-compliance on his part

with the covenant, and a petition for a renewal was therefore dismissed.

Matters not put in issue by the petition, or by amendment thereof, cannot be relied on at the hearing of a cause petition. It is not sufficient to put them in issue by an affidavit in reply.—*Murphy v. Jackson*, 7 I. C. R. 189; 3 I. Jur. N. S. 132. (R.)—[Affd.: 7 I. C. R. 502; 3 I. Jur. 288. (C.A.)]

*Under The Chancery Ireland Act 1867.*

*See* 30 & 31 Vic., c. 44, ss. 66 & 67.

[And see General Orders 1867, Nos. 130 & 131.]

#### VI. PETITIONS UNDER THE STATUTORY JURISDICTION OF THE COURT.

As to Minors and Wards of Court see tit. INFANT.

As to Leases by persons under disability by 1 W. 4, c. 65; 5 & 6 W. 4, c. 17; 1 & 2 Vic., c. 62; 2 & 3 Vic., c. 60.

The Settled Estates Act, 19 & 20 Vic., c. 120, and Rules thereunder: see Gamble's Chancery Orders, 336.

The Landed Property Improvement Act, 23 & 24 Vic., c. 133, sec. 24 to 32. The Renewable Leasehold Conversion Act, 12 & 13 Vic., c. 105.

As to Ecclesiastical Leases, by 3 & 4 W. 4, c. 37; 6 & 7 W. 4, c. 99. Leases subject to Rentcharge: see Tithe Rentcharge Act, 1 & 2 Vic., c. 109. Ecclesiastical Residences, see 14 & 15 Vic., c. 73.

As to the Appointment of Trustees, &c., 11 & 12 Vic., c. 68; 13 & 14 Vic., c. 60; 15 & 16 Vic., c. 55.

As to Solicitors, The Solicitors Act, 12 & 13 Vic., c. 53.

As to Charities, 52 G. 3, c. 10; 18 & 19 Vic., c. 124; 23 & 24 Vic. c. 136.

Lands Clauses Act, 8 & 9 Vic., c. 18.

[As to the Decisions under these several Acts, see under the different headings.]

6. Cause petitions under the Ch. Reg. (Ir.) Act 1850, are not pleadings, of which attested copies must be taken out at the Rolls Office before answering affidavits will be received there.—*Daly v. Wade*, 1 I. C. R. 372; 3 I. Jur. 287. (C.)

#### VII. PLEA.

##### 1. *Its Form and Validity.*

- a. *Generally.*
- b. *False Plea.*
- c. *Uncertainty.*
- d. *Surplusage.*
- e. *Double.*
- f. *Negative.*

##### 2. *Of Account Stated and Settled.*

##### 3. *Of Agreement.*

##### 4. *Of Attainder and Alien Enemy.*

5. *Of Award.*
6. *Of Bankruptcy and Insolvency.*
7. *Of Discovery tending to Criminate, or to Forfeiture.*
8. *Of the Statute of Frauds.*
9. *To the Jurisdiction.*
10. *Of the Statute of Limitations, and Length of Time.*
11. *Of Lis Pendens: former Suit and Decree.*
12. *Of Lunacy.*
13. *Of Outlawry.*
14. *Of Want of Parties.*
15. *Of Purchase.*
16. *Of Release, Payment, or Compromise.*
17. *Of Title.*
18. *When it lies generally.*
19. *When ordered to stand as Answer.*
20. *When overruled by Answer.*
21. *Effect of: Allowance of.*

Under The Ch. (Ir.) Act 1867.

## VII. PLEA.

1. *Its Form and Validity.*
  - a. *Generally.*
  - b. *False Plea.*
  - c. *Uncertainty.*
  - d. *Surplusage.*
  - e. *Double.*
  - f. *Negative.*

### VII. 1. a. Plea, Form and Validity of, generally.

1. *Semble*—The setting down a plea for argument is not, in this country, as it is in England, an acknowledgment of the truth of the plea. —*Howlett v. Lambert*, Fl. & K. 226. (R.)

2. It is the duty of the deft. to set down his plea to be argued; and if the ptf. admits the validity, but denies the truth of the plea, the Court will give him leave to file a replication. *Wilson v. W.*, 5 I. E. R. 514. (E.E.)

3. Ptf. in an original suit, being a creditor on foot of a freehold mortgage, an equitable mortgage, and judgments, died. Her devisees, three of them being also her executors, filed an original bill in the nature of a bill of revivor. Defts., entitling their plea as one to a bill of revivor, pleaded in bar, that ptf. in the original suit "by a deed or instrument in writing executed by her, the date, parties' names, and exact contents whereof are wholly unknown to" deft., assigned her interests in the subjects of the suit to B.; and that, therefore, no estate therein passed to ptf.s as executors. *Held*, bad in form, as not following the nature of the bill, and as treating ptf.s as if they were all executors; and bad in substance, since the facts on which it relied, to show want of interest in ptf.s, did not amount to a sufficient assignment of that interest.

*Semble*—The plea was bad, as being in the alternative and uncertain.—*Pike v. O'Connor*, 7 I. E. R. 65. (R.)

4. To a bill, praying (*inter alia*) an account of certain dealings between ptf. and deft., and charging specific errors and omissions in the accounts made more than six years before, but not discovered until long afterwards,

deft. put in a plea and answer entitled "a plea to part of the bill, and an answer to the residue;" and (after protestation in the usual form) pleaded, touching so much of the bill as prayed an account, the Statute of Limitations, and that he did not "within six years next before the filing of the bill, and within six years next before suing out process," &c., sign any writing, &c., in the words of the exceptions in the statute. The plea did not negative the allegations respecting the errors in the accounts. Deft. then answered, at length, nearly the whole of the matters in the bill. *Held*, that the plea was properly entitled; that the portion negating the exceptions in the statute might be rejected as surplusage; that the allegations of errors, even if they amounted to fraud, did not state that the errors had been discovered within six years; and therefore need not be negated by the plea; that the answer, since it did not cover the whole bill, did not, by the 66th G. O., overrule the plea.—*Hughes v. Taylor*, 7 I. E. R. 80. (R.)

5. A *sci. fa.* on a recognizance stated, that, "on &c., at B. in the county of G., M., L., and T. came before J., who then and there was one of the Masters Extraordinary, &c., and then and there jointly and severally acknowledged themselves to be indebted." The record of the recognizance did not contain the words in italics; but at foot of it were these words: "Taken and acknowledged before me at B., in the county of G. aforesaid, the day and year above mentioned." *Held*, on the plea of *nul tiel record*, than the variance was fatal.—*Reg. v. Lynch*, 7 I. E. R. 263; 1 Jon. & L. 462. (C.)

6. Of two pleas to a *sci. fa.* on a recognizance, the second began with an averment "by leave of the Court, &c., pursuant to the statute in that case," &c. On demurrer—*Held* sufficient, though informal.

A *sci. fa.* on a recognizance, averred that it was taken in the county of C., before A. B., a Master Extraordinary for the county of C.; Plea:—that A. B. was not a Master Extraordinary for the county of C. *Held*, good.—*Reg. v. Irwin*, 9 I. E. R. 546. (R.)

7. Recognizance by E. of Mallard Lodge; *sci. fa.* against E. of Mallow Lodge. On *nul tiel record* pleaded; *Held*, sufficient.—*Reg. v. Naghten*, 9 I. E. R. 593. (C.)

8. A. obtained a decree directing the deft. to pay him money. A. died. The ptf., as administrator, filed a bill of revivor, to which the deft. pleaded an agreement with A., that if he procured B. to execute his bond and warrant of attorney to enter judgment for part of the money, and paid the remainder, A. would accept the same in full satisfaction and discharge of the sum decreed. That B. executed his bond and warrant to A., on which judgment was entered, and the deft. and his son executed their joint and several bond and warrant to B., on which judgment was also entered; that the deft. paid the balance of the sum decreed; which bond and warrant



of B., and balance, A. accepted in full satisfaction and discharge of the sum decreed. The plea further stated, that the judgment entered against the deft. and his son had been assigned by B.; that the defendant had been compelled to pay the amount to the assignee, and the judgment had been satisfied. That A. had assigned the judgment against B. in trust for his daughters, and afterwards by his will bequeathed it on the same trust. The plea then averred, that A. thereby and otherwise recognised and affirmed the said agreement, and admitted that the judgment against B. had been substituted for the debt decreed. *Held*, that the covenants in the pleas with respect to the assignment of the judgments being immaterial did not make the plea double.

That the agreement stated in the plea was a valid defence in Equity, although the debt was by decree, and the agreement by parol. That the defence was a proper subject for a plea, and that a cross-bill need not be filed to raise it.—*Daly v. Kirwan*, 10 I. E. R. 312. (R.)

1. A plea may be good in part and bad in part, with respect to the quantity of the bill covered by it; but not with respect to the defence made by it. If part of the defence be bad, the plea must be overruled.

A ptf.'s bill sought a revivor against a deft. in several characters. The deft. pleaded to the whole relief, and the Court was of opinion that the ptf. was entitled to revive against the deft. in one character. The plea was overruled.—*Fitzmaurice v. Sadlier*, 12 I. E. R. 136. (R.)

2. A receiver who has gone into receipt of rent under the Court, will not be allowed to plead to a *sci. fa.* upon his recognizances, that it was taken by an unauthorised person.—*Wellesley v. Mornington*, 13 I. C. R. 559. (C.)

#### VII. 1. b. False Plea.

3. A rejoinder falsely traversing matter of inducement contained in a replication to a plea to a *sci. fa.* upon a receiver's recognizance, taken off the file, with costs.—*The Queen v. Foot*, 1 I. C. R. 9. (C.)

4. After the 13 & 14 Vic., c. 51, a *sci. fa.* at the Petty-bag side of the Court of C., upon a recognizance entered into by a surety for a tenant of lands, which were the subject of a suit at the Equity side of the Court of Ex., after reciting the recognizance, proceeded thus:—"As by the said recognizance, which was on, &c., in, &c., duly enrolled in her Majesty's said Court of Exchequer, and now remaining as of record in our said Court of Chancery, by virtue of the statute in that case made and provided, might appear." To this *sci. fa.* the deft. pleaded that the Court of Ch. ought not to have or take further cognizance of the action, because the recognizance was on, &c., duly enrolled in the Court of Ex., whereby that Court acquired, and still retained, full jurisdiction to award execution against him for the sum of &c., according to the tenor of the recognizance. The plea concluded with the averment, "that there

is not any such record of the said supposed recognizance now remaining in her Majesty's said Court of Chancery, as in said writ of *sci. fa.* is above alleged; and this the said deft. is ready to verify; wherefore he prays judgment whether this Court can or will take further cognizance of the action aforesaid." Upon a motion at the Petty-bag side to take this plea off the file as irregular, as not having been verified by affidavit, and as being false and frivolous, this Court refused to make any rule.

Under the concluding part of the 13th sec. of the statute, such recognizances may, upon agreement between the Lord Ch. and Lord C. B., be delivered over to such persons as may be appointed by the M. R.

*Quere*—Whether recognizances, so transferred, become records of, and capable of being sued upon in, the Court of Ch., unless perhaps by the Crown, under its special privilege to select its Court?—*The Queen v. Jones*, 1 I. C. R. 524. (C.)

#### VII. 1. c. Uncertainty in a Plea.

5. The ptf. in an original suit, who was a creditor on foot of a freehold mortgage, an equitable mortgage and judgments, having died, her devisees, three of whom were also her executors, filed an original bill in the nature of a bill of revivor. The defts. pleaded in bar (entitling their plea as one to a bill of revivor), that the ptf. in the original suit "by a deed or instrument in writing executed by her, the date, parties' names, and exact contents whereof are wholly unknown to the deft.," assigned her interest in the subjects of suit to J., and that therefore no estate therein passed to the ptf. as executors. *Held*, that the plea was bad in form, as not following the nature of the bill, and as treating the ptf. as if they were all executors.

*Semble*—Also as being in the alternative, and uncertain.

*Held*, that it was bad in substance, as the facts on which it relied, as showing want of interest in the ptf., did not amount to a sufficient assignment of that interest.—*Pike v. O'Connor*, 7 I. E. R. 65. (R.)

#### VII. 1. d. Plea of Surplusage.

6. To a bill praying, amongst other things, an account of dealings between the ptf. and deft., and charging specific errors and omissions in the accounts, and made more than six years before, but not discovered until long afterwards, the deft. put in a plea and answer entitled a plea to part of the bill, and an answer to the residue; and (after the protestation in the usual form) pleaded, as to so much of the bill as prayed the account, the Statute of Limitations, and that he did not "within six years next before the filing of the bill, and within six years next before suing out process," &c., sign any writing, &c., in the words of the exceptions in the statute. The plea did not negative the allegations with respect to the errors in the accounts. The defendant then answered at length nearly the whole of the matters in the bill. *Held*, on

argument, that the plea was properly entitled; that the portion of the plea negating the exceptions in the Statute of Limitations might be rejected as surplusage: that the allegations of errors, even if they did amount to fraud, were not stated to have been discovered within six years, and therefore the plea was not bound to negative them: that the answer, not covering the whole bill, did not by the 66th G. O. overrule the plea.

The 66th G. O. has repealed the old rule of pleading, which overruled the plea in all cases where the answer gave any discovery from which the plea, if allowed, would have protected the debt.—*Hughes v. Taylor*, 7 I. E. R. 80. (R.)

#### VII. 1. e. Double Plea.

1. Two pleas to a *sci. fa.* on a recognizance, the second of which commenced with the averment by leave of the Court, &c., pursuant to the statute in that case, &c., though informal—*Held*, sufficient, on demurrer.

To a *sci. fa.* on a recognizance, averring that it was taken in the county of C., before A., a Master Extraordinary for the county of C., it was pleaded that A. was not a Master Extraordinary for the county of C. *Held*, a good plea.

To a *sci. fa.* stating a recognizance taken before A., and that it was so taken at X., in C., before the said A., then being a Master for the county of C., duly authorised in that behalf; a plea that the recognizance was not taken and acknowledged in manner and form as in the *sci. fa.* alleged, at X. in the county of C., or elsewhere in C.; *Held*, bad for duplicity, and as too large a traverse.—*The Queen v. Irwin*, 9 I. E. R. 546. (C.)

2. The rule that matter immaterial cannot operate to make a pleading double prevails in Equity as well as at Law.—*Daly v. Kirwan*, 10 I. E. R. 312. (R.)

3. Liberty given to a debt. to plead double to a bill, she not having entered any appearance, but undertaking to adopt the parliamentary appearance filed by the ptf., and to pay the costs of the motion.—*Fitzgerald v. F.*, 2 I. Jur. N. S. 181. (R.)

#### VII. 1. f. Negative.

#### VII. 2. Of Account Stated and Settled.

4. Principles touching pleadings and relief in suits to open accounts.—*Earl of Lucan v. O'Malley*, 2 Con. & L. 180. (C.)

#### VII. 3. Of Agreement.

#### VII. 4. Of Attainder and Alien Enemy.

#### VII. 5. Of Award.

#### VII. 6. Plea of Bankruptcy or Insolvency.

5. A discharge under the Bankruptcy Act, 6 & 7 W. 4, c. 14, is not a defence to a *sci. fa.* on a recognizance by a tenant under the Court.

*Secus*—A discharge under the Insolvent Act, 1 & 2 G. 4, c. 59.—*Reg. v. O'Donnell*, 6 I. E. R. 639; 1 Jon. & L. 271. (C.)

6. The Insolvency of ptf. is a good plea in bar.—*Irwin v. I.*, 8 I. E. R. 9. (R.)

#### VII. 7. Of Discovery tending to Criminate, or to Forfeiture.

#### VII. 8. Of the Statute of Frauds.

#### VII. 9. To the Jurisdiction.

#### VII. 10. Of Statute of Limitations, and Length of Time.

7. A debt. who does not, by pleading, claim the benefit of the 3 & 4 W. 4, c. 27, s. 42, cannot rely upon it in the office in bar of the account.—*Walsh v. W.*, Jon. & C. 52. (E.E.)

8. On a reference to enquire the sum due for principal, interest, and costs on foot of a judgment for which a receiver has been appointed, the respondent is entitled to the benefit of the Statute of Limitations, although not set up in showing cause against the appointment of the receiver; and the petitioner is entitled only to interest for six years from the date of the conditional order for the appointment of the receiver.—*Dowell v. Burke*, 9 I. E. R. 83. (C.)

9. The bill stated that the executors and others answered a bill of 1808, but the devisees of the real estate "stood out process of contempt; and thereupon a decree on sequestration was obtained against them;" but the nature of the decree was not stated. After the decree on sequestration, the party against whom it was obtained died, and a bill of revivor and three amended bills were filed against W., who derived under the party against whom the decree on sequestration was obtained; but the suit was never brought to a hearing against any of the debts. who had answered. By the practice of the Court, during the pendency of such former suit, an absolute decree on sequestration could not be obtained against a party until the suit was heard against the answering debts. *Held*, that the statement in the bill, that there was "a decree on sequestration," must be taken to be a conditional decree, which, upon the facts stated, was the only decree which could, according to the practice of the Court, have been obtained; that such conditional decree fell to the ground by the death of the party against whom it was obtained, and the subsequent proceedings against W.; and that W., who had demurred to the present bill, was not precluded by such statement, that there was "a decree on sequestration," from relying on the Statute of Limitations.

That such conditional decree did not prevent the operation of the 81st G. O., and that the suit of 1808 was dismissed before the present suit was instituted, by the operation of that G. O.

That the statement, that there had been "a decree on sequestration," without stating what that decree was, and which might have been consistent with the relief now prayed, was altogether vague and uncertain, even though it were to be considered to have been an absolute decree.

That the defence of the former Statute of Limitations (8 G. 1, c. 4) might have been relied on by demurrer to the bill of 1808; and that statute being now repealed, and there being nothing on the face of the bill to show that the judgment of 1781 was not barred when the bill of 1808 was filed, the present ptf. could derive no benefit from such suit.

That the appointment of a receiver in a cause will not (except under particular circumstances) take the case out of the operation of the 81st G. O., whether as relates to the lands or the funds brought into Court by the receiver.—*Young v. Wilton*, 10 I. E. R. 10. (R.)—[Affd.: 10 I. E. R. 265. (C.)]

#### VII. 11. *Plea of Lis Pendens: former Suit and Decree*

1. A former decree, dismissing a bill if not enrolled and pleaded, is not an absolute bar to another suit for the same demand. If it is relied on by answer, and appears not to have been on the merits, it is no defence.—*Joly v. Swift*, 11 I. E. R. 410. (C.)

2. A demand being assigned, for which a suit is being prosecuted, if the assignee file a new bill, the pendency of the former suit is no defence or objection, at least unless pleaded; but if both causes be brought on, the Court will prevent the double costs.—*O'Brien v. Villiers*, 12 I. E. R. 21. (C.)

3. A creditor who has brought an action at law against an administrator, and who has notice of a decree for the administration of the assets, is not in general entitled to his costs of appearing on a motion to enjoin him from proceeding with the action.

A civil-bill decree against an administrator is in the nature of a judgment *de bonis propriis*. Therefore the Court, though it will enjoin a creditor from enforcing such a decree against the assets, when there has been a decree for the administration of them, will not restrain him from enforcing it against the administrator personally.

*Semble*—A decree for the administration of assets is a defence to a civil-bill against the administrator, if prior to the civil-bill. *Secus*, if subsequent to the hearing, but prior to an appeal to the Judge of Assize.—*Powell v. P.*, 12 I. E. R. 501. (R.)

4. To a bill to perpetuate the testimony of witnesses with respect to the execution and attestation of a will of 1845, whereby a will of 1838, under which the deft. claimed, was stated to be revoked; the deft. pleaded that

the ptf. put the deft. by force out of a part of the lands; and that the remainder was in the occupation of tenants under leases or from year to year, who had not acknowledged the ptf.'s title, or paid him rent due; and that the ptf. would, by action at law against the tenants, forthwith try his title. *Held*, on the authority of *Drew v. Clarke* (1 Sim. & Stu. 108), that the plea was good.—*Lindesay v. L.*, 12 I. E. R. 508. (R.)

5. A person having a power to appoint £10,000 secured on a term of years, appointed separate portions of the sum to A. and B. by separate deeds. A. filed a bill, to which B. was made a notice party, and obtained a decree declaring his portion to be well charged, directing the usual accounts of incumbrances, and a sale for payment of them. B. also filed a bill for his portion, praying the same relief, to which a plea of the pendency of the former suit was put in. *Held*, that the two suits were not for the same matter, and the plea was overruled.

*Quere*—Whether the existence of the decree (supposing it to be binding on B.) in A.'s suit, would be a defence in bar of B.'s suit?

*Semble*—The decree was not binding on B., as he should have been made an answering and not a notice party.—*Sadler v. Whaley*, 1 I. C. R. 167; 2 I. Jur. 305. (R.)

#### VII. 12. *Of Lunacy.*

#### VII. 13. *Of Outlawry.*

#### VII. 14. *Of Want of Parties.*

6. A plea of want of parties, pleaded to the whole bill, will be overruled if, in any one state of facts charged by the bill, the parties would not be necessary.—*Homan v. Sheil*, 2 Jones, 164. (E.E.)

7. When a bill seeks a discovery of necessary parties, an objection for want of parties will not in general be allowed.

A statement or charge in a bill, though it relates only to one deft., puts the matter of it in issue as to all the defts. They cannot therefore decline to answer an interrogatory founded on it.

A bill, that lands might be declared bound by marriage articles, stated that the deft., A., pretended that neither he nor any person in trust for him was seized of any part of the lands bound by the articles; but at other times admitted the contrary, and refused to discover the particulars to the ptf.; and contained interrogatories as to incumbrances and parties. Another deft. was required to answer the interrogatories, but he filed a plea of want of parties, which was overruled.—*Sherlock v. Disney*, 13 I. E. R. 233. (R.)

#### VII. 15. *Of Purchase.*

#### VII. 16. *Of Release; Payment; Compromise.*

VII. 17. *Of Tide.*VII. 18. *When it lies generally.*VII. 19. *Ordered to stand for Answer.*VII. 20. *When Overruled by Answer.*

1. To a bill, praying (*inter alia*) an account of certain dealings between ptf. and deft., and charging specific errors and omissions in the accounts, and made more than six years before, but not discovered until long afterwards, deft. put in a plea and answer entitled, "A plea to part of the bill, and an answer to the residue;" and (after protestation in the usual form) pleaded, touching so much of the bill as prayed an account, the Statute of Limitations, and that he did not, "within six years next before the filing of the bill, and within six years next before suing out process," &c., sign any writing, &c., in the words of the exceptions in the statute. The plea did not negative the allegations respecting the errors in the accounts. Deft. then answered, at length, nearly all the matters in the bill. *Held*, that the answer, since it did not cover the whole bill, did not, by the 6th G. O., overrule the plea.—*Hughes v. Taylor*, 7 I. E. R. 80. (R.)

2. Plea to the whole relief and discovery, except that sought by interrogatories specified in the plea. Answer to the excepted interrogatories. *Held*, that the answer overruled the plea, notwithstanding G. R. 66.—*Fitzmaurice v. Sadlier*, 12 I. E. R. 136. (R.)

3. A deft., by his answer, objected to an interrogatory because he might, by answering it, subject himself to pains, penalties, and forfeitures. By plea, he declined to answer part of the same interrogatory, because the subject of it had come to his knowledge in his character of solicitor for the other deft. *Held*, that the answer being equivalent to a demurrer, the case did not fall within G. R. 66; and that the answer overruled the plea.—*Kelly v. Jackson*, 13 I. E. R. 129. (R.)

VII. 21. *Effect of Allowance of.*

4. When the ptf. sets down a plea for argument and does not appear when it is called on, the plea will be allowed with costs.—*Walker v. Daly*, 9 I. E. R. 460. (R.)

5. On the argument of a plea to a bill of revivor the Court is not at liberty to look into the original bill. The case must be decided on the facts stated in the bill of revivor and the plea. But when the facts did not fully appear therein, the Court reserved to the defendant the benefit of the plea, and directed it to stand over until the hearing of the cause.

A suit may be revived as to part of the matter in litigation.—*Duggan v. Kelly*, 10 I. E. R. 295. (R.)

*Under The Ch. (Ir.) Act 1867.*

[*See* 30 & 31 Vic., c. 44, ss. 65, 66, 67, 154, &c.]

## VIII. REPLICATIONS.

*See PRACTICE; REPLICATION.*

6. The 82nd G. O. will not be relaxed. When the plaintiff cannot show due diligence, and is disabled from filing a replication in consequence of requiring to amend his bill, the bill will be dismissed.—*M. Laughlin v. M. L.*, 8 I. E. R. 109. (R.)

7. The replication should not be filed against persons against whom process is prayed only when they come within the jurisdiction.—*Stephens v. O'Shaughnessy*, 11 I. E. R. 279. (R.)

8. It is not an objection to a replication in *sci. fa.* on a recognizance, that it purports to be pleaded by the Queen, instead of by her Att.-General.—*Reg. v. Bowen*, 13 I. E. R. 241. (C.)

9. The practice of the office at the Petty-bag side of the Court of Ch., requiring special similiter, is erroneous, and is not to be followed. When the replication tenders an issue to the country, the ptf. may make up the issue, unless the replication be excepted to.—*Reg. v. Humphreys*, 3 I. Jur. 173. (C.)

## IX. RIGHT TO SUE.

10. Ptf. being beneficially interested, with others, in an annuity or rentcharge issuing out of lands, and secured by the grantor's covenant, joined in a suit against A., the purchaser of the lands, to whom they had been conveyed expressly subject to the annuity, to recover arrears thereof; and recovered six years' arrears only, more being due. Ptf. then obtained administration to the grantor of the annuity, in order to become deft. to an action on the covenant. Judgment by default was therein obtained against her for the arrears due beyond the six years; damages and costs to be levied *de b. t., et si non, de bonis propriis*. She then filed against A. a bill to be indemnified against the judgment. *Held*, that her right to institute the suit depended on the existence of damage sustained by her, or which she might sustain by the judgment; and therefore that she was bound to show that there were assets out of which the judgment might be levied.

*Quære*—Whether she was entitled to relief on proving the existence of assets, she having obtained administration to the covenantor in order to raise the cause of damage whereof she complained.—*Byrne v. Duignan*, 9 I. E. R. 295; 3 Jon. & L. 116. (C.)

11. A bill lies to recover an ancient rent, the origin of which is unknown, and the lands charged not accurately ascertainable, especially when the parties liable to pay it have, by selling parts of the lands charged, and charging others by way of indemnity to the purchaser, and long acting on that arrangement, rendered the owner's rights more uncertain.—*Archbishop of Dublin v. Lord Trimleston*, 13 I. E. R. 251. (C.)

1. All the parties to the original bill being dead, the cause was set down in the names of the parties to a supplemental bill only. *Held*, regular; and that parts of the answer to the original bill could be read as of an answer in the cause at hearing; and that it was not to be treated as an answer in another cause.

The allegation made in a bill to prevent a demurrer for multifariousness was unproved; but it appeared that the accounts might be such as to render the suit not multifarious. *Held*, an objection for multifariousness, though made by the answer, could not be sustained.

*Quære*—If the objection should not be pleaded?—*Anderson v. Pratt*, 12 I. E. R. 603. (C.)

2. If a bill alleges fraud, which is not proved, and also alleges other matters which, being proved, are grounds for a decree, the proper course is to dismiss so much of the bill as is unproved, and to give so much relief as, under the circumstances, *ptf.* is entitled to.—*Archbold v. Comrs. of Ch. D. & E.*, 2 H. L. Cas. 440.

#### X. PLEADING IN GENERAL.

3. The *ptf.* in an original suit, a creditor on foot of a freehold mortgage, an equitable mortgage, and judgments, having died—her devisees, three of whom were also her executors, filed an original bill in the nature of a bill of revivor. The *defts.* (entitling their plea as one to a bill of revivor) pleaded in bar that the *ptf.* in the original suit “by a deed or instrument in writing executed by her, the date, parties’ names, and exact contents whereof are wholly unknown to the *deft.*,” assigned her interest in the subjects of suit to J. B., and that therefore no estate therein passed to the *ptfs.* as executors. *Held*, that the plea was bad in form, as not following the nature of the bill, and as treating the *ptfs.* as if they were all executors.

*Semble*—Also as being in the alternative and uncertain.

*Held*, that it was bad in substance, as the facts on which it relied, as showing want of interest in the *ptfs.*, did not amount to a sufficient assignment of that interest.—*Pike v. O’Connor*, 7 I. E. R. 65. (R.)

4. The trustees of V.’s will instituted in the Court of Ch. in Ir. a suit to carry into execution the trusts thereof, and to administer his estate. One of the *defts.*, B., entitled to the residue of V.’s estate, died before a decree. The *ptfs.* in that suit filed a bill against B.’s personal representatives, and against all the parties interested under his will in his real and personal estates. The Court decreed that accounts should be taken of the personal estates, debts, and legacies, of V. and B. respectively. A subsequent decree (affirmed by the H. L.) declared that certain unpaid legacies bequeathed by B. should, together with the interest thereon, if his personal estate proved insufficient, be charged on his real estates;

but that the principal should not be raised until after the death of C., tenant for life thereof under B.’s will, and that the interest should, during C.’s life, be paid out of the rents. D. was tenant in tail of the real estates in remainder after C.’s life estate. A question afterwards arose between C. and D., whether a fund in Court, which constituted part of B.’s personal estate, should be applied exclusively in paying arrears of interest on the legacies, or rateably in paying the legacies and the interest. The M. R. of Ir. directed that the fund should be applied exclusively in paying the arrears of interest. The Ld. Ch., on appeal, affirmed that order, and refused to direct an enquiry to ascertain how much of the fund in Court was principal, and how much was accumulated interest. On appeal against those orders—*Held*, that any question touching the application of B.’s personal estate could not be regularly adjudicated, in this form of suit, between the *co-defts.*, C. and D.

The orders were affirmed, with a variation, and a declaration that they should not prejudice any question between C., and D., touching the manner in which the principal and interest of the legacies should be paid.—*Coote v. Trench*, 9 Cl. & F. 74.

[See *Earl of Milltown v. Trench*, 4 Cl. & F. 276.]

5. A Court cannot, without proof, presume an agreement, on the ground that, if there was not an agreement, there was fraud.

The Court will not act upon fraud or misconduct, unless that fraud or misconduct has been put in issue by the pleadings.—*Siree v. Kirwan*, 9 Cl. & F. 716.

6. The practical application of Ld. Redesdale’s classification of bills observed on.—*Bennett v. Bernard*, 10 I. E. R. 584. (C.)

[On re-argument:—12 I. E. R. 229. (C.)]

7. When a personal representative sues or is sued, and dies, the administrator *de bonis non* may proceed or be proceeded against by bill of revivor, or by bill of revivor and supplement; but he is not bound so to frame his bill. He may file an original bill. An administrator obtained a decree declaring that a judgment was held on certain trusts. Afterwards the judgment was fraudulently assigned, and the administrator *de bonis non* filed a bill, stating at length the proceedings in the original suit, making the assignee a party, and praying that he might be declared entitled to the benefit of the decree, and accounts and enquiries thereby directed, and to an assignment of the judgment, or to original relief if he was not entitled to the benefit of the said suit and decree. On demurrer—*Held*, that the bill being an original bill as regarded the assignee, *ptf.* could not have proceeded by bill of revivor; and, although the bill might have been framed as a bill of revivor and supplement, as against the representative of the *deft.* in the original suit, it was sustainable as against him, either as an original bill, or as original bill in the

nature of a supplemental bill.—*Banfield v. O'Shaughnessy*, 12 I. E. R. 63. (R.)

1. When a bill seeks a discovery of necessary parties, an objection for want of parties will not in general be allowed. A statement or charge in a bill, though it relates only to one deft., puts the matter of it in issue as to all the defts. They cannot therefore decline to answer an interrogatory founded on it. A bill, that lands might be declared bound by marriage articles, stated that the deft. A. pretended that neither he, nor any person in trust for him, was seized of any part of the lands bound by the articles; but at other times admitted the contrary, and refused to discover the particulars to the ptf., and contained interrogatories as to incumbrances and parties. Another deft. was required to answer the interrogatories, but he filed a plea of want of parties, which was overruled.—*Sherlock v. Disney*, 13 I. E. R. 233. (R.)

2. It is no objection to a replication in *sci. fa.* on a recognizance, that it purports to be pleaded by the Queen, and not by her Att.-General.

An allegation in pleading a breach of a recognizance, that a receiver did not, *nor would not*, account, but on the contrary refused to do so, though ungrammatical, is not open to demurrer. A statement that the receiver received moneys while he was receiver, and afterwards was required to account, is also sufficiently certain without stating that he was receiver when required to account, or showing how he was required.—*Reg. v. Bowen*, 13 I. E. R. 241. (C.)

3. A bill filed in 1850 to set aside for fraud a limitation under a deed of 1818, which limited the reversion in lands to the deft. for life, stated that he went to America in 1822, to avoid service of subpoena, and there concealed himself, which conduct prevented the grantor from taking proceedings to set aside the deed; and that the grantor devised the lands to the use of the ptf. for life, "with remainder as therein;" and devised the residue of his estate to the ptf. absolutely. *Held*, on demurrer, that lapse of time was not a bar to the ptf.; and that she might as devisee maintain a suit to set aside the deed, without making the heir-at-law of the grantor a party; but that the persons entitled to the estate after the death of the ptf. were necessary parties.—*Johnston v. Howison*, 13 I. E. R. 463. (R.)

4. Cause petitions are not pleadings within the meaning of the Ch. Reg. (Ir.) Act 1850. The Dep. Keeper of the Rolls is bound to receive answering affidavits without an attested copy of the petition being taken out.—*Daly v. Wade*, 3 I. Jur. 288. (C.)

5. The affidavit of a party in a cause, so far as it states or charges facts merely to elicit a reply, is admissible as a part of the pleadings; but not as evidence.—*Kernaghan v. Kells*, 5 I. Jur. N. S. 168. (C.)

6. At the hearing, the Court will allow the pleadings to be amended, by filing a further plea to meet the evidence.—*Gumley v. G.*, 8 I. Jur. N. S. 198. (P.)

7. When pleadings in Equity are framed so as to rest the claim for relief solely on the ground of fraud it is not open to ptf., if he fails in establishing the fraud, to pick out, from the allegations in the bill, facts which, if not put forward as proofs of fraud, might have warranted ptf., in asking, and the Court in granting relief.

It is the duty of the Judge to determine whether the two are so interwoven with each other that, on failure of proof of the fraud, it is impossible to treat the other facts as separate allegations justifying a separate mode of dealing with them.—*Hickson v. Lombard*, L. Rep. 1 H. L. 324.—[*Rev. Lombard v. Hickson*, 13 I. C. R. 533, (C.A.), which *affd.* s. c., 13 I. C. R. 98. (R.)]

8. When a cause petition (in Ir.), seeking the cancellation of an agreement to hire property, sets forth facts which go to establish a title to the property itself, and the answering affidavits do not deny these facts, but set up a title in the defts. to the property, the Court may, under the general prayer for relief, make a declaration touching ptf.'s title to the property.—*Cooper v. Phibbs*, L. Rep. 2 H. L. 149. [Rev. s. c., 17 I. C. R. 73. (C.)]

#### XI. PLEADING IN THE COURT OF PROBATE.

See PRACTICE: PROBATE, COURT OF.

9. The declaration relied upon a document alleged to be the last will of the deceased. Deft. pleaded a prior will, which, as he alleged, had been destroyed by ptf. *Held*, that the plea was insufficient, as deft. had not stated his case fully on its face.—*Connolly v. Teevan*, 3 I. Jur. N. S. 303. (P.)

10. Plea:—That the will was executed by the testator according to the provisions of the 1 Vic., c. 26, in presence of the witnesses whose names severally appear upon the said will—*Held*, bad, for not stating that the witnesses subscribed the will in the presence of the testator, and of each other.—*Mitchell v. Huffington*, 4 I. Jur. N. S. 40. (P.)

11. Parties cited in a cause, instituted to ascertain the validity of a will, cannot therein plead and allege a prior paper-writing as the last will of the deceased.—*Custis v. C.*, 4 I. Jur. N. S. 248. (P.)

12. A plea, that no instructions were given by the testator to the drawer of his will to include therein a certain property, is bad.—*Ratty v. Potts*, 6 I. Jur. N. S. 168. (P.)

13. A plea, alleging that a testamentary instrument incorporates another testamentary instrument, need not, if they are lodged in the registry, set out the passage in the will or

codicil relied on as constituting the incorporation; but the instruments must be specially referred to in the plea as being then lodged in the registry, and thereby their contents will be considered as if fully set out in the pleadings.—*Bell v. The Att.-Gen.*, 7 I. Jur. N. S. 127. (P.)

1. In testamentary causes the husband of a ptf. propounding a will should be joined as a co-ptf.—*Gamble v. Williams*, 8 I. Jur. N. S. 159. (P.)

2. Declaration propounded a will. Plea alleged undue execution, incapacity, and undue influence, and averred that the will was not the last will of the deceased, for that he made his last will, &c. (alleging a former will); *Held*, good, provided that the former will be alleged with the same formalities as are required in a declaration.—*Berry v. Hillas*, 11 I. Jur. N. S. 119. (P.)

3. The deft. propounded a will which named him a legatee and sole executor. A previous will was alleged in the plea by the ptf., whom it named executor jointly with the deft. That will did not make the deft. a legatee. The defendant was testator's next-of-kin. *Held*, that the earlier will might be alleged; and that the defendant might, in a replication impeaching that will, state his interest as next-of-kin.—*Tierney v. Byrne*, 11 I. Jur. N. S. 218. (P.)

#### PLEDGE.

See SECURITY—BAILEE, &c.—MORTGAGE.

#### POLICY OF INSURANCE.

See INSURANCE, II.

#### POOR.

See STATUTE, II.

#### POPERY.

See PAPISTS.

#### PORTIONS.

See INTEREST IN PROPERTY—INTEREST PECUNIARY, I.

##### I. GENERALLY.

##### II. CONDITIONAL, WHEN NO DEVISE OVER.

##### III. WHEN VESTED—DIFFERENCE WHEN NOT CHARGED ON LAND.

##### IV. VESTED, BUT NOT PAYABLE IMMEDIATELY.

##### V. SURVIVORSHIP, AND ACCRUE OF.

##### VI. WHEN AND HOW RAISABLE.

##### VII. WHEN LANDS ARE LIABLE TO.

##### VIII. MERGER OF IN LANDS CHARGED.

##### IX. WHEN A SATISFACTION OF A DEBT OR LEGACY.

##### X. DOUBLE. See infra, XI.

##### XI. SATISFACTION OF. See supra, X.

##### XII. WHEN SUBJECT TO DEBTS.

##### XIII. PRIORITY OVER MORTGAGES, &c.

#### I. PORTIONS GENERALLY.

4. Before 1826, a marriage was solemnized in England, between a gentleman domiciled in Ireland and a lady domiciled in England. By their settlement, which was drawn and executed in England, and of which one of the two trustees was domiciled in England, the other in Ireland; the husband assigned lands in Ireland, of which he was possessed in fee, for 500 years, upon trust (among others) to levy and raise by perception of the rents and profits, or by sale or mortgage, "£5000 of lawful British money," as portions for younger children of the marriage; and to hold it in trust for them, in such shares as the husband should appoint. *Held*, that the portions should be paid in British money.—*In re Boate's Estate*, 10 I. C. R. 164. (C.A.)

#### II. CONDITIONAL PORTIONS, WHEN THERE IS NOT ANY DEVISE OVER.

5. T. devised lands to F., his eldest son, for life; remainder to F.'s first and other sons, in tail male; remainders over; with power to F. to appoint a jointure to any wife he should marry, together with any sum not exceeding £3000 for the younger children of such marriage; provided such marriage should be with the assent of the guardians and executors of the will, or the survivor of them. E., T.'s wife, and two other persons, were named executors of T.'s will. E. alone was named guardian of his children, and proved the will. The other two executors disclaimed. F., in 1843, while a minor, was married to S., by a person in holy orders, but without license or publication of banns; and without the consent of E., who subsequently consented to the celebration of a formal marriage. *Held*, that the power of charging could not be exercised in favour of the younger children of F. and S., inasmuch as the irregular marriage, not having been avoided by suit under the 9 G. 2, c. 11, was valid *ab initio*, and the subsequent regular marriage therefore inoperative.—*Adams v. A.*, 8 I. C. R. 41; Dr. Rep. temp. Napier, 247. (C.)—[See *Dobbyn v. Adams*, 6 I. C. R. 170. (R.); 7 I. C. R. 193. (C.)]

#### III. WHEN VESTED: DIFFERENCE WHEN NOT CHARGED ON LANDS.

[See INTERESTS IN PROPERTY, II., III., IV.]

6. The donee of a testamentary power to charge a sum on B.'s estate, "as and for a provision for the donee's lawful issue," exercised the power by a deed which merely charged the estate with the specific sum "as a provision for my lawful issue."

He had one child born before the testator's death; others born before the date of the deed; others subsequently. *Held*, that all the children were entitled to shares, which vested *seriatim* on their successively attaining 21, the share of each being proportioned to the

number of children *in esse* when it vested, and then unprovided for, the dates at which the children respectively attained 21 being regarded as successive new periods of distribution, though this decision produced considerable inequality in the shares, and would wholly disappoint any child born after all the others had attained 21. The grandchildren were considered as having been provided for by their parents' shares.

This principle is not applicable to a legacy; the rule being that, whenever a legacy is given to a class of persons, and the gift is immediate, those only take who answer the description at the testator's death; but, when the enjoyment is deferred, as by the intervention of a life estate, or by appointing a future time for payment, those only take who answer the description at the prescribed period.—*Norman v. N.*, Beat. Rep. 430. (C.)

1. Money was settled upon trust to pay the principal among the issue of the marriage, with power of appointment in the parents; and, in default of appointment, to pay those moneys "amongst the said issue, in equal shares and proportions, upon their respectively attaining" age, or marriage (if daughters). The language being ambiguous—*Held*, that the whole object of the settlement being to provide for the children of the marriage, the Court, in order to effectuate that object, ought not to give them vested interests in their portions.—*Richardson v. Goodman*, 3 I. Jur. 317. (C.)

2. By ante-nuptial articles, husband and wife covenanted that £2000 should be assigned to A. and B., in trust for the younger children of the marriage, as the husband and wife should jointly, or as the survivor should, by deed, appoint; and in default of appointment, in trust for all the younger children, sons at 21, and daughters at 21, or marriage; if no child should attain a vested interest, in trust for the survivor of the husband and wife; and that the settlement to be made, in pursuance of the articles, should contain a power to the husband and wife to revoke all or any of the trusts, powers, &c., in such settlement contained, of all or any part of the trust fund; and by the same or any other deed or deeds to declare other trusts of the trust premises, the trusts of which should be so revoked. No settlement was executed. The husband and wife, by deed, reciting the power of revocation in the articles, revoked the trusts as to the £1000, and declared that it should be held in trust, to be forthwith assigned to C. and D., whose receipt should be a good discharge for that sum. *Held*, that the trusts of the marriage articles were revoked, and that the £2000 became the property of the wife.

V. had power to charge real estates with any sum not exceeding £20,000, for portions for his younger children; that sum, or such less sum as should be charged, to be vested in and to be paid to, or shared between and amongst, all and every such children or child,

or any one or more of them, exclusively of the others or other of them, at such age or time, or respective ages or times; or, if more than one, in such proportions, and upon such terms and conditions, and in such manner, as he should think proper, and should by deed or will appoint. V., by will, reciting the power, charged £20,000 on the estate, and bequeathed it, share and share alike, to his four younger children. *Held*, that the shares of the younger children became vested on the death of V., and bore interest from that time.

V. directed that the rents, issues, and profits of property should be vested in the funds, and kept there until his second son should attain age; when the sum so invested should be divided between his younger children. *Held*, that the shares in the accumulated fund vested at V.'s death.

*Semble*—In a special case under the Ch. Reg. (Ir.) Act 1850, parties having conflicting rights should not be made co-petitioners.—*In re Charleville*, 13 I. C. R. 6. (R.)

3. A fund was, by deed of 1841, vested in trust for such of four persons as should be living at the determination of life interests limited to their father and mother. On the marriage of A., one of the four, her father being alive, a settlement was executed, which recited an agreement that a share of £2700, and the one-fourth share of the fund, and the interest thereof to which A. should become entitled should be conveyed, upon trusts, and by which A. assigned to the trustees the share of £2700, and all and every other sum or sums of money or other property to which she might thereafter become entitled, upon trusts as to the share of £2700; and upon trust, after the decease of A. and L., her intended husband, to permit the children of the marriage to receive the interest of the share of £2700, and every other sum or sums of money to which A. might become thereafter entitled, in such shares, &c., as A. and L., or the survivor, should appoint; in default of appointment as to the principal, equally among the issue of the marriage; and if but one child, for such child only. It was agreed that the one-fourth of the trust fund, or any other sum to which A. might thereafter become entitled, under the settlement of 1848, should, when received by the trustees of that deed, be paid by them to L. or his assigns, should A. be then living, and not otherwise, the same to be for his sole use. L. died, leaving a son, a minor. His wife, A., survived him. A.'s father afterwards died; whereupon the trust fund under the deed of 1841 became divisible between A. and her sister. *Held*, that L., having died before A.'s father, did not take a vested interest in the principal of the moiety of the fund, under his marriage settlement.

That A. was entitled to the interest of it during her life.

That the minor, son of L., was entitled to the principal after her death.—*In re Jager's Trusts*, 14 I. C. R. 155. (R.)



## IV. VESTED, BUT NOT PAYABLE IMMEDIATELY.

[See *Interest in Property*, II. 3, and III. 1.]

1. A fund was assigned by a marriage settlement, on trust, after A.'s death to transfer it and all the interest, &c., unto and amongst all and every the child or children of the marriage, or the issue of any such child or children who might happen to be then dead, leaving issue, or to any one or more of such children, or issue of such deceased children, &c., at such age or ages, time or times, and in such parts, shares, or proportions, if more than one, and with such maintenance in the meantime; and under and subject to such conditions, restrictions, charges, and limitations over (such limitations over being for the benefit of some one of such children) as A., by his will, &c., should appoint; and in default of appointment, to pay the fund between all the children, if more than one, of the marriage, and the issue of any children who should be then dead, leaving issue; and if but one, to such one child; the said fund to be paid, &c., to sons at twenty-one, and to daughters at twenty-one or marriage, in case such ages or days should not take place until after the decease of A.; but in case such should happen in his lifetime, then such payment should be postponed until after his decease. A. by will appointed the fund to the children of the marriage, share and share alike, on their attaining twenty-one, or marrying with consent; and directed that the interest should be for their support and maintenance, given in trust to his wife, until the boys entered professions or attained twenty-one, and the girls attained twenty-one, or married with consent. *Held*, that the portions were by the settlement vested in the children before the period of payment. That the provision in the will as to maintenance was of itself sufficient to vest the portions.

The rules, as to the vesting of portions and legacies are the same.—*In re Orme's Trust*, 1 I. C. R. 175. (R.)

2. Lands were conveyed, by marriage settlement, to trustees, to the use of A. for life, remainder to trustees for 100 years, remainder to B. (the husband) for life, remainder to trustees for 300 years, and subject to such term to the use of the first and other sons of B. in tail male; in default of such issue, to the use of the daughter and daughters of B. in tail, remainder to the first and other sons of C. (the wife), by any after-taken husband; remainder to the use of A., with power (which he exercised) to dispose thereof by will or otherwise, during his life. The trusts of the term for 300 years were, that if there should be one or more child or children of B. and C., other than an eldest or only son, the trustees should, in the life of B., with his consent, or else not until after his decease, by demise, &c., of the term, raise such sum and sums for the portion or portions of all and every such child or children (not being an eldest son), not exceeding in the whole £1000, as B. should by deed or will appoint; to be divided amongst them as B. should appoint, and in default of

appointment equally; the portion or portions to be paid to sons at twenty-one, and to daughters at twenty-one or days of marriage, which should first happen; with interest in the meantime from the death of B., if such respective times of payment should happen after his death; but if in his life, within three months after his death, but not sooner, unless with the consent of B. There was issue a son, who died in his infancy; and a daughter, who married, and died in B.'s life. *Held*, that the portion vested in the daughter, although she died in her father's life, and although the term to secure it was in remainder after his life estate.

That she answered the description of a child other than an eldest or only son, although she was an only child at her death; and that she was entitled to the portion, although the estate on which the portion was charged was vested in her in remainder after her father's death, as such remainder was not absolutely vested in her, but was liable to be divested in case her father should have a son.—*Simpson v. Frew*, 4 I. C. R. 428. (R.)—[Reversed: 5 I. C. R. 517; 1 I. Jur. N. S. 222. (C.)]

3. A fund was vested in the trustees of a settlement, in trust to pay the principal in such shares, &c., as the husband and wife, during their joint lives, or the survivor of them, should appoint, among the issue of the marriage; and if no appointment, the principal, and interest due thereon at the decease of the survivor of the husband and wife, to be divided between the issue, share and share alike; if there should be but one child living at the decease of such survivor, then the principal sum, and the interest then to be due, to go and be paid to that one. If there should be no such issue of the marriage, living at the decease of such survivor, or should there happen to be issue of the marriage then living, and that such issue should happen to die before respectively attaining the age of twenty-one, as to males, unmarried and without issue, or eighteen years or marriage as to females, then the principal and interest due at the decease of the survivor of the children, and the securities taken for the same, should be paid to the survivor of the husband and wife. *Held*, that in default of appointment, the portions vested in males at twenty-one or marriage, and in females at eighteen or marriage; or if they vested in each child at its birth, they became divested on the death of a male under twenty-one, unmarried and without issue, and of a female under eighteen and unmarried.

That the representatives of children who died under fourteen and unmarried, in their father and mother's lifetime took nothing.

That the representative of a daughter who married; attained eighteen; and died in her father's life, was entitled to a portion.—*In re Dennis's Trusts*, 6 I. C. R. 422. (R.)

4. By articles of agreement, a sum of stock was vested upon trust for several parties, in different proportions, for their absolute use:

provided that no payment or transfer should be made to any of them until he or she had completed the twenty-fifth year, unless he or she should sooner be settling in life, with the approbation of the trustees, or of the major part of them; and if any beneficiary married, or acted otherwise in opposition to the trustees' wishes, it should be optional with them to deprive such beneficiary of all benefit under the articles; such beneficiary's portion to then go, and be distributed equally amongst the others; provided that if any beneficiary died before his or her share had been transferred to him or her, that share should be distributed equally amongst the survivors; and that the trustees should apply the dividends of the fund for the beneficiaries' maintenance and education, in the proportions to which they severally would be entitled to the principal. *Held*, that the original portions were vested, though not transferable until the beneficiaries respectively attained twenty-five.

That shares, accrued under the survivorship clause, did not go over on the beneficiaries entitled to them dying under twenty-five; but belonged to their next-of-kin.—*Bardon v. B.*, 16 L. C. R. 415. (R.)

#### V. SURVIVORSHIP AND ACCRUEE OF PORTIONS.

1. A marriage settlement created a term of years, of which it declared the trusts to be to raise a sum, not exceeding £2000, for the portions of the younger children of the marriage. In default of appointment by the settlor, the sum was to be divided equally amongst such younger children, and to be payable to sons at full age, and to daughters at full age, or days of marriage, whichever should first happen: Proviso, that, if any such younger child died under age and unmarried, that child's share should go to the survivors; "and in case there should be but one younger child, son or daughter, the same should have and be entitled to the sum of £1000, and no more; and that, in that event, the sum of £1000, and no more, should be raised."

There were two younger children, both of whom survived their parents. One died under age. On a bill filed by the other's representative, claiming the entire £2000. *Held*, that in the events which had happened, £1000 only was raiseable.—*Clarke v. Jessop*, Dr. Rep., temp. Sugden, 301. (C.)

2. Bequest of personal estate in equal shares, to each and every of my children, whether sons or daughters, "with benefit of survivorship." *Held*, that the period of survivorship was the death of the testator.—*Caulfield v. Giles*, 12 L. E. R. 427. (R.)

3. A term of years was by deed vested in trustees, on trust to raise £31,000, and apply and dispose of the same to A., B., C., and D., the younger children of the Earl of C., for their respective maintenance and education, at such times, ages, and in such shares, &c., as the Earl should appoint; and in default of appointment, and so far as same should not

extend, in trust, after the death of the Earl, for the four children, equally, for their respective lives; and if any one or more of them died, leaving a child or children living at his or her death, in trust as to the parent's share, for such child or children in equal shares. The deed contained clauses of survivorship and accruee among the younger children, and a proviso, that no one of the children for whom portions were to be provided under the trusts, should, by virtue of the provisions for survivorship and accruee, be entitled to receive more than the sum of £16,000 in the whole, including his or her original share of the £31,000; and no two of the children should, by virtue of same provision of survivorship and accruee, become entitled to more than £21,000, including their original shares of the £31,000, it being agreed, that, if by reason or virtue of such survivorship or devise, any such child or children should, under the provisions therein before contained, be entitled to a greater sum than £16,000 or £21,000 for his, her, or their portion or portions, the residue of the sum before directed to be raised for the younger children was to sink into the inheritance. C. and D. died unmarried, and without issue, in the Earl's life. £8250 was appointed to A., who, after the Earl's death, became the eldest son, and entitled to the estate, and £10,250 to B., who became the younger child. *Held*, that notwithstanding the appointment, the sum of £21,000 only was raiseable.

The Earl became surety for A. in a bond and warrant of attorney, on which judgment was entered for £2000. By his will, he appointed £2500 of the £31,000, to A. to be raised and paid immediately after his decease, upon condition that A. should have paid off and discharged the debt of £2000 and interest, and that the creditor should have released the testator's effects from the sum of £2000; and if A. should not have paid, and the creditor should not release the same, the £2500 should be considered as unappointed, and A. should not be entitled to any of the unappointed part of the £31,000. *Held*, that the appointment of the £2500 was valid, and was not vitiated by the condition annexed to it.—*Stuart v. Lord Castlestuart*, 8 L. C. R. 408. (R.)

4. By articles of agreement, a sum of stock was vested upon trust for several parties, in different proportions, for their absolute use: provided that no payment or transfer should be made to any of them until he or she had completed the twenty-fifth year, unless he or she should be sooner settling in life, with the approbation of the trustees, or of the major part of them; and, if any beneficiary married, or otherwise acted in opposition to the trustees' wishes, it should be optional with them to deprive such beneficiary of all benefit under the articles: such beneficiary's portion to then go, and be distributed equally amongst the others: provided that if any beneficiary died before his or her share had been transferred to him or her, that share should be distributed equally amongst the survivors; and that the trustees should apply the dividends of the fund for the beneficiaries' maintenance and

education, in the proportions to which they severally would be entitled to the principal. *Held*, that the original portions were vested, though not transferable until the beneficiaries respectively attained twenty-five.

That shares, accrued under the survivorship clause, did not go over on the beneficiaries entitled to them dying under twenty-five; but belonged to their next-of-kin.—*Bardon v. B.*, 16 I. C. R. 415. (R.)

#### VI. WHEN AND HOW RAISEABLE.

[See also INTEREST IN PROPERTY, III.]

1. Lands were conveyed by marriage settlement for 999 years, upon trust, during so many years of the term as A. should live, to pay the rents to her, or as she should appoint; and, subject to a charge of £10,000, to pay to H. for so many years as he should live after the decease of A., an annuity of £1000; to pay the residue of the rents as A. should by deed or will appoint; the residue of the term after the decease of A. and H., was limited in trust that if there should be younger children of the marriage the trustees should by sale or mortgage of the residue of the term, and by the rents and profits thereof in the meantime, and until such sale, raise £15,000 for the portions of such younger children, the portions to be paid to sons at twenty-one, and to daughters at twenty-one or marriage; and should, out of the rents in the meantime, and until the portions be payable, raise such yearly sums for the maintenance and education of the younger children as A. should deem meet, not exceeding the interest of the respective portions at the rate of £5 per cent. Provided, that if any of the children should die before his portion should become payable, it should be divided among the survivors. A. appointed, and died. A bill having been filed to raise the principal and interest of the £15,000, while H. was alive—*Held*, that the Court had no power under the settlement to direct a sale of the term in possession during the life of H. [Affirmed, 12 I. E. R. 298. (C.)]

That the Court could not sell so many years of the term as should be unexpired at the death of H., as the security of the prior charges would thereby be impaired.

That interest was payable on the £15,000 from the death of A., and during the life of H.—[Reversed, 12 I. E. R. 298. (C.)]—*Lloyd v. Massy*, 11 I. E. R. 429. (R.)—[See *Lloyd v. Massy*, 10 I. C. R. 240; 5 I. Jur. N. S. 119. (C.A.)]

2. A., by deed settled his freehold estate and created a term to secure a charge of £4000 for younger children, payable at twenty-one in the case of males, and at twenty-one or marriage in the case of females. The settlement, reciting that the intended wife of A. had valuable jewellery, declared that, if there were younger children of the marriage, the jewellery should, after her death, be sold, and the produce go to discharge the estate from the charge; but, if no children, or if they all died in the life of their mother, she was to

have the jewellery absolutely. On petition during the life of the mother—*Held*, that the portions were raiseable during her life, and that the children need not wait until the value of the jewellery was ascertained.—*Bennett v. Helsham*, 4 I. Jur. 335. (C.)

3. A., entitled to estates in Scotland and Ireland, by a marriage contract executed in Scotland, in the Scotch form, settled his estates to himself and the heirs male of his body, to be begotten on the body of his intended wife, and bound himself to execute all dispositions and conveyances in the Scotch and Irish forms, for rendering the destination of the estates more complete. It was provided that A. should have power to impose conditions and limitations on the heirs male, and to vary the course of succession, so far as to prefer one heir male to another; and if the lands should descend to one child of the marriage, and there should be other children whom he should have neglected to provide for, A. bound himself and the heirs of the marriage to pay to each of such younger children £600 as a portion. Another clause provided that, notwithstanding the provision, the settlor might augment, diminish, or make void the provision of £600, it being provided solely with a view to remedy A.'s neglect in not providing for the children other than the heir; and declared that the provision should be a burden upon the heir of the marriage. By a subsequent instrument, not under seal, reciting the provision, and that A. considered it inadequate, and had resolved to add thereto, A. bound himself, his heirs and successors, to pay to the younger children £2000 each; and declared that sum to be inclusive of and in satisfaction of the provision in the marriage contract. He also provided a further annuity for his daughters, in an event which happened, and declared these provisions to be in full satisfaction of all their claims under the marriage contract or otherwise.

*Semble*—The marriage contract should be construed according to the law of Ireland, as to the Irish estates, and the portions of £600 were a charge on those estates, although by the Scotch law they were not a charge on the Scotch estates.

*Held*, that the portions of £2000, provided by the second instrument, were in substitution of the portions of £600 provided by the marriage contract, and were not charges on the Irish estates.

Contracts relating to real estate are to be governed by *lex loci rei sitæ*. Contracts relating to personal estate by *lex loci contractus et domicilii*.—*Dalzell v. D.*, 5 I. C. R. 463. (R.)—[On Appeal: 6 I. C. R. 483. (C.)]

4. By indenture executed upon his marriage, A. covenanted to convey lands to uses in strict settlement. The indenture provided that, if there should be one or more child or children of the marriage, besides an eldest or only son, such child or children should have £2000, payable as A. should appoint; in default of appointment, to be equally divided among such younger child or children, on

their respectively attaining age, or marriage. A. afterwards conveyed the lands to re-lessees, to hold to the uses and upon the trusts declared by the articles. There was issue of the marriage, an eldest son, and several younger children. All the younger children, save one, died without having attained a vested interest in the fund. *Held*, that the younger child who attained age was entitled to have the entire £2000 raised for her benefit.—*In re Martin's Trusts*, 6 I. C. R. 211. (C.A.)

1. A wife's lands were conveyed by her settlement to trustees for 999 years, on trust, during so many years of the term as she should live, to pay the rents to her or her appointees, and, subject to a prior charge of £10,000, to pay her husband M., during the residue of the term, for so many years as he should live, after her death, an annuity of £1000, and to pay the residue as she should by deed or will appoint. As to the residue of the term, after the death of her and M., on trust, if there should be younger children of the marriage, that the trustees should, by sale or mortgage of the residue of the lands, and by the rents and profits in the meantime, raise £15,000, for their portions, payable with interest as she should appoint, or in default of appointment, to sons at twenty-one years, and daughters at twenty-one or marriage; and should, out of the rents, in the meantime, and until the portions should be payable, raise for maintenance such sums as she should appoint, not exceeding interest at £5 per cent., on the respective portions; if no appointment, sums not exceeding such interest. The wife appointed the surplus rents after the £10,000 charge, and £1000 annuity, and some legacies, to her eldest son; and died, leaving M., her son, and one daughter surviving her. The daughter married L. On bill, filed by L. and his wife, it was decided that L. and his wife were not entitled to have either principal or interest on the portion raised during the lifetime of M. After the death of M., L. and wife instituted a suit to raise the portions, with interest from the date of the marriage of L. and wife, when the portion vested absolutely. *Held*, that they were entitled to interest from the period when the portion vested absolutely.—*Lloyd v. Massy*, 10 I. C. R. 240; 5 I. Jur. N.S. 419. (C.A.)

2. Lands were settled to the use of A. and B., his wife, for their lives, and the life of the survivor of them, and after the death of such survivor, to the use of a trustee, for 800 years, upon trust, if there should be no children of A. and B. living at the death of A. other than X., and an eldest son (and which event happened), to raise £5000 as the portion of X., to be paid to her on attaining twenty-one, or marriage, with interest in the meantime, at the rate of £5 per cent., for her maintenance, education, and advancement; but if there should be any children of A. and B. living at the decease of A., other than an eldest son and X., to raise £10,000 (including the first mentioned sum of £5000), as portions for all

the children of A. and B. (except as aforesaid), as A. and B., or the survivor of them, should by deed or will appoint, and in default of such appointment, among all such children equally, at twenty-one or marriage; with interest, from the decease of the survivor of A. and B. in the meantime, and until their portions should become payable, for their maintenance and education. A. died, leaving B. surviving him.

*Held*, that X. was entitled to have her portion raised by sale of the reversionary term of 800 years, with interest from the time of A.'s death.—*In re Aychoard's Estate*, 13 I. C. R. 472. (L.E.C.)

3. The question touching the time at which portions become payable is one of construction. When the appointed time arrives, the portions must be raised and paid, although they can be raised only by a waste of property and sale or mortgage of a reversionary term.

A portion is properly payable by trustees only when the time appointed for raising it has arrived, and the *c. q. t.* is competent to give a discharge; but a portion is often said to be payable to a child when the event, which gives the child a vested right in it, has happened.

Circumstances under which the interest will not be severed from the principal, but both must be raised and paid at once.—*Massy v. Lloyd*, 8 I. Jur. N. S. 102. (H.L.)

4. By articles executed in 1784, before the marriage of A., lands were covenanted to be settled on A. for life, remainder to trustees for a term, to raise £3000 for two or more younger children of the marriage, payable at twenty-one or marriage; with power to A. to appoint it as he might think proper among the younger children; remainder to the first and other sons of the marriage successively in tail male, remainder to the daughters as tenants in common in tail. There was issue, a son T., and two daughters, M. and S. On the marriage of M., A. appointed to M. £2000, part of the £3000 which was assigned to the trustees of her settlement. T., on attaining twenty-one, joined A. in suffering a recovery, and the lands were resettled on A. for life; remainder to T. in fee. T. died in 1821, intestate and unmarried, leaving M. and S. his co-heiresses.

On the marriage of S. with R., a settlement was executed, by which A. and S., after reciting their title to the estate, but without noticing the charge of £3000, conveyed S.'s moiety of the lands upon trusts for the benefit of R., S., and their issue. In 1825, A. died without making any further appointment of the charge of £3000; and on the 10th December 1825, S. and R. executed a deed purporting to assign the £1000, the unappointed residue of the £3000 charge, to the trustees of the P. Bank.

All parties conceded that the marriage articles should be construed as if they contained a hotch-pot clause.

*Held*, that, in consequence of the execution of the settlement of S., her £1000 was not a subsisting charge on her moiety.

That it could not be raised out of M.'s moiety.

That M. was entitled to have £500, part of her appointed share of £2000, raised out of S.'s moiety.

*Savage v. Carroll*, 1 B. & B., 265, disapproved of: *Tennison v. Moore*, 13 I. E. R. 424. followed.—*In re Norcott's Estate*, 14 I. C. R. 315. (L.E.C.)

1. By settlement executed on the marriage of A. with B., A. granted lands of which he was seized in *quasi* fee, to trustees, to the use of himself for life, remainder to the use of the trustees for 99 years, if B. should so long live, upon trust to pay B., out of the rents, an annual jointure of £400, and as to the surplus rents upon trusts for the issue of the marriage. The settlement provided that if the rents should, during the term, be insufficient to pay B.'s jointure, it should be lawful for the trustees, by the direction in writing of B., to raise the deficiency, by mortgage or demise of the lands for any term of years. There was no issue. B. survived A.; and by will, after reciting that arrears of her jointure were due, bequeathed them to C. B. had not, in her life, given her trustees any directions in writing to raise the arrears by mortgage or demise of the lands. Her executor filed a petition in the L.E. Court, to sell the fee.

*Held*, that B.'s will did not amount to a direction in writing to her trustees, within the meaning of the proviso in the settlement; that they had no power to create a term to pay the arrears; and that there was no estate in the land which the Court could sell to raise the arrears.—*In re St. George's Estate*, 14 I. C. R. 447; 8 I. Jur. N. S. 277. (C.A.)

#### VII. WHEN LANDS ARE LIABLE TO.

2. Lands were settled to the use of the husband J., for life, and a term of 500 years was created to secure a jointure for the wife, and £8000 for the issue of the marriage, in case the wife should die in the lifetime of J., to be divided between them if more than one in such shares as the husband should appoint. Subject thereto the lands were limited to J. in fee. J. devised different parts of the settled lands to his first and second sons in strict settlement, with power of jointuring and charging for younger children's portions; and, after reciting his power under the settlement, in pursuance of it, and of every other power reserved to him, he appointed £1 to his eldest son, and the remainder of the £8000 among his other children. He gave one of his daughters £1000 in addition to the sum appointed to her, and charged it on part of the lands devised to one of his sons; and directed that if all his younger children should die before the portions became payable, the £8000 should sink into the inheritance; and he also directed the residue of his personal estate, after payment of his funeral expenses, debts, and legacies, to be applied *pro tanto* to discharge the £8000, in exoneration of his real estate. J. died in the lifetime of his wife. *Held*, that the settled lands were well charged with the £8000.—

*Mandeville v. Roe*, 7 I. E. R. 253; 1 Jon. & L. 371. (C.)

3. An ante-nuptial settlement, executed in 1782, recited that H. was seized in fee of the lands of W. (the fact being that he was seized in tail of part, and in fee of the remaining part of those lands); that he was seized of an estate for three lives, with a covenant for perpetual renewal, in the lands of B.; and possessed of a term for years in the lands of R. By that settlement W. was settled upon H. for life (subject to a term of 5000 years, to provide for younger children £1500 as portions, which might be raised during the life of H., with his consent); remainder to the first and other sons of the marriage successively in tail male. B. and R. were settled upon H. for life, and (subject to making good any deficiency in the £1500 portions), with remainder to the first son of the marriage, his heirs, executors, administrators, and assigns. That settlement also contained a power (afterwards exercised) for H. to charge upon all the lands £2000, to be raised at any time which he might appoint; and a proviso enabling him to deprive any son, who might misconduct himself, of any estate thereby limited to him. No recovery of W. was suffered to the uses of that settlement. In 1811, E., the eldest son of the marriage, being of age, joined H. in a deed making a tenant to the *præcipe* in a recovery about to be suffered of W., reciting that he was seized of an estate for life, and E. of an estate in remainder in tail male in W., and their intention to bar all estates tail, remainders, &c., therein, and declaring that the recovery should enure for the purpose of securing any sums which H. and E. might jointly charge upon W., and to such other uses as they might jointly appoint; in default of appointment, to the uses of the settlement of 1782. The deed of 1811 also provided that, in the event of E. dying in the lifetime of H., without issue, W. should stand charged with £2000 for the younger children of H. A recovery was duly suffered to the uses of that deed. Neither H. nor E. ever exercised the powers conferred upon them of jointly charging or appointing W. After 1811, judgments were recovered against E., who died in 1819, in the lifetime of H., without issue. *Held*, that the £1500 for portions created by the settlement of 1782, was primarily charged upon W., and that the other lands constituted only an auxiliary fund for payment of those portions.

That the younger children of H., in regard to their charge of £2000 under the deed of 1811 upon W., were not, as against the judgment creditors of E., entitled to have, upon the principle of marshalling, the charge of £2000, created by the settlement of 1782, thrown altogether upon R.; but that all the lands should bear that charge *pro rata*.—[Hargreave, C., *dissentiente*.]

That as the power for H. to charge £2000 under the settlement of 1782 overrode all the other powers and provisions in it, the £1500 portions should not be deducted from the value of W. in ascertaining the proportion of

the £2000 charge of 1782, which those lands were to bear; but that proportion should be calculated upon the full value of W.—*In re Jones's Estate*, 2 L. C. R. 544. (I.E.C.)

1. When bequests of several legacies are followed by a gift of the residue of the testator's real and personal estates, the legacies are a charge upon the real estate.

B., who was possessed of both real and personal estate, by will, in 1825, after bequeathing an annuity to his wife, bequeathed to her £1000, "in trust, to give such part of said sum as she may consider my estates and assets may justify, to my daughter A., on her marriage, with her consent: the entire or remainder of said sum to go and be considered as part of the residue of my property, as hereinafter bequeathed to my son B." He then bequeathed £5000 to A., and if she should die before marriage, then "this bequest shall be considered as part of the residue of my property, and shall go and merge in same." Then, after some small pecuniary bequests, "As to all the rest, residue and remainder of any property I may die possessed of or entitled to, of what nature soever, whether estates freehold, leases, &c., &c., I hereby bequeath, devise, and grant the same to my son B., with liberty to dispose of the same in any way he may think proper." *Held*, that the legacies bequeathed to A. were well charged on the real estates, and entitled to priority over a subsequent mortgage by B.—*In re Browne*, 6 L. C. R. 240; 2 I. Jur. N. S. 322. (I.E.C.)—[*Affd.*: 6 I. C. R. 390; 3 I. Jur. N. S. 49. (C.A.)]

2. By settlement executed on the marriage of B., in 1811, the S. estate was conveyed to trustees, to the use of A. for life, remainder to B. for life, remainder to the first and other sons of B. in tail, subject to a term, the trusts of which were, that if there should be an eldest or only son, and one or more younger children of the marriage, to raise £2000, for the portion or portions of all and every such younger child or children; if but one younger child, the whole to be paid to such younger child, and if two or more, to be divided as B. should by deed or will appoint, &c.; for default of appointment to be equally divided. Provided that, if any of the younger children should die before his portion became payable, or that any younger son should become an eldest son before he attained age, the portion or portions of such of them so dying or becoming an eldest or only son, should go and be equally divided among the survivors or survivor, or others or other of them.

By the settlement, £2000 was charged on the X. estate (which was not otherwise the subject of that settlement) upon trust, after the decease of B., for the same purposes as were therein before declared, concerning the £2000 charged on the S. estate. There were six children of the marriage, the two eldest of whom were C. and D., and in 1836, C. being of age, the S. estate was disentailed, and afterwards re-settled by a deed, under which C. and D. took life estates: remainder to their issue male. In 1839, on the marriage of

D., B. by deed appointed the £2000 charged on the S. estate, and £500 of the £2000 charged on the X. estate, upon trusts in favour of D. and his children, provided that if, under the limitations in the settlements of 1811 and 1836, or either of them, D. should succeed to an estate tail in possession in the S. estate, the appointment should not take effect, and the £2500 should belong to the remaining younger children of B. as he should appoint; in default of appointment, equally. In 1841, the S. estate was re-settled in pursuance of a power of revocation in the deed of 1836, to B. for life, remainder to C. for life, remainder to his first and other sons in tail.

In 1853 C. died without issue, whereupon D. became entitled to the estates under the last-mentioned deed. *Held*, that, supposing the appointment of 1839 to have been avoided by D. having become an eldest son, his share in the two sums of £2000, in default of appointment, had not been divested, as he had not become an eldest son before he attained age.

That the X. estate not being subject to the settlement of 1811, the appointment of £500 of the £2000, charged on that estate, was not divested, by D. having as eldest son succeeded to the S. estate.

That D. having, as eldest son, succeeded to an estate for life, under the deed of 1841, and not to an estate in tail, under the deeds of 1811, or 1836, the appointment of 1839 was not defeated.

*Semble*—The Court would not, on a petition, under the Trustee Relief Act, to draw out the £2000 charged on the X. estate, and in the absence of minors claiming under the appointment of 1839, determine the right to the fund adversely to them.—*Ex parte Smyth*, 12 I. C. R. 487. (R.)

3. Lands being re-settled, £2500 was charged for younger children by a deed reciting that estates were charged with £1000 for them under a previous settlement, which really charged the lands with £2000. Those children claimed both sums. *Held*, no case for election between the deeds, but merely a misrecital; and that if the real intention had been to charge the £2500 in addition to £1000 only, that intention should have been proved by parol evidence.

The trusts of a term were to raise, at twelve years from a mother's death, £2500 for younger children; £1000 of that sum for one of them, and the remainder for the others; the sums to be paid to them respectively, when raised pursuant to the deed. The deed was one in which the mother, tenant for life, joined her eldest son, the remainderman, in opening the estate. That younger child, to whom the £1000 was to have been paid at twelve years from the mother's death, died during her life. *Held*, that the £1000 was not vested, and could not be raised.

A charge payable at a future day, is in general not raiseable, if the party dies before the day, except when the time of payment is postponed for the convenience of the estate.

Then, it is otherwise. But this exception does not apply to children's portions, which are not generally raiseable for the child's representative, if the child dies before he wants a provision.—*Ruby v. Foot and Beamish*, Beat. Rep. 581. (C.)

1. By marriage settlement the husband's (A.'s) real estate was limited to him for life; then to trustees for a term of years; subject thereto, to the first and other sons of the marriage in t. m.; remainder to the husband in fee. The trusts of the term were to raise portions for the younger children if "there should be one child or more children of the marriage, besides an eldest or only son." Two daughters were the sole issue. A. settled upon one, on her marriage, and on her husband and children, an annuity more valuable than her share of the portions under his own settlement, and charged it upon the settled estate. On his other daughter's marriage, A. made for her a pecuniary provision declared to be in satisfaction of her portion under the settlement. A. devised his settled estate to his two daughters in the way in which it would have come to them if he had died intestate. *Held*, that, there not being a son, the portions were not raiseable in the events which had happened.—*Walcot v. Bloomfield*, 6 I. E. R. 227; 2 Dr. & War. 211; 2 Con. & L. 577. (C.)

#### VIII. MERGER OF IN LANDS CHARGED.

2. Settlement of real estate on the issue of a marriage in tail male; if one or more child or children of the marriage, besides an eldest or only son, the younger child or children should have £2000, "payable to the said younger child or children at such times," &c., as the husband should by deed or will appoint; for want of such appointment, to be equally divided between such younger child or children, share and share alike, on their respectively attaining age, or marrying. There were five children, three of whom died under age and unmarried. The remaining son and daughter survived their father. The daughter attained age, and married. The father died without exercising the power. *Held*, that the portions of the children who died did not merge into the estate, but that the daughter surviving was entitled to the whole £2000.—*In re Dowling's Trusts*, 2 I. Jur. N. S. 318. (R.)—[Affirmed, *ibid*, 427. (C.A.)]

3. When a term was created by marriage settlement, in trust, to raise by demise or mortgage, &c., by or out of the rents, &c., £1500 as a provision for R., and a like sum as a portion or provision for D., with interest thereon, to be paid at such time or times as J. shall by any deed, or by will, appoint; in default of appointment, said sums to be paid and payable to R. and D., and each of them, respectively, upon the day of the decease of J. Provided, that if R. and D. shall intermarry in the life of J., without his consent in writing for that purpose first obtained, or that R. and D., or either of them, shall die unmarried, then it was the true intent and meaning of the parties thereto, that the fortune of her

so marrying or dying unmarried should thenceforward cease, and merge into the inheritance of the lands contained in the term. J. appointed the sum to R. by will. R. was still unmarried. *Held*, that she was entitled absolutely to the £1500.—*In re Irwin*, 5 I. Jur. 1. (I.E.C.)

4. A term of years was by deed vested in trustees, on trust, to raise £31,000, and apply and dispose of it to A., B., C., and D., the younger children of the Earl of C., for their respective maintenance and education, at such times, ages, and in such shares, &c., as the Earl should appoint; and in default of appointment, or so far as same should not extend, in trust, after the death of the Earl, for the four children equally, for their respective lives; and if any one or more of the children died, leaving a child or children living at his or her death, in trust, as to that parent's share, for such child or children, in equal shares. The deed contained clauses of survivorship and accruer among the younger children, and a proviso that no one of the children for whom portions were to be provided under the trusts should, by virtue of the provisions for survivorship and accruer, be entitled to receive more than £16,000, including his or her original share of the £31,000; and no two of the children should, by virtue thereof, become entitled to more than £21,000, including their original shares of the £31,000; it being agreed that if, by reason of such survivorship or otherwise, any such child or children should, under those provisions, be entitled to a greater sum than £16,000, or £21,000, for his, her, or their portion or portions, the residue of the sum directed to be raised for the younger children was to sink into the inheritance. C. and D. died, unmarried and without issue, in the Earl's life. £8250 was appointed to A., who, after the Earl's death, became the eldest son, and entitled to the estate, and £10,250 to B., who became the younger child. *Held*, that notwithstanding the appointment, £21,000 only was raiseable.

The Earl became surety for A., in a bond and warrant of attorney, on which judgment was entered for £2000. By will, he appointed £2500 of the £31,000 to A., to be raised and paid immediately after his decease; upon condition that A. should have paid off and discharged the debt of £2000, and interest, and that the creditor should have released the testator's effects from the sum of £2000; and in case A. should not have paid, and the creditor should not release the same, the £2500 should be considered as unappointed; and A. should not be entitled to any of the unappointed part of the £31,000. *Held*, that the appointment of the £2500 was valid, and was not vitiated by the condition annexed.—*Stuart v. Lord Castletuart*, 8 I. C. R. 408. (R.)

5. By articles executed in 1784, before the marriage of A., lands were covenanted to be settled on A. for life, remainder to trustees for a term, to raise £3000, for two or more younger children of the marriage, payable at twenty-one, or marriage; with power to A.

to appoint this sum as he might think proper among the younger children; remainder to the first and other sons of the marriage successively in tail male; remainder to the daughters, as tenants in common in tail. There was issue a son, T., and two daughters, M. and S. On the marriage of M., A. appointed to M. £2000, part of the £3000, which was assigned to the trustees of her settlement. T., on attaining twenty-one, joined his father, A., in suffering a recovery. The lands were re-settled on A. for life; remainder to T. in fee. T. died in 1821, intestate and unmarried, leaving M. and S. his co-heiresses.

On the marriage of S. with R., a settlement was executed, by which A. and S., after reciting their title to the estate, but without noticing the £3000, conveyed S.'s moiety of the lands upon trusts, for the benefit of R., S., and their issue. In 1825, A. died, without making any further appointment of the £3000; and on the 10th December 1825, S. and R. executed a deed, purporting to assign the £1000, the unappointed residue of the £3000, to the trustees of the P. Bank.

All parties conceded that the marriage articles should be construed as if they contained a hotch-pot clause. *Held*, that, in consequence of the execution of the settlement of S., her £1000 was not a subsisting charge on her moiety.

That it could not be raised out of M.'s moiety.

That M. was entitled to have £500, part of her appointed share of £2000, raised out of S.'s moiety.—[*Savage v. Carroll*, 1 B. & B. 265, disapproved of: *Tennison v. Moore*, 13 I. E. R. 424, followed.]—*In re Norcott's Estate*, 14 I. C. R. 315. (L.E.C.)

#### IX. WHEN A SATISFACTION OF A DEBT OR LEGACY.

1. £1000 was vested by a settlement in a father, in trust for the use of his daughter until she attained the age of twenty-five or day of her marriage with consent; afterwards in trust to permit her to receive the interest for life; after her death, in trust for her issue as she should appoint. On the daughter's marriage, the father, without noticing the former settlement, settled by deed several sums, amounting to £1933, in trust for the daughter for life to her separate use; after her death, in trust for the children of the marriage as the husband should appoint; in default of appointment, equally; in default of issue, in trust for the husband. *Held*, that the sum secured by the latter was a satisfaction of the debt due under the former settlement.

In general, a father will be presumed to have paid the debt he owes to a daughter, when in his life he gives her on her marriage a greater sum than he owes her. It is not necessary that there should be an express stipulation to that effect, or that the husband should know of the debt.—[*Drew v. Bidgood*, 2 Sim. & Stu., disapproved of.]—*Hayes v. Garvey*, 8 I. E. R. 90; 2 Jon. & L. 268. (C.)

2. By marriage settlement of L., a fund was vested upon trust, after the decease of L., and his intended wife, for their children as L. should appoint; in default of appointment, equally. There was a hotch-pot clause, but no advancement clause.

The fund produced £4700, and was, with £300 belonging to L., invested on mortgage. There were five children. In 1844, on the marriage of A., one of them (L.) settled £1000 of his own upon A., her husband, and issue. In 1845, L., by will, appointed and bequeathed the £5000 invested upon mortgage, as to £1000, to J., another of his daughters, and as to the residue among his remaining children excepting A. He also bequeathed £1200 to the trustees of A.'s settlement, for her benefit. In 1848, L., on the marriage of J., gave £1000 of his own, and secured £1200 upon trusts for J., her husband, and issue. By a subsequent codicil L. revoked the appointments and bequests made to J., by his will, "in consequence of what he had paid and secured on her marriage." *Held*, that the sum appointed to J., and revoked by the codicil, should go as in default of appointment.

That A. and J. were not excluded from sharing in it.

That L. could not be taken to be a purchaser of the shares of A. and J., in the unappointed part of the settled fund.—[*Folkes v. Western*, 9 Ves. 456, approved of.]—*Noblett v. Litchfield*, 7 I. C. R. 575; Dr. Rep. temp. Napier, 158. (C.)

#### X. DOUBLE PORTIONS.

3. By settlement in 1800, on his first marriage, A. was seized of an estate for life in lands, remainder to his first and other sons in tail, with power to charge the lands with £2000 for such purposes as he should think fit, and with £1000 for his child, or children by any after-taken wife. He also became entitled by subsequent events to two sums of £500 and £1000, charged on the lands by the same deed. There was no issue of the first marriage. By a settlement, in 1809, on his second marriage, he charged the lands with £2000 and £1000 under the powers, and assigned the £2000, £500, and £1000, in trust, if there should be two or more younger children or daughters, to be divided amongst them, after the death of their father and mother, as he should by deed or will appoint, and in default of appointment equally; and if there should be no issue of the marriage, or issue one only son, or there should be issue one or more daughter or daughters, or one or more younger children who should die before the payment of the portions, then, as to the £2000, £1000, and £500, in trust for A., his executors, &c. There were issue, two sons and a daughter (B., C., and D.). B. joined A. in suffering a recovery of the estate, and by deed of 1834 it was conveyed subject to a term to the use of A. for life, remainder to the use of B. for life, remainder to the first and other sons of B. in tail, remainder to C. the second son for life, remainder to the first and other sons of C. in tail, remainder over. The trusts



of the term were to raise by sale or mortgage £12,500 to be disposed of as A. and B., or the survivor, should appoint; which was raised. A. appointed £250 of the sums of £500, £1000 and £2000 to D., and the residue to C. Afterwards B. died without issue, whereupon C. became entitled, subject to the charge of £12,500 to a life estate in part of the lands, the remainder having been sold for payment of incumbrances. *Held*, that the appointment out of the sums of the £500, £1000 and £2000 did not become void by C. becoming an elder son entitled to the lands under the deed of 1834.—[*Spencer v. S.*, 8 Sim. 87, and *Peacocke v. Pares*, 2 Keen. 689, observed on.]—*Tennison v. Moore*, 18 I. E. R. 424. (R.)—[Followed: *In re Norcott's Estate*, 14 I. C. R. 315. (L.E.C.)]

1. J., in 1810, by marriage settlement, covenanted with the trustees that all the property of which he should die seized or possessed should be charged with £1300 for the issue of the marriage. There was but one child, E. On the marriage of E., in 1847, J. conveyed freehold property to trustees, for E.'s benefit, and that of the children of her marriage; and covenanted to make up the amount of the produce of that property to £300 per annum. J., in 1852, devised real estates to the separate use of E. for life, remainder for her children; and declared that devise to be in satisfaction of the covenant of 1847. In 1852, J. assigned railway shares upon trust for E. for life, for her separate use, if she survived him, remainder for her children. By codicil, in Jan. 1853, J. bequeathed chattels personal to E., for her separate use, and bequeathed to trustees £1050 bank stock, upon trust for G., the husband of E., for life, remainder to E. for life, remainder for her children, as therein mentioned. Both the will and codicil disposed of all J.'s estate. *Held*, that E., and her husband were entitled to the £1300, secured by the covenant in the deed of 1810 as well as to the benefit conferred by the settlement of 1847, the will and codicils, and the deed of 1852.—*Garner v. Holmes*, 7 I. C. R. 412; 3 I. Jur. N. S. 229. (C.)—[*Rev'd.*: 8 I. C. R. 469. (C.A.)]

#### XI. SATISFACTION OF PORTIONS.

2. Sums of money invested in stock in the names of trustees under a marriage settlement were, at the desire of A., paid to him by the trustees, on A.'s representation that he had provided for some of his children upon their marriage, and would provide for those remaining unprovided for. A. had provided for some of his daughters who had been married, and did provide for daughters subsequently married. *Held*, as to the daughters married subsequently to that representation, that the funds given to them by their respective settlements were intended to be in satisfaction of their rights under their father's settlement.

That, to create a case of satisfaction, some expression of intention must appear; and that the rule laid down in *Walpole v. Conway*, Barnard, 156, is to be followed.—*Warner v. Latouche*, 1 I. Jur. N. S. 34. (C.)

3. A father, V., who had government stock standing in his own name, in 1838 transferred all except a small portion of it into the joint names of himself and his son A.; and in 1856 deposited moneys in a bank in their joint names. Small purchases of stock were at intervals made in their names up to 1851, and the joint deposits were made at intervals up to V.'s death in 1862. These investments constituted the bulk of V.'s property.

No definite provision for A. had been made by V., whose other seven children lived away, and were provided for. A. was married, but lived chiefly with V., whom he assisted in his business, and who during his life received all the dividends on the stock, and the interest on the deposit receipts; and also drew small portions of the principal money deposited.

By the practice of the bank, new deposit receipts were issued on every occasion of drawing the interest. On the first occasion of the joint lodgment, the manager of the bank explained to V. that the effect would be to enable A. to draw the money after V.'s death. V. then, and on a subsequent occasion, intimated his intention that A. should do so without expense. There was evidence that V., eighteen months before his death, stated to a third person that he did not mean all his property to go to A. after his death; and a short time before his death refused to allow A. to meddle with the stock certificates and deposit receipts. Evidence of testamentary intention in favour of the other children was also given. *Held* (reversing the Lord Chancellor's decree), that there was an advancement for A. to the extent of the joint investments and deposits.

*Semble*—The re-issue of the bank, according to its practice, of new deposit receipts did not amount to a new investment.—*Fox v. F.*, 15 I. C. R. 89. (C.A.)

#### XII. WHEN SUBJECT TO DEBTS.

##### XIII. PRIORITY OVER MORTGAGES, &c.

4. A father (tenant for life, with power to charge £500 for younger children) and son, tenant in tail, re-settled the estate, to the use that the son should receive a rentcharge of £100 for their lives and that of the survivor, with powers of distress and entry for non-payment; then to the use of the father for life, with a power to charge an additional £1000 for younger children; then to the son in tail. *Held*, that, although, if it was the intent to give the annuity priority over the £1000, equity would not allow a legal merger to destroy it; yet, on the true construction, it was not intended that it should exist after the father's death, though granted for the son's life; and therefore that the general rule, giving priority in family settlements to charges for younger children, should prevail.—*Mills v. M.*, 9 I. E. R. 299; 3 Jon. & L. 242. (C.)

5. When bequests of several legacies are followed by a gift of the residue of testator's real and personal estates, the legacies are a charge upon the real estate. B., possessed of both real and personal estate, by will, in 1825, after bequeathing an annuity to his wife, be-

queathed to her £1000, "in trust to give such part of said sum as she may consider my estate and assets may justify, to my daughter A., on her marriage, with her consent; the entire or remainder of said sum to go and be considered as part of the residue of my property, as hereinafter bequeathed to my son B." He then bequeathed £5000 to A., and in case she should die before marriage, then "this bequest shall be considered as part of the residue of my property, and shall go and merge in the same." Then, after some small pecuniary bequests, "as to all the rest, residue, and remainder of any property I may die possessed of, or entitled to, of what nature soever, whether estates freehold, leases, &c., I hereby bequeath, devise, and grant the same to my son B., with liberty to dispose of it in any way he may think proper." *Held* (affirming the ruling of the Commissioners of the I. E. Court, 6 I. C. R. 240; 2 I. Jur. N. S. 322), that the legacies bequeathed to A., were well charged on the real estates, and entitled to priority over a subsequent mortgage by B.—*In re Browne*, 6 I. C. R. 390; 3 I. Jur. N. S. 49. (C.A.)

#### POSSESSION.

See ADVERSE POSSESSION—LIVERY OF SEISIN—PRACTICE, SALES JUDICIAL—DELIVERY OF—ITS EFFECT. See VENDOR AND PURCHASER, VII. MORTGAGEE IN. See MORTGAGE, III.

#### POSSIBILITIES.

See ASSIGNMENT—INTEREST IN PROPERTY, IV, V.

#### POST OBIT BONDS.

See HEIR-AT-LAW, III.

1. The assignees of a *post obit* security take it with notice of all its incidents; and in order to establish the validity of the security they must show that a fair consideration was given for it.—*Cooke v. The Marquis of Donegal*, 9 I. Jur. N. S. 41. (C.)

#### POSTHUMOUS AND AFTER-BORN CHILDREN.

##### I. POSTHUMOUS CHILDREN.

##### II. AFTER-BORN CHILDREN.

2. The 33 G. 2, c. 14 (Bankers Act), s. 3, applies to a conveyance made in favour of a child or grandchild unborn at the date of the execution, as well as to a conveyance in favour of a child or grandchild then alive.—*Spearing v. Delacour*, 1 Dr. & Wal. 591. (C.)

3. A general gift of the *corpus* of a fund to A.'s children, described as her children, following a gift to her of the interest for the maintenance of her children W. and R.; *Held*, confined to W. and R., and not to include after-born children.—*In re Connor*, 8 I. E. R. 401; 2 Jon. & L. 456. (C.)

#### POWERS.

[See ILLUSORY APPOINTMENT.]

##### I. EXECUTION OF.

1. *Effect of respecting Assets, Dower, Priority.*
2. *What amounts to an Execution—Validity of Appointment.*
3. *Compliance with Conditions.*
4. *By Married Women.*
5. *Exclusive and Illusory Appointments.*
6. *Whether the Instrument operates as an Appointment, or as a Conveyance of the Interest of the Party.*
7. *When void in Equity, et c contra.*
8. *Partial Execution—at what time a Power may be executed.*
9. *Excessive Execution of.*
10. *Defective Execution, when supplied.*
11. *Non-execution.*

##### II. WHEN POWERS SURVIVE.

##### III. WHEN THEY TEND TO PERPETUITY.

##### IV. POWERS OF LEASING.

##### V. WHAT ARE CONSTRUED USUAL POWERS.

##### VI. POWERS TO APPOINT TO CHILDREN.

##### VII. POWERS OF SALE.

1. *In general.*
2. *Implied.*

##### VIII. POWERS OF REVOCATION.

##### IX. LIMITATIONS IN DEFAULT OF APPOINTMENT.

##### X. POWER OF ATTORNEY.

##### XI. MERGER, EXTINGUISHMENT, AND SUSPENSION OF.

##### XII. CONSTRUCTION OF POWERS IN GENERAL.

##### XIII. TRANSFER OF POWERS BY DELEGATION OR ACT OF LAW.

##### I. EXECUTION OF POWERS.

1. *Its Effect upon Assets, Dower, Priority.*
2. *What amounts to an Execution: Validity of Appointment.*
3. *Compliance with Conditions.*
4. *By Married Women.*
5. *Exclusive and Illusory Appointments. See APPOINTMENT.*
6. *Whether the Instrument operates as an Appointment: or as a Conveyance of the Party's Interest.*
7. *When void in Equity, et c contra.*
8. *Partial Execution: when a Power may be executed.*
9. *Excessive Execution.*
10. *Defective Execution, when supplied.*
11. *Non-execution.*

##### I. 1. *Effect of Execution on Assets, Dower, Priority.*

4. When P. attained age, the family estates were settled. The settlement empowered every tenant for life, when in possession, to charge as portions for all younger children any sum not exceeding £4000. In 1798 P. became tenant for life. In 1815, in the Isle of Man, P. married A., by whom he had two children, the pfs. In 1828, P., being indebted on bond, filed a bill to restrain his creditors from proceeding at law. He alleged

usury, and offered to pay whatever sum should, when accounts were taken, be found due on the bonds. In 1832, it was referred to the Master to take the necessary accounts. In 1833, in this and several other causes wherein P. was a party, there was entered into a consent that the Master should find £4207 due up to 11th of December 1833. This consent was embodied in the report. In 1834, it was decreed that £4207 was due on foot of the securities; that it was well charged on the lands; and that the receiver in the other causes should be extended to this. In 1836, P. executed this power by appointing the £4000 in equal shares between the ptfs. On a bill filed during P.'s life to raise this charge—*Held*, that the consent was, on P.'s part, a contract which, when acted upon and embodied in the decree, deprived him of the right to execute the power so as to affect the rights of the creditors under the decree which had attached on his life estate.

That the power was not duly exercised, since no part of the £4000 was reserved for any children who might be born to P. after the date of the appointment.—*Piers v. Tuitt*, 1 Dr. & Wal. 279. (C.)

1. Three policies of insurance on the settlor's life were assigned by a voluntary deed on trust for A., B., and his other children, in such shares, &c., as he should appoint. He, on A.'s marriage, appointed to her £2000 out of the sums secured by the policies. He made a similar appointment on B.'s marriage. By will he appointed £2000 to each of the other children. Two of the policies having dropped before his death—*Held*, that the sums given to A. and B. should be paid in full, according to the priorities of the appointments, and the entire loss fall on the other objects.—*Borough v. Close*, 11 I. E. R. 391. (C.)

#### I. 2. What amounts to an Execution: Validity of Appointment.

2. A father was tenant for life of estates, with remainder amongst his children, in such shares, &c., as he should appoint; and was absolute owner of other property.

Having two daughters, one of whom was then very young, he, on the marriage of the elder, limited all his estates in trust to secure himself an annuity until scheduled debts were paid; then to divide the rents equally between himself and that daughter's husband, during his (the father's) life; remainder for a term to secure £2000 for the younger daughter; remainder, subject to a jointure for his widow, to his eldest daughter and her husband, and their issue, in strict settlement. *Held*, a good execution, the benefit which the donee took to himself not being a fraud on the power, since he settled the additional property; and the limitations to the daughter's issue being good, because made with the consent of the object of the power.—*Conolly v. M'Dermott*, Beat. Rep. 601. (C.)

3. V., having a power to appoint by deed

or will, executed a will; then a deed; then a codicil. The will appointed four denominations of land to V.'s four sons. It gave one denomination to each son and his heirs, "to go to them immediately after the death of his wife; and in case of the death of any or either of his said younger sons, before he or they should be respectively entitled thereto, then the part or share of him or them, so dying, to go to and be divided amongst the survivors equally, share and share alike." The deed partly displaced that appointment; and appointed to V.'s third son and his heirs the denomination devised to V.'s fourth son, whom the deed left without provision. The codicil appointed to that son and his heirs another denomination "instead of" that devised to him. *Held*, that the words, "and in case of the death of any or either of his said younger sons," &c., referred to the death of V.'s wife.

That though the testamentary appointment would have been subject to the clause of survivorship, the appointment by the codicil was absolute to the fourth son and his heirs.—*Comurs. of Ch. Don. & Beg. v. Cotter*, 2 I. E. R. 196; 2 Dr. & Wal. 615. (C.)—[*Affd.*, 1 Dr. & War. 498. (C.); the Court holding, however, that the date of vesting was the death of the testator, not that of the tenant for life.]

4. A party having a life estate in settled lands, with an unlimited power of jointuring, and having an absolute interest in other lands, charged all the lands with a jointure, the first payment of which was to be made on the day of his death.

*Semble*—A bad execution of the power, but the Court will so arrange the contribution between the two estates, as to give to the jointress the benefit of it.—*Purcell v. P.*, 4 I. E. R. 558; 2 Dr. & War. 217; 1 Con. & L. 371. (C.)

5. Tenant for life, with a power to jointure, marries; but does not exercise the power. His wife was seized of real estate for life, which, on the marriage, was settled to the use of the husband for the joint lives of himself and his wife, remainder to the wife for life. The husband became indebted; and agreed with his wife and creditor to exercise the power in her favour, and that she should grant the creditor an annuity for her life, equal in amount to the jointure, to be charged upon her estate, and to become payable upon the death of the husband. The agreement was carried into execution. The husband died. *Held*, that the execution of the power was not a fraud upon the remainderman.

In the execution of a power of jointuring, given for the benefit of the wife, it shall not be so executed as to be the means, colourably, of conveying an interest in the jointure itself, to the creditor of the husband. If the intention of the parties really is, that the jointure should go to some third person, such intention cannot be effected by an execution of the power; for such execution of the power is not a grant of a jointure at all.

A jointure power is one by which the husband may take a benefit; not a benefit by perverting that, which is the subject matter of the power, to a purpose which the donor of the power did not intend, but by applying it to its proper use, in consideration of his getting something, which he is at liberty to get for his own benefit. It is very different from a power to appoint to children.—*Baldwin v. Roche*, 5 I. E. R. 110. (E.E.)

1. A., having a power of appointing money among his younger children, by will, reciting the power, bequeathed as follows:—"I leave and bequeath unto my said daughter Harriet, a further sum of £200, to have me properly buried, and to pay what small debts I may owe at my decease." *Held*, a bad exercise of the power, and that the £200 should go as if unappointed.—*Hay v. Watkins*, 2 Con. & L. 157; 3 Dr. & War. 339; 5 I. E. R. 273. (C.)

2. *Semble*—A power to appoint in such "manner, shares, and proportions, as the donee should think proper," authorises him to appoint the fee. The objects of the power take the fee by implication in default of appointment.—*Crozier v. C.*, 5 I. E. R. 415; 3 Dr. & War. 373. (C.)

3. By settlement upon the marriage of J., fee-simple lands were conveyed to J. for life, and, after his decease, to such of his children as he should by deed or will appoint, and to their heirs and assigns; in default of appointment, to such children equally. J., having several children, devised these lands to his wife, for life, upon condition that she should support, maintain, and educate the children; after her decease to J.'s son, John. *Held*, that the gift to the wife was void, but the trusts in favour of the children valid; and that the gift to the son was good, the execution of the power being void only for the excess, and not *in toto*.

A power to appoint an estate amongst a class, will be executed in equity by giving the whole of the estate to one of the class, and a part of the produce thereof, or money charged thereupon, to the other.

In considering whether a will be a valid execution of a power, the intention of the testator is always to be considered and effectuated as far as possible.

*Semble*—That the remainders after an estate, which is void because an excessive execution of a power, are not void; but are accelerated by the extinction of the intermediate void estate.—*Crozier v. C.*, 5 I. E. R. 540; 3 Dr. & War. 373; 2 Con. & L. 294. (C.)

4. In the case of real estate, when there is power to give a fee, the donor can give a less estate, at least, when the words "shares and proportions" are used. A., by will, having charged £6000 on his estates, and directed same to be paid to and among such of his younger children, in such shares and proportions as his wife should appoint, and the wife having by will directed the inheritor as follows:—"Three of the £6000 I wish to have

given to the two elder girls." *Held*, that this was a good appointment of £3000, and that the appointees took as tenants in common, and not as joint tenants.—*Alloway v. A.*, 2 Con. & L. 509. (C.)

5. The doctrine of *cy-pres* applies to the construction of a will made in exercise of a power.—*Stackpole v. S.*, 2 Con. & L. 506; 6 I. E. R. 18. (C.)

6. By marriage settlement, landed property of the wife was settled upon her and her husband for their lives and the life of the survivor, and after the death of the survivor upon the issue, if no issue, to such uses as the wife should by will appoint. There being no issue, the wife executed an instrument (in form a deed-poll) by which she appointed that if there should be no issue, the property should, at her death, go to her husband absolutely. The instrument was stamped and attested as a deed-poll, and a memorial of it was registered. *Held*, that it was not testamentary in its character, and, therefore, not a valid execution of the power.—*Marjoribanks v. Hovenden*, 6 I. E. R. 238; Dr. Rep. temp. Sug. 11. (C.)

7. Lands were settled to the use of the husband R. for life, and a term of 500 years was created to secure a jointure for the wife, and £8000 for the issue of the marriage, in case the wife should die in the lifetime of R., to be divided between them if more than one, in such shares as the husband should appoint; subject thereto the lands were limited to R. in fee. R. devised different parts of the settled lands to his first and second sons in strict settlement, with power of jointuring and charging for younger children's portions; and after reciting his power under the settlement, in pursuance of it, and of every other power reserved to him, gave and appointed £1 to his eldest son, and the remainder of the £8000 among his other children. He gave one of his daughters £1000 in addition to the sum appointed to her, and charged it on part of the lands devised to one of his sons; and directed that if all his younger children should die before the portions became payable, the £8000 should sink into the inheritance. He also directed the residue of his personal estate, after payment of his funeral expenses, debts, and legacies, to be applied *pro tanto* to discharge the £8000 in exoneration of his real estate. R. died in the lifetime of his wife. *Held*, that the settled lands were well charged with the £8000.—*Mandeville v. Roe*, 7 I. E. R. 253; 1 Jon & L. 371. (C.)

8. A. having power to give a fund to all and every her child or children, and to the exclusion of any one or more of them, in such shares and at such times as she should appoint, by will, after reciting that her daughter had gone into a convent, bequeathed £1000, part of the fund, if her daughter should change her mind and return to her family and friends, in trust to pay the interest to her for life, remainder to her children, if any; and in case of her either not leaving the convent or not

leaving issue, the £1000 to go to A.'s other children. The daughter continued in the convent. *Held*, that this was a gift on a contingency authorised by the power, and that the daughter was not entitled to the interest or any part of it as unappointed, but that it went with the principal, which should be invested, with liberty to the legatees in remainder to apply for it on her death.

By a will, made under a power, personal property was given to such children as A. should have living at her death, in default of such issue, over. Other personal property was bequeathed to M., wife of C., for her separate use; and if she died without issue by her present husband, or by any other husband she might thereafter take, to other persons. *Held*, that M. took the money absolutely, for her separate use.—*Caulfield v. Maguire*, 8 I. E. R. 164; 2 Jon. & L. 141. (C.)

1. A., having a power of appointing among his children, appointed a large portion of the property to one son, B., who by deed shortly after mortgaged it. Both deeds were prepared by the mortgagee's solicitor, but were attested by the family solicitor of A. and B. The mortgage and receipt endorsed treated the money as paid to B.; but A., who had a legal estate, was a party to the mortgage, and the mortgagee wrote a letter of the same date to A., promising not to call in the money for three years. A. and B. joined in a collateral bond. The draft mortgage furnished to the family solicitor differed in date from that executed. An underhand agreement was alleged, but not proved, to have been made by the mortgagee's solicitor, against whom the bill was dismissed by consent. There was no proof that A. received the money, except a transfer to his credit at a banker's, a considerable time after. He became a bankrupt. In a suit to impeach the transaction as a fraud on the power, and unfair—*Held*, that although the transaction was suspicious, it must be supported in favour of the mortgagee.—*Hamilton v. Kirwan*, 8 I. E. R. 278; 2 Jon. & L. 393. (C.)

2. Though a contract, by a tenant for life with a leasing power, to lease, cannot be enforced as an execution of the power, it may be partially enforced by decreeing a lease for the life of the tenant for life, if the contract was *bona fide*, and more especially if there has been an outlay on the faith of it.—*Dyas v. Cruise*, 8 I. E. R. 407; 2 Jon. & L. 461. (C.)—[*See s. c.*, 9 I. E. R. 256. (R.)]

3. The Lagan Nav. Act created a joint-stock company, and enacted that it should be lawful for every subscriber and person advancing money under the Act, and through whose estate the navigation passed, to charge his real estate for the use of his younger children, with the payment of such sums or other interest in the joint stock as he should assign or bequeath to his heir, it being deemed fit that the proprietors of estates through which the navigation passed should have an interest in it. A., through whose estate the navigation passed, tenant for life under a deed of 1761,

with powers of jointuring and leasing, remainder in tail to his eldest son, B., made advances, and took shares before 1791. In that year A. and B. suffered recoveries, and limited the estates anew, subject to a joint power of appointment, under which, in 1792, they appointed the estates, subject to all powers vested in A., to X., in order that he might join in a re-settlement. By a re-settlement in 1792, reciting A.'s powers under the deed of 1761, and an agreement to re-settle the estate, subject to the powers thereafter mentioned, they were conveyed to A. for life, remainder to B. for life, remainder to his first and other sons in tail, subject to a term and jointure under the deed of 1761; but with no saving of any other powers, and giving a new power to jointure, and new and different leasing powers to A., and other usual powers to him and B. A. made further advances; by will devised his shares in the navigation to B.; and charged their amount on the estate for his younger son. *Held*, that the power to charge as given by the Act would not be destroyed by the recovery alone, unless the parties intended it.

That the re-settlement in 1792 amounted to a contract not to exercise the power as to past advances, and the power to charge could be exercised by A. only as to subsequent advances.

That the direction to give the shares to his heir was complied with, and the power well exercised by giving them to B., though he was only tenant for life in remainder.

The younger son, in whose favour the charge was made, being also A.'s executor, got possession of debentures representing A.'s shares, and, having lost them, joined in application for new shares, which were granted on the face of them in lieu of the old ones; and delivered them over to B., the tenant for life. *Held*, that there being no fraud, this transaction did not affect his right to the charge under A.'s will.—*Stewart v. Marquis of Donegal*, 8 I. E. R. 621; 2 Jon. & L. 636. (C.)

4. A., having a power to appoint an estate to the use of all and every his child and children for any estates or interests, and in any shares, and subject to any charges and payments to one or more of them, devised it in trust to apply the rents, until the eldest son attained age, to the maintenance and education of all the children, and thereout to pay the interest of his debts and so much of the principal as the surplus would reach. He charged the estate with £3000 for the younger children, and if the eldest son should, by business or marriage, or otherwise, be enabled to pay off the £3000, that the trustees should convey the lands to him; if the eldest son should not pay it, to the second or third sons on the same conditions; and if none of the sons should take or accept the estate, that the trustees should sell the estate, pay off the father's debts, and divide the surplus among all the children. *Held*, that the will was a good equitable execution of the power, the portion of it which exceeded the power being separable, and the £3000 being a charge and

not a personal condition.—*Richardson v. Simpson*, 9 I. E. R. 367; 3 Jon. & L. 540. (C.)

1. A., entitled to one-sixth of leasehold lands under the will of T.; and having a power of appointment over another sixth, under the will of C., both wills being nearly of the same date, devised all "his property" in the lands bequeathed "by the will of C.;" speaking of it as property of which he was possessed, and giving it for purposes in common with other property which he owned absolutely. *Held*, merely a *falsa demonstratio*, and to apply only to the property he was entitled to under T.'s will.—*Lendrick v. Russell*, 10 I. E. R. 269. (C.)

2. £8000 was bequeathed in trust for E. for her separate use for life, and at the decease of E. that two-thirds of the sum should remain for the use of the child and children of E.; the remaining third thereof she should be at liberty to dispose of by her will; and failing such disposition, that the said remaining third should go to the use of the child or children of E. in equal proportions. By a settlement, executed upon E.'s marriage, she, according to her right and interest therein, and in consideration of the marriage, assigned to trustees the £8000 in trust, after the decease of the survivor of E. and her husband, if there should be issue of the marriage one or more children, to pay it over among such issue as they should by deed or will appoint; in default of appointment, to the issue, in equal shares. E. covenanted for further assurance. There were two children. E., by will, in virtue of the power given her by the will of her father, and of all other powers enabling her in that behalf, devised and bequeathed one-third of £8000, in trust, to pay two legacies to strangers; and as to the residue of said one-third, in trust, for the use of one of the children, whom she also appointed residuary legatee. *Held*, that the will of E. was an ineffectual appointment of the one-third, so far as it was inconsistent with the trusts of the settlement, and therefore the appointment of the two legacies to strangers was void; but that the appointment of the residue to the child of E. was valid.

The donee of a power, although to be executed by will only, may bind himself not to execute it, or not to execute it except under restrictions.—*In re Chambers*, 11 I. E. R. 518. (R.)

3. Two sums were charged on real estate to be divided among the younger children of A., one sum in such parts and proportions, &c., the other in such shares and manner as he should appoint. By will he recited the powers, and directed his executors to raise the two sums and apply them together with the rest of his personal estate in discharge of legacies bequeathed to his younger children.

*Semble*—A good execution of the powers.—*Van Reizenstein v. Magan*, 12 I. E. R. 415. (R.)

4. By a petition presented under the Ch. Reg. (Ir.) Act 1850, s. 11, it appeared that A.,

entitled to the interest of a legacy of £3000 during her life, with a power to appoint the principal amongst her children (which power did not authorise an exclusive appointment), having three sons and a daughter, by deed in 1834 appointed that sum equally amongst her two younger sons and her daughter, and made a provision *aliunde* for her eldest son. The daughter married. The eldest son died an infant.

The petition stated that A., having been advised that the appointment in 1834 was not a valid execution of the power, by deed in 1850 appointed £1900 to one of the surviving sons, £1000 to the other, and £50 to the daughter, and left £50 unappointed. The petition by the two surviving sons prayed that the appointment of 1834 should be declared invalid, and that the appointment of 1850 should be declared valid. Counsel appeared at the hearing for the daughter, and supported the prayer of the petition. Her husband resisted the petition; and in his affidavit stated that his wife was, at the instigation of A., living separate from him, and that A. had executed the latter appointment in order to defeat the former, on faith of which he had married the daughter. The affidavit also alleged that A. was in collusion with her sons for the purpose of obtaining the fund, or a large portion of it, to pay her own debts. There was not any evidence given on either side. The Court refused to make the declaration prayed for, and dismissed the petition, without prejudice, and without costs.

The jurisdiction created by the Ch. Reg. (Ir.) Act 1850, s. 11, is to be exercised with the greatest possible caution. All facts material to the formation of a correct decision upon each case should be contained within the four corners of the petition.—*In re O'Reilly*, 1 I. C. R. 497. (C.)—[*See s. c.*, 1 I. C. R. 208. (C.)]

5. A. devised an estate *pur autre vie* in B. and G., and a term for years in S., upon trust for his son for life, remainder over; and also empowered that son X. "to make a settlement for the use of any wife he might marry, and to incur the properties for that use, and to the use of any issue lawfully begotten." The donee of the power exercised it on his marriage in 1805 in favour of his wife, and reserved a power to charge a jointure for any future wife. The first wife having died, he, on his second marriage in 1815, executed a settlement reciting his title to the premises under the will, but without allusion in that recital to the power contained in the will, and also reciting the settlement of 1805, and the reservation therein of a power to grant a jointure to a future wife, and then granting to trustees for the second wife a jointure of £100 per annum, "chargeable upon B. and S.; and chargeable, if they should be insufficient for payment thereof, upon all and every other property real or personal of which he was then or should thereafter be possessed of, or which he should die possessed of, in lieu of dower," &c. *Held*, that the power in the will might be exercised in favour of the second

wife), notwithstanding the former exercise of it in favour of the first wife.

That the settlement of 1815 was a valid execution of the power in favour of the second wife, although that settlement contained no reference to that power, and only alluded to the reservation in the settlement of 1805.

That G., although not specified by name in the settlement of 1815, was charged thereby with the jointure in favour of the second wife.

That it was within the jurisdiction of this Court to appoint a receiver over the lands for the purpose of collecting the arrears of that jointure.—*Maulby v. M.*, 2 I. C. R. 32; 4 I. Jur. 333. (C.)

1. C. had a power to charge X. with £1000; and, after limitations, the reversion was limited to him in fee. C., by will, after referring to the power, proceeded:—"I charge the said lands, and direct my executors do raise out of the lands, and which sum of £1000 I give and direct that the same may be paid to my daughter E." C. devised the reversion of X. to F., and gave the residue of his real and personal property to E. E. died in C.'s lifetime. *Held*, that the power was well executed, and that the charge must be raised for the benefit of C.'s next-of-kin.—*Fosberry v. Smith*, 5 I. C. R. 321. (C.)

2. By settlement of 1810, power was given to A., the intended husband, to appoint to all and every, or any one or more of the children, grandchildren, or other issue of the marriage, in such manner and form, and if more than one, in such parts, shares, and proportions, and for such estate and estates, time or times, and for such interests, and with such limitations over, or substitutions or charges in favour of any one or more of the children, grandchildren, and issue respectively, and either by way of legacy, portion, present interest, remainder or otherwise, as he should by deed or will direct; it being the true intent of the parties that A. might either divide the premises in such portions as he should think fit amongst his children, or appoint the entire to one or more child or children, and charge the premises by way of pecuniary provision for the other children of the marriage. Power was also given to A. to charge £200 for his own benefit, and a jointure and portions for a second wife, and the children of a second marriage.

By settlement in 1844, by A. and B., his eldest son, on B.'s marriage—reciting the power in the settlement of 1810, and the powers to A. to charge, and that A. had agreed to release the latter powers, and that the lands in which A. had a life estate were subject to various debts, charges and incumbrances stated in a schedule, and that A. had made no appointment of the lands.—A. appointed the lands after his own death, but subject to the debts, charges and incumbrances thereinbefore mentioned, and then affecting the lands, and released his power of charging the lands with a jointure and portions. A present annuity of £200 a-year, and

a jointure of £300 for his intended wife, were provided and secured by a term of 100 years. A term of 200 years *pursue* to the term of 100 years was created, to raise £4000 portions for the younger children of A. The schedule to the deed comprised the £4000 portions, and £530, a bond debt of both father and son.

*Semble*—The power would have authorised an exclusive appointment; but—

*Held*, that the deed of 1844 operated as an appointment of the estate, subject to a charge of £4000, which took priority of the jointure to B.'s wife.

That a charge of the bond debt was created by the recital, and by the appointment subject to it, and also had priority over the jointure.

That, independently of the power, the £4000 was a charge in priority to the jointure, under the deed of 1844.—*In re Nash*, 5 I. C. R. 384. (P.C.)

3. A., by marriage settlement in Nov. 1823, conveyed lands to trustees for a term, upon trust to raise £20,000, of the late currency, to be paid to and divided amongst the children of the marriage, in such shares, manner, and form, at such ages, days, and times, and subject to such restrictions, as A. should by deed or will appoint. There were eight children of the marriage, some of whom were born after 1834.

On the 7th of Sept. (April in the judgment) 1843, A., by will, after referring to his power, appointed the interest of the £20,000 to his wife until his children severally attained age, to be applied to their maintenance, in such proportions as she should judge right, provided that his eldest son, S., should, on attaining the age of twenty-three, be paid an annual sum of £45, and each of the remaining children, on attaining such age, the annual sum of £35 out of the interest of £20,000; and that his children, on respectively attaining the age of twenty-three years, or marrying under that age, with consent, should be paid the following sums out of the charge, viz.: S. £600, and to each of the other children £2540; and if any of them died under the age of thirty-three years, or married without consent, that the share of the child so dying or marrying should, together with the residue of the sum, be distributed equally amongst the younger children who should attain the age of thirty-three years, or marry with consent, subject to the payment of the annual sums before mentioned, which he intended to be paid to each of them until he or she received their portion of the charge. *Held*, a valid appointment of the shares in which the children were to take.—*Grogan v. Dopping*, 6 I. C. R. 265; 2 I. Jur. N. S. 171. (C.)

4. A fund was vested in the trustees of a settlement, in trust to pay the principal in such shares, &c., as the husband and wife, during their joint lives, or the survivor of them, should appoint, among their issue; and if no such appointment, the principal and interest due thereon at the decease of the survivor of the husband and wife, to be divided between the issue, share and share alike; and

if but one child living at the decease of the survivor of the husband and wife, the principal and the interest then due to go and be paid to that one. But if no such issue living at the decease of the survivor of the husband and wife, or should there happen to be issue then living, and that such issue should happen to die before respectively attaining age, as to the males unmarried and without issue, or eighteen years, or marriage as to the females, then the principal and interest due at the decease of the survivor of the children, and the securities taken for the same, should be paid to the survivor of the husband and wife. *Held*, that, in default of appointment, the portions vested in males at twenty-one or marriage, and in females at eighteen or marriage; or if they vested in each child at its birth, they devolved on the death of a male under twenty-one unmarried and without issue, and of a female under eighteen and unmarried.

That the representative of children who died under fourteen and unmarried in their father's and mother's lifetime, took nothing.

That the representative of a daughter who married, attained eighteen, and died in her father's lifetime, was entitled to a portion.

A., having a power of appointing among his children a fund, and having other property, by will, after making bequests, directed that if his property exceeded £4000, the excess should be divided between his remaining children; and should either of them be dead, leaving a family, then his or her portion was to be given to her children. *Held*, that the will was not an execution of the power.—*In re Dennis' Trusts*, 6 I. C. R. 422. (R.)

1. A., tenant for life of estates, with a power to appoint them to his issue male, and to charge a sum for the benefit of his younger children, on the marriage of his third son, executed a bond and warrant of attorney, on which judgment was entered, for a sum of money as a provision for him. On the marriage of a daughter he also made a provision for her, by way of an annuity charged on one of the settled estates. He afterwards, by will, devised certain of the estates to his eldest son, subject to all his debts and incumbrances of every description, and subject to charges made by his will in favour of his other children. He then charged other sums in favour of others of his children, and devised an estate to his fifth son, freed and exonerated from all his debts, charges, and legacies; his will being, that if any creditor should recover any demand from the lands so devised to his fifth son, it should be recouped by other estates devised to his eldest son. He stated that he had avoided mentioning his married children, as he had already provided for them, by bond or otherwise, at their respective marriages, fully and adequately to the provisions made thereby for his other children. A. did not appear to have left other property but that which was the subject of his power. *Held*, that the charge of the judgment debt to the third son by the will operated as an execution of the power to charge for younger children.

That an instrument should operate as an execution of a power, it is not necessary that the donee should intend to execute the power, or that he should have it in contemplation. It is sufficient if the act which he intends to do, or the benefit which he intends to confer, cannot be done or conferred otherwise than by an execution of the power.—*In re Morgan*, 7 I. C. R. 18. (P.C.)—[See next case.]

2. A., tenant for life of estates, with a power to charge them with £7000, for the benefit of his younger children, executed on the marriage of P., his third son, a bond and warrant of attorney, on which judgment was entered, to secure £1400 as a provision for him. He devised his estates to his eldest son, subject to his debts and incumbrances of every kind; bequeathed a legacy of £2000 to his daughter, M., and a legacy of £1000 to his son H., charging these legacies on the said estates in exercise of the power. A. concluded by stating that he had avoided making mention, in his will, of his married children, as he had already, by bond or otherwise, made provision for them at their respective marriages, adequate to the provision made by his will for his other children.

It having been decided (7 I. C. R. 18, P.C.) that the charge of the judgment debt to P., by the will, operated as an execution of the power to charge for younger children—*Held* (overruling a decision of the I. E. Court), that the charge of £1400 had a priority over the legacies bequeathed to M. and H.—*In re Morgan*, 8 I. C. R. 266. (C.A.)

3. A husband, tenant for life of his estate, with a power to charge a jointure for a second wife, by articles executed on his first marriage, covenanted that if there should be a child or children of that marriage he would assign the wife's fortune, as also his own property in lands and money, among such child or children, in such manner as he (the husband) by deed or will should appoint. But, if the wife should survive the husband, that an annuity should be paid to her out of his estate, which was stated in the articles to be the absolute property of the husband. It was agreed that if the wife's fortune should not be paid, the articles should be void.

*Quere*—Whether the articles amounted to a contract by the husband which precluded him from charging a jointure for a second wife?—*Barron v. Constable*, 7 I. C. R. 467; 3 I. Jur. N. S. 312. (R.)

4. A., having a general power of appointment over a fund which was settled on her husband for life, by will bequeathed legacies thereout, and the remainder of the fund, share and share alike, to her sisters; and as to "any other" residue of moneys or property not specified or disposed of, she directed it to be given share and share alike, to her then surviving sisters, who might be living when her will and the bequests therein might become available. One of the sisters died in A.'s lifetime, who died before her husband, *Held*, that the lapsed share of a deceased sister passed under the general residuary



clause to the surviving sisters. That those sisters only who survived the husband took under the general residuary clause.—*Hickson v. Wolfe*, 9 I. C. R. 144. (C.A.)—[Affirming the Rolls decision, 7 I. C. R. 452.]

1. A., having a power to appoint by deed or will the lands of D. (held with other lands for lives renewable for ever, and subject to a proportional rent of £19) to the use of such child or children of his marriage in such shares, &c., or the whole to one of such children, for such estates, and with such conditions, &c., and limitations over for the benefit of some or one of such children, and subject to such charges for the other or others of such children as he should appoint, purchased the reversion of the lands of D.; and by a settlement on the marriage of B., his eldest son, reciting that he was seized in fee of D. and that it had been agreed that an annuity to be thereby granted and charged on D. should be assigned upon the trusts of the settlement, granted an annuity of £100, charged on D. for 100 years, upon trust, after the decease of the survivor of A. and his wife, to pay the same to B. for life, and after his decease to C. (B.'s intended wife), so long as there should be issue of the marriage, and she should remain a widow; and after the decease of the survivor, or if C. should survive B., and there should have been no issue, or she should marry again, in trust for the executors, &c., of A. By will, A., reciting his power, devised all his right to D. to his three sons, in trust, by sale, &c., to raise a sum for his younger children. *Held*, that the settlement was an execution of the power, and that the annuity was charged on the entire interest in the lands of D., and not on the reversion only.

That the settlement operated as an appointment to B., and a settlement by him on C., and that she, though not an object of the power, was therefore entitled to the annuity after B.'s death.—*Irwin v. I.*, 10 I. C. R. 29. (R.)

2. Tenant for life had power to charge a jointure not exceeding the proportion of £100 yearly for every £1000 *bona fide* received with his wife. Her life estate in a leasehold interest, producing £206 yearly, was by the marriage settlement conveyed in trust for the husband for life; after his decease to his wife, for whom he charged a jointure of £200 a year. *Held*, a good execution of the power.—*Brereton v. Barry*, 6 I. Jur. N. S. 117. (C.A.)

3. A., having a power to appoint real estate and £4000 to all or any, or one or more of the children, or more remote issue of his marriage, made his will before any child was born, but while the wife was *enroute*, bequeathing all his property on trust, in the event of his leaving one child, that he or she should inherit all his landed and personal property; but if he left a son and daughter, he devised and bequeathed all his landed and personal property to his son, save and except £4000 to his daughter.

A. died, having no real estate except what was the subject of the power, but considerable

personal estate, and leaving two sons and two daughters. *Held*, that the will did not operate as an execution of the power over the real estate, as the devise was either void for uncertainty, or conditional on events which had not happened.

That the will did not operate as an execution of the power over the £4000, the Statute of Wills (1 Vic., c. 26, s. 27) applying to general powers, and not to special powers in favour of particular objects.—*Russell v. R.*, 12 I. C. R. 377. (R.)

4. By settlement executed on the marriage of B. in 1811, the S. estate was conveyed to trustees to the use of A. for life; remainder to B. for life; remainder to the first and other sons of B. in tail, subject to a term, the trusts of which were, that if there should be an eldest or only son, and one or more younger children of the marriage, to raise £2000 for the portion or portions of all or every such younger child or children; if but one younger child, the whole to be paid to such only younger child; and, if two or more, to be divided as B., by deed or will should appoint, &c., and for default of appointment, to be equally divided. Provided that if any of the younger children should die before his portion became payable, or that any younger son should become an eldest son before he attained age, the portion or portions of such of them so dying, or becoming an eldest or only son, should go and be equally divided amongst the survivors or survivor, or others or other of them.

By the same settlement, £2000 was charged on the X. estate (which was not otherwise the subject of that settlement), upon trust, after the decease of B., for the same purposes as were thereinbefore declared concerning the £2000 charged on the S. estate. There were six children of the marriage, the two eldest of whom were C. and D. In 1836, C. being of age, the said estate was disentailed, and resettled by a deed, under which C. and D. took life estates, with remainder to their male issue. In 1839, on the marriage of D., B. by deed appointed the £2000 charged on the S. estate, and £500 of the £2000 charged on the X. estate, upon trusts, in favour of D. and his children, provided that, if under the limitations contained in the settlements of 1811 and 1836, or either of them, D. should succeed to an estate tail in possession in the S. estate, that appointment should not take effect; and the £2500 should belong to the remaining younger children of B. as he should appoint; and in default of appointment, equally. In 1841 the S. estate was re-settled in pursuance of a power of revocation in the deed of 1836, to B. for life; remainder to C. for life; remainder to his first and other sons in tail; remainder to D. for life; remainder to his first and other sons in tail.

In 1853, C. died without issue. D. became entitled to the estates under the last mentioned deed.

*Held*, that supposing the appointment of 1839 to have been avoided by D. having become an eldest son, his share in the two sums of £2000 in default of appointment had not

been divested, as he had not become an eldest son before he attained the age of twenty-one.

That the X. estate not being subject to the settlement of 1811, the appointment of £500 of the £2000 charged on that estate, was not divested, by D. having as eldest son, succeeded to the S. estate.

That D. having, as an eldest son, succeeded to an estate for life under the deed of 1841, and not to an estate tail under the deeds of 1811 or 1836, the appointment of 1839 was not defeated.

*Semble*—The Court would not, on a petition under the Trustee Relief Act to draw out the £2000 charged on the X. estate, and in the absence of minors claiming under the appointment of 1839, determine the right to the fund adversely to them. — *Ex parte Smyth*, 12 I. C. R. 487. (R.)

1. A., having power to appoint to his children in remainder, after his brother's death, by will, left all the property of every kind he died possessed of, or was entitled to by reversion or otherwise, to his wife, giving her the power of dividing his property among his children, as she might think proper; and by a codicil, reciting that he had, on the marriage of his eldest son, executed a deed conveying his interest in other lands, over which he had a power of appointment, he desired the trustees of his will to hand over to his eldest son the reversionary property of every kind to which he was entitled after the death of his brother; the son binding himself to pay the £3000 to his younger brother and sisters. He appointed the eldest son joint executor with his wife. A. had no other property on which the codicil could operate, which would be sufficient to pay the £3000. *Held*, that the codicil was a good execution of the power. *Jones v. J.*, 13 I. C. R. 409. (R.)

2. By settlement, executed on the marriage of A. with B., A. granted lands, of which he was seized in *quasi* fee, to trustees to the use of himself for life, remainder to the use of the trustees for 99 years, if B. should so long live, upon trust to pay to B., out of the rents, an annual jointure of £400, and as to the surplus rents upon trusts for the issue. The settlement provided that, if the rents should, during the 99 years, be insufficient to pay B.'s jointure of £400, it should be lawful for the trustees, by B.'s written direction, to raise the deficiency by mortgage or demise of the lands for any term of years. There was no issue. B. survived A.: and by will, after reciting that there were due to her arrears of jointure, bequeathed them to C. B. had not in her life given to her trustees any written directions to raise the arrears by mortgage or demise. Her executor filed in the L. E. Court a petition to sell the fee. *Held*, that B.'s will did not amount to a direction in writing to her trustees, within the meaning of the proviso; that they had no power to create a term for the payment of the arrears; and that there was no estate in the land which the Court

could sell to raise them.—*In re St. George's Estate*, 14 I. C. R. 447; 8 I. Jur. N. S. 277. (C.A.)

### I. 3. Compliance with Conditions.

3. When an appointment has a condition annexed, if there appears to be a clear intention to benefit the appointee, the Court will hold the appointment good, discharged of the condition.—*Hay v. Watkins*, 2 Con. & L. 157; 3 Dr. & War. 339; 5 I. E. R. 273. (C.)

4. The execution of a power to appoint a jointure and portions for children by deed, supported in equity though executed by will. By marriage articles a provision was made for the intended wife and the children of the marriage; and a power given to the husband to appoint a jointure for any wife or wives he might marry, and in like manner to appoint portions for younger children. *Held*, that the power to appoint a jointure and portions was confined to the children of a second or subsequent marriage.—*Mills v. M.*, 8 I. E. R. 192. (C.)—[*See s. c.*, 9 I. E. R. 299; 3 Jon. & L. 242. (C.)]

5. Under a power, reserved in a mortgage, to make leases for any term, provided the rents as set forth in a schedule were not thereby diminished, the mortgagor granted a lease for 300 years, and soon afterwards granted a second lease of the premises comprised in the former lease, together with other portions of the mortgaged property, and reserved a rent in pursuance of the powers contained in the deed of mortgage. *Held* (reversing the decision of the Court below), that the second lease, being strictly within the terms of the power, was valid, although concurrent.

*Held* (overruling the decision of the M. R.), that the mode of appointment given under the power as originally created, being by will, the marriage settlement was ineffectual as an appointment; and that the appointment by the will of the donee of the power was valid, being uncontrolled by the provisions of the settlement.—*In re Wrixon's Estate*, 4 I. Jur. 73. (P.C.)

6. When the appeal is from the whole decree or order, the ptr.'s counsel begins.

A tenant for life had a power of charging a jointure, not exceeding £100 a-year, for every £1000 which he should actually and *bona fide* receive with his wife. By his marriage settlement a life estate of an intended wife in a chattel interest, which produced £206 a-year, was conveyed in trust for the husband for life, and after his decease for his wife. The husband charged a jointure of £200 a-year. *Held*, that the power was not well executed, the condition not having been complied with.

*Semble*—A fortune, consisting of fee-simple land, or stock, or of a well-secured mortgage, would authorise the execution of such a power. — *Brereton v. Barry*, 10 I. C. R. 376. (R.)

## I. 4. By Married Women.

1. By marriage settlement, properties belonging to A., the intended wife, were settled on the husband and wife for their lives, and for the survivor's life; then to the use of their issue; in default of issue, to the use of that person to whom A. should appoint by will. There was not any issue. By an instrument in the form of a deed-poll, reciting the antecedent deeds, A. appointed that, if she died without issue, all the properties should, after her death, go to her husband absolutely. This instrument was stamped and attested as a deed. A memorial of it was lodged in the Registry Office. *Held*, that the instrument was a deed in substance and in form, and was therefore an invalid execution of the power. — *Marjoribanks v. Hovenden*, 6 I. E. R. 238; Dr. Rep. temp. Sug. 11. (C.)

## I. 5. Exclusive and Illusory Appointments.

[See APPOINTMENTS, ILLUSORY, OR EXCLUSIVE.]

2. M. bequeathed £4000 upon trust for his wife for life, and, after her decease, amongst such of his children as should then be living, or the issue of such of them as might be then dead, in such proportions as his wife should appoint; in default of appointment, amongst such of his children, except F. and B. (who should not be entitled to any share thereof), as should be then living, and amongst the issue of such of them as should be then dead. *Held*, that an appointment excluding any of the children could not be made under the above power.

*Held further*, that F. was an object of the power. — *Woodlock v. Mahony*, 6 I. C. R. 236; 2 I. Jur. N. S. 276. (C.)

## I. 6. When the Instrument operates as an Appointment, or as a Conveyance of the Party's Interest.

3. A. was tenant for life, remainder to his children as he should appoint, remainder in default of appointment among them equally. A. joined his eldest son in fines and a recovery, and afterwards, by an innocent conveyance which the son signed, conveyed to a purchaser, the entire purchase money being paid to A. *Held*, that as the transaction, if formal, would have been in fraud of the power, it could not be aided so as to give it operation, first, as an appointment, and then as a conveyance to a purchaser; but that whatever interest the son had at the time passed by the deed.

*Semle*—That as the parties intended to convey wholly independently of the power, the deed could not be construed as an appointment to the son and a conveyance by him to the purchaser. — *Thompson v. Simpson*, 8 I. E. R. 55; 2 Jon. & L. 110. (C.)—[See the decree in this case, 1 Dr. & War. 459. (C.)]

## I. 7. When Void in Equity, et c. contra.

4. A., having a power to appoint a sum amongst his younger children, by will, reciting

the power, bequeathed as follows:—"I leave and bequeath unto my said daughter, Harriet, a further sum of £200, to have me properly buried, and to pay what small debts I may owe at my decease." *Held*, a bad exercise of the power, and that the £200 should go as if it had been unappointed.

When a condition is annexed to an appointment, if there appears a clear intention to benefit the appointee, the Court will hold the appointment good, discharged of the condition. — *Hay v. Watkins*, 5 I. E. R. 273; 3 Dr. & War. 339; 2 Con. & L. 157. (C.)

5. If a power of appointment among children is exercised improperly, as for the benefit of the donee, this Court will interfere and restrain such acts. — *Keily v. K.*, 2 Con. & L. 342; 4 Dr. & War. 38; 5 I. E. R. 435. (C.)

6. When a power is vested in a father, who, when exercising it, makes a stipulation for his own benefit, that disposition is a fraud upon the power. The fraud consists, not in the selection by the father of one child in preference to another, but in the arrangement which makes the appointment, though in form to a child, in effect an appointment to the father himself. To render such an appointment fraudulent, it need not be wholly for the father's benefit. If it is partly for his benefit, that is enough. — *Jackson v. J.*, Dr. Rep. temp. Sugden, 91. (C.)

7. The execution of a power to appoint a jointure and portions for children by deed, supported in Equity, though executed by will.

By marriage articles a provision was made for the intended wife and the children of the marriage, and a power was given to the husband to appoint a jointure for any wife or wives he might marry, and in like manner to appoint portions for younger children. *Held*, that the power to appoint a jointure and portions was confined to the children of a second or subsequent marriage. — *Mills v. M.*, 8 I. E. R. 192. (C.)—[See s. c., 9 I. E. R. 299; 3 Jon. & L. 242. (C.)]

8. An appointment to persons who are, and to others who are not, objects of the power, is invalid as to the latter. — *In re Chambers*, 11 I. E. R. 518. (R.)

9. By settlement, executed in 1800, on his first marriage, A. was seized of an estate for life in lands, remainder to his first and other sons in tail, with power to charge the lands with £2000 for such purposes as he should think fit, and with £1000 for his child or children by any after-taken wife. He also became entitled by subsequent events to two sums of £500 and £1000, charged on the lands by the same deed. There was no issue of the first marriage. By a settlement, executed in 1809, on his second marriage, he charged the lands with £2000 and £1000 under the powers, and assigned the sums of £2000, £500 and £1000, in trust, if there should be two or more younger children or daughters, to be divided amongst them, after the death of their father

and mother, as he should by deed or will appoint, in default of appointment equally; and if there should be no issue of the marriage, or issue one only son, or there should be issue one or more daughter or daughters, or one or more younger children who should die before the time of payment of the portions, then as to the £2000, £1000, and £500, in trust for A., his executors, &c. There was issue, two sons and a daughter (B., C., and D.). The eldest son, B., joined A. in suffering a recovery of the estate. By deed of 1834 it was conveyed subject to a term, to the use of A. for life, remainder to the use of B. for life, remainder to the first and other sons of B. in tail, remainder to C. the second son for life, remainder to the first and other sons of C. in tail, remainder over. The trusts of the term were to raise by sale or mortgage £12,500 to be disposed of as A. and B. or the survivor should appoint, which was raised. A. appointed £250 of the sums of £500, £1000, and £2000 to D., and the residue to C. Afterwards B. died without issue, whereupon C. became entitled subject to the charge of £12,500 to a life estate in part of the lands, the remainder having been sold for payment of incumbrances. *Held*, that the appointment out of the sums of the £500, £1000, and £2000, did not become void by C. becoming an elder son entitled to the lands under the deed of 1834.

*Spencer v. S.*, (8 Sim. 87) and *Peacocke v. Pares* (2 Keen, 689) observed on.—*Tennison v. Moore*, 13 I. E. R. 424. (R.)

1. A., seized of P. and other lands, by will directed all his debts, &c., to be paid; and devised all his real and freehold estates, save a part devised to his wife, upon trust that she and her assigns should after his death receive a rentcharge, with power of distress; and that three of his daughters should receive rentcharges, with like remedy by distress and entry as provided respecting his wife's rentcharge. A. then bequeathed pecuniary legacies to his children, and left all the residue of all his real, freehold, and personal estates, subject to his debts, and the aforesaid legacies and annuities, to the trustees.

By marriage settlement of one of the daughters, one of the rentcharges and part of a legacy were vested in the children of the marriage (some of whom were minors), subject to an exclusive power of appointment in the parents. The minors were depts. in a suit to carry the trusts of the will into execution, in which the Master found, upon the consent of the counsel and trustee of the minors, that the legacies and rentcharges were in equal priority, and that the finding was in the nature of a compromise, and beneficial to the minors. The report was confirmed by a final decree, and the lands of P., among others, were decreed to be sold to pay the several sums reported, in the first instance subject to the rentcharges to the daughters, and if sufficient was not produced to pay the debts and legacies, then discharged of the said rentcharges; and if the sum arising from such sale should be insufficient to pay the debts, legacies, and value of the rentcharges, and

costs, the legatees and devisees of the rentcharges should abate rateably. The lands of P. were sold discharged of the rentcharges. *Held*, allowing exceptions to the Master's report of good title, that the report and decree, being founded on a consent which the Court had no jurisdiction to take, were erroneous, and that the title under it was bad.

Pending an appeal from the above decision, which was affirmed, a deed was executed by the father of the minors, appointing the rentcharge to a son (who was adult when the consent was entered into, and was a party to it), and the legacy to him and two of the minors, who had since come of age. The Lord Chancellor having, on the statement that the ptf. could then show a good title, referred it back to the Master to review his report, who found that a good title could be made by reason of said deed.

*Semble*—That the appointment having been made on an emergency, and not *bona fide* for the end designed by the donor of the power, was void.

*Held*, that the title was too doubtful to be forced on a purchaser, and the exceptions to the Master's further report of good title were also allowed.—*Weir v. Chamley*, 1 I. C. R. 295. (R.)—[*See s. c.*, 2 I. C. R. 566. (R.)]

2. By settlement, made on the marriage of K. with R., the lands of C., held by lease for lives renewable for ever, were limited to K. for life, remainder to the sons of the marriage successively in *quasi* tail; in default of sons, to the daughters as tenants in common, with the usual power to K. to make leases in possession for any term not exceeding three lives or 31 years. There were issue two daughters. R. died, and K. married M., by whom he had several children. K., a few days before his death, "being," as the petition stated, "in a very weak state of health, and knowing that he had but a short time to live, and with a view of making a provision for M. and her children, and in order to enable them to support themselves by their industry after his death," executed this agreement:—"I agree to give a lease of the lands of C. now in my possession to Messrs. J. and P. B., of S., in the county of D., for the term of 31 years or three lives, for the sum of £1. 10s. per Irish acre; said lease to be for the benefit of my wife M. K., and her children; and the lives to be J., N., and R. K., my three sons—T. K. Witness present, J. K.—J. M." This agreement did not appear to have been delivered to the trustees during the life of K., and was not set up by them, or M. and her children, until some months after his death; but the rent reserved by it did not appear to be under the value of the lands. *Held*, that M. and her children were entitled to have a lease executed by the daughters of K., pursuant to the terms of the agreement.—*King v. Roney*, 5 I. C. R. 64. (C.)

3. A., having power to appoint, by deed or will, the lands of D. (held, with others, for lives renewable for ever, and subject to a proportional rent of £19) to the use of such child

or children of his marriage, in such shares, &c., or the whole to one of such children, for such estates and with such conditions, &c., and limitations over, for the benefit of some or one of such children, and subject to such charges for the other or others of such children as he should appoint, purchased the reversion of D.; and afterwards, by settlement on the marriage of B., his eldest son, reciting that he was seized in fee of D., and an agreement that an annuity, to be hereby granted and charged on D., should be assigned upon the trusts of the settlement, granted an annuity of £100 to be charged on D., for 100 years, upon trust, after the decease of the survivor of A. and his wife, to pay the same to B. for life, and after his decease to C. (B.'s intended wife), so long as there should be issue, and she should remain a widow; and after the decease of the survivor, or if C. should predecease B., and there should have been no issue, or she should marry again, in trust for the executors, &c., of A. By will, A., reciting his power, devised all his right to D. to his three sons, in trust, by sale, &c., to raise a sum for his younger children. *Held*, that the settlement was an execution of the power, and that the annuity was charged on the entire interest in D., and not on the reversion only.

That the settlement operated as an appointment to B., and a settlement by him on C., and that she was, therefore, though not an object of the power, entitled to the annuity after B.'s death.—*Irwin v. I.*, 10 I. C. R. 29. (R.)

1. By marriage settlement, lands were limited (amongst other uses) to the use of trustees for 500 years; and, subject to the term, to the use of A. for life, remainder to the use that A.'s intended wife should receive a jointure; and, subject to these limitations, to the use of the first son of the marriage in tail male; remainder over. The trusts of the term of 500 years were, first, to secure the payment of the jointure; and upon further trust, after the decease of A., or in his lifetime, with his consent in writing, to raise £10,000, late Irish currency, as portions for younger children, to be divided between them as A. should appoint. There were issue, an eldest son and two younger children. A., by two deeds-poll, appointed the whole of the £10,000, late Irish currency, to his two younger children, and directed that it should be raised, with interest, immediately.

Before the registration of the deeds-poll, A. had, in conjunction with his eldest son, executed a mortgage of the lands in fee, and had confessed judgments to a large amount, prior to the mortgage, some of which A. charged by mortgage on his life estate. The aggregate amount of the judgments and the mortgage in fee exceeded the value of A.'s life estate. One of A.'s younger children presented a petition for the sale of A.'s life estate of her appointed share of the £10,000, late currency; but the petition was dismissed, at the instance of the creditors on A.'s life estate. A petition was then presented, by the same

younger child, to raise her portion, by a sale of the reversion expectant on the determination of A.'s life estate; but, on cause shown against the conditional order for payment by the remainderman, and various mortgagees and judgment creditors—*Held*, that the petition must be dismissed, with costs; that the power given to A., to raise the £10,000 in his lifetime, was a power appendant to his life estate, and was suspended by his acts; that it was inequitable for him to exercise it, as the effect would be to throw exclusively on the estate of the remainderman the payment of the interest which accrued during A.'s lifetime, and for the payment of which his life estate was the primary fund.

That this equity does not apply to judgment creditors; for, as they do not acquire any security by contract, there is nothing inequitable in diminishing their security by a power of charging. When cause, shown by different parties, who represent but one estate, is allowed, and costs are awarded, they are to be paid to the person first showing cause.—*In re Green's Estate*, 14 I. C. R. 325; 8 I. Jur. N. S. 348. (L.E.C.)

#### I. 8. Execution as to Part of a Fund: when Power may be executed.

2. V., by will, having charged £6000 on his estates, and directed it to be paid among such of his younger children, and in such shares as his wife should appoint; and she having, by will, directed the inheritor as follows:—"Three of the £6000 I wish to have given to the two elder girls." *Held*, a good appointment of £3000; and that the appointees took as tenants in common, not as joint tenants.—*Alloway v. A.*, 4 Dr. & War. 380; 2 Con. & L. 509. (C.)

3. When a settlement gives the wife surviving the husband a power to appoint by will, in default of direction, limitation, or appointment by the husband, the legal effect of such provision is to give the wife a power to appoint, in respect of any portion unappointed by the husband, or not completely or validly appointed by him.

A father, having a power of appointment among all his children, by will, purporting to make an appointment of the whole fund, excluded one child, and appointed a portion of the fund to grandchildren, who were not objects of the power—*Held*, that the appointment was valid, so far as it related to the portion of the fund appointed to the children.

But having given other legacies by the will to the children in whose favour he had appointed—*Held*, that they were bound to elect in favour of the grandchildren.

*Quære*—Whether the Court has jurisdiction to decide a question, on a petition under the Trustee Relief Act?

*Semle*—The Court has not jurisdiction under the Trustee Relief Act to order service of the notice of the petition on parties residing out of the jurisdiction.

The prayer of a petition, and notice thereof, under the Trustee Relief Act, should specify

the exact order sought for, and the precise portions of the fund which are to be transferred to the several parties entitled.—*Ex parte Bernard*, 6 I. C. R. 133; 2 I. Jur. N. S. 226. (R.)

#### I. 9. Excessive Execution of a Power.

1. Lands were settled to the use of A. for life; remainder in fee to such one or more of his children as he should by deed or will appoint to; in default of appointment to the children equally.

A. devised the lands to his wife for life, upon condition that she thereout maintained and educated his children in such manner as his executors should think proper; and that, after defraying all necessary expenses, whatever sum remained in her hands at the end of the year should be accumulated as a fund to pay the legacies thereafter given by him. He bequeathed to each of his younger children £500; and devised the lands to his eldest son in tail, with a direction that, if at his wife's death, a fund sufficient to pay the legacies had not been accumulated, those lands, and others not subject to the power, should stand charged with the deficiency. *Held*, that the devise to the eldest son was not invalidated by the previous devise to the wife, which was, nevertheless, void for excess of the power.

That, during the wife's life, the amount of rents, not required to maintain the younger children and pay the legacies, went as in default of appointment.

That the direction to maintain the younger children, and the bequests to them, were *pro tanto* a good execution of the power.—*Crozier v. C.*, 5 I. E. R. 540; 3 Dr. & War. 373; 2 Con. & L. 294. (C.)

2. Under a power of appointment to children, an appointment to a child's husband is void.—*Congers v. Crosbie*, 7 I. E. R. 302. (E.E.)

3. By a marriage settlement V. conveyed premises to trustees to uses, with such remainders over as V. should by deed, &c., appoint.

V., by deed purporting to be in exercise of the power of appointment, appointed certain of the premises to his eldest son; that deed contained this declaration:—"that the appointee and J." (to whom the premises were appointed in certain events) "respectively shall have full power of making leases, &c." The premises came to J., who exercised that leasing power in favour of the petitioner, who afterwards agreed to sell his interest under the lease to the respondent, upon whose behalf it was objected to the abstract of title—that the deed of appointment was void for excess of the power in the marriage settlement; that the lease to the petitioner was therefore void; and that he could not make title. He filed this petition to enforce specific performance of the respondent's agreement to purchase the interest in the lease. *Held*, that the deed of appointment was in excess of the

power, and that the petition should be dismissed with costs.—*Anderson v. Heron*, 7 I. Jur. N. S. 254. (C.)

4. E., wife of T., being seized of fee-simple lands, E. and T. conveyed them, by fine and deed leading its uses, to a trustee and his heirs, to the use of E. and T., and the survivor, for life; remainder to enable E., by will, to devise them to and among the issue of E. and T., in such shares as she should appoint; "it being however expressly declared that E. is to have power thereby only to devise such shares and proportions in strict settlement upon such child or children, and their lawful issue, whether male or female; but that if such child should die without having such lawful issue who should attain age, or be married, then the lands should be devised to and among the surviving children and their issue who should attain age, in such proportions as E. should by will appoint; in default of appointment, to the children and such of their lawful issue as should attain age or be married, share and share alike. The deed contained a further provision, that if E. made no will, T. might by will "give, devise, and bequeath the said town and lands to and among their issue in the manner aforesaid, in such shares and proportions as he should thereby direct, limit, and appoint;" in default of appointment, to go equally among the said children and their lawful issue, for ever. *Held*, that T. could not appoint greater estates than life estates to his children.

That T. had power to appoint life estates to his children *in esse* at the date of the deed, with remainders to their children, in strict settlement.—*Bell v. B.*, 13 I. C. R. 517. (C.A.)

#### I. 10. Defective Execution: when supplied.

5. Whether, in case of a lease made by tenant for life, having leasing power, the lessee at best rent, without fine, is so far a purchaser as to be entitled in equity to relief, as against the remainderman, from a defect in the execution of the power under which the lease was intended to have been made? *Quære*.

*Semble*—It is questionable whether the rule laid down in text-books, that equity will aid a defective execution of a power only in behalf of purchasers for valuable consideration, or a child, is a sound one.—*Donnell v. Church*, 4 I. E. R. 630. (R.)

6. A. was tenant for life; remainder to his children as he should appoint; remainder, in default of appointment, amongst them equally. A. joined his eldest son in suffering a recovery; and, afterwards, by an innocent conveyance, which that son signed, conveyed to a purchaser. The whole price was paid to A. *Held*, that the transaction, since it would have been, if formal, in fraud of the power, could not be aided so as to give it operation, first, as an appointment, and then as a conveyance to a purchaser; but the son's interest, whatever it was, which he had at the deed's date, passed thereby.—*Thompson v. Simpson*, 8 I. E. R. 55;

2 Jon. & L. 110. (C.)—[See the decree in this case, 1 Dr. & War. 459. (C.)]

1. Lands devised to three sons in such shares, &c., as A. should appoint, in default of appointment as tenants in common, were settled by A.'s direction, the share of each son on himself for life, with remainder, if he should marry with the consent of A., but not otherwise, to secure a jointure, subject to his appointment, to such woman or women as he should so marry; with a power to him, if he should marry with such consent, but not otherwise, to charge £500 for his younger children; remainders in strict settlement. One son married, first with consent, and, after A.'s death, without consent. *Held*, that the consent to the first marriage did not dispense with the necessity of a consent to the second; but, on the apparent intention that the condition of obtaining A.'s consent having become impossible by his death, that the powers did not cease, but might be exercised in favour of the wife and children of the second marriage.

A person having power to charge £500 and appoint it among his younger children, by articles on his first marriage, charged it for the benefit of the younger children of that marriage. He married again. There were younger children of both marriages. By his will he appointed nominal shares to the children of the first, and the entire substantially to those of the second marriage. *Held*, that the power included all younger children, and the articles therefore became invalid as an appointment after the second marriage, and that the power might be re-exercised: but, that the articles were a contract to exercise it substantially for the children of the first marriage, and controlled the power; and that the testamentary appointment was therefore also invalid, and the fund should be divided equally among the younger children of the first marriage, and the younger children of the second marriage, as a class.—*Greene v. G.*, 8 I. E. R. 473; 2 Jon. & L. 529. (C.)

#### I. 11. Non-execution.

2. £8000 were bequeathed in trust for E. for her separate use for life, and at the decease of E. that two-thirds of the sum should be and remain for the use of the child and children of the said E., and the remaining third thereof she should be at liberty to dispose of by her will; and falling such disposition, that the remaining third should go to the use of the said child or children in equal proportions. By settlement, executed upon E.'s marriage, she, according to her right and interest therein, and in consideration of the marriage, assigned the £8000 in trust, after the decease of the survivor of E. and her husband, in case there should be issue of the marriage one or more children, to pay it over among such issue as they should by deed or will appoint; in default of appointment, to the issue in equal shares; E. covenanted for further assurance. There were two children. E. by will, in virtue of the power given her by the will of her father, and of all other powers enabling her

in that behalf, devised and bequeathed one-third of £8000 in trust to pay two legacies to strangers; and as to the residue of said one-third, in trust for the use of one of the children, whom she also appointed residuary legatee. *Held*, that the will of E. was an ineffectual appointment of the one-third, so far as it was inconsistent with the trusts of the settlement, and therefore the appointment of the two legacies to strangers was void; but that the appointment of the residue to the child of E. was valid.

The donee of a power, although to be executed by will only, may bind himself not to execute it, or not to execute it except under certain restrictions.—*In re Chambers*, 11 I. E. R. 518. (R.)

#### II. WHEN POWERS SURVIVE.

3. Lands devised to three sons in such shares, &c., as A. should appoint, and in default of appointment as tenants in common, were settled by A.'s direction, the share of each son on himself for life, with remainder, if he should marry with the consent of A., but not otherwise, to secure a jointure, subject to his appointment, to such woman or women as he should so marry, with a power to him, if he should marry with such consent, but not otherwise, to charge £500 for his younger children; remainders in strict settlement. One son married, first with consent, and after A.'s death, without consent. *Held*, that the consent to the first marriage did not dispense with the necessity of a consent to the second; but on the apparent intention that the condition of obtaining A.'s consent having become impossible by his death, that the powers did not cease, but might be exercised in favour of the wife and children of the second marriage.

A person having a power to charge £500 and appoint it among his younger children, by articles on his first marriage, charged it for the benefit of the younger children of that marriage. He married again. There were younger children of both marriages. By will he appointed nominal shares to the children of the first, and the entire substantially to those of the second marriage. *Held*, that the power included all younger children, and the articles therefore became invalid as an appointment after the second marriage, and that the power might be re-exercised: but, that the articles were a contract to exercise it substantially for the children of the first marriage, and controlled the power; and that the testamentary appointment was therefore also invalid, and the fund should be divided equally among the younger children of the first marriage, and the younger children of the second marriage, as a class.

Costs of raising a family charge under a power, but not of the suit to raise it, given out of the estate.—*Greene v. G.*, 8 I. E. R. 473; 2 Jon. & L. 529. (C.)

#### III. WHEN THEY TEND TO PERPETUITY.

##### IV. LEASING POWERS.

4. A., seized of an undivided moiety of W.,

on his marriage in 1775, conveyed it to the use of his first and other sons, reserving to himself a power to lease for three lives. Having afterwards purchased the other undivided moiety, A., in 1785, leased the whole of W. to B. for lives renewable for ever. In 1797, on the marriage of A.'s eldest son, G., A. conveyed W. to his own use for life; remainder to G.'s use for life; remainder to the use of such of G.'s sons as G. should appoint to. In his covenant against incumbrances A. excepted leases *bona fide* made by him. G. appointed W. to his eldest son, C., and died in A.'s lifetime. C. survived G. On A.'s death, C. filed a bill to set aside the lease of that moiety of W. comprised in the settlement of 1775, as contrary to the leasing power. *Held*, that W. claiming under the settlement of 1795, was bound by the lease of 1785, and could not set it aside.—*Steele v. Mitchell*, 3 I. E. R. 1; 2 Dr. & Wal. 568. (C.)

1. On P.'s marriage, lands, held on a lease for lives renewable for ever, were settled. The settlement gave P. an estate for life, and contained this leasing power: "It shall be lawful for P., and all and every other person or persons to whom any use is hereby limited, when in actual possession of the said lands, &c., to demise the said lands for any number of lives or years, consistent with their respective interests therein, to commence in possession, and not in reversion, remainder, or expectancy," reserving the best rents, without taking any money by way of fine, &c.

P. demised to A., at a farm-rent, for three named lives, with a covenant, that, on failure of any of the three lives, the lessor, his heirs, and assigns, would, on the payment of £5 as a fine upon each life that should happen to die, add to the term of the lease the life of another person, nominated by the lessee, from time to time successively for ever. The Court of Ch. in Ir. decreed specific performance of the covenant for renewal. *Held*, that this lease was not warranted by the power; and that that decree should be reversed, and the bill dismissed with costs.

The appellant had, under the decree, actually paid the costs. The H. of L. declined to order that he should be repaid them, and left him to apply to the Court below on the judgment now pronounced.—*Clark v. Smith*, 9 Cl. & F. 126.—[See the application for costs in the Court below: *Smith v. Clarke*, 5 I. E. R. 423; 3 Dr. & War. 344. (C.)]

2. Under a power to lease at the best rent, the very highest rent that can be obtained is not required. The true criterion is, whether the rent has been fairly obtained without any private advantage to the donee of the power. Therefore an agreement, which the Court treated as subject to the same rule, was enforced, though the rent obtained was below the offers made by less solvent tenants, and below the average at which the lands were valued, when the agreement was fairly made, and was a prudent one.—[*Hartnett v. Yielding* (2 Sch. & Lef. 549) commented on.]

Though a contract to lease by a tenant for

life, with a leasing power, cannot be enforced as an execution of the power, it may be partially enforced by decreeing a lease for the life of the tenant for life, if the contract was *bona fide*, and more especially if there has been an outlay on the faith of it.—*Dyas v. Cruise*, 8 I. E. R. 407; 2 Jon. & L. 460. (C.)

3. D., tenant for life, purporting to exercise a leasing power, made a lease in 1767, covenanting for quiet enjoyment against the acts of all claiming through him. In 1791 and 1792, D. and his son, tenant in tail in remainder, joined in suffering recoveries, and re-settled the estates subject to then existing leases, D.'s son having secured to him an annuity of £2000 and £30,000 for his debts. D. died in 1799, and the estates were re-settled by his son and the then remainderman. In 1848 the lease was impeached as an excess of the power. *Held*, that, on the doctrine of *Taylor v. Stibbert* (2 Ves. jun. 437), and *Stoughton v. Crosbie* (5 I. E. R. 451), the lease was then valid, whether originally void or not.

The doctrine of these cases does not clash with the principle of *Garrard v. Lowderdale* (2 R. & Myl., 451), and similar cases, preventing a stranger from taking advantage of a creditor's deed, or the like, to which he is not a party. The two classes of authorities distinguished.

The owners of the estate being obliged, under the circumstances, to raise the objections to the lease in equity—*Seemle*, the mere lapse of time and acquiescence from 1767 to 1848 would bar them from relief.

A lease impeached for alleged fraud and undervalue—*Held*, under the circumstances valid. Concealment and misrepresentation, relied on in such a case, must be proved fraudulent, and the contract shown to be based upon it, and the very fraud alleged in the bill proved.

A settlement authorised D., for the encouraging of building in B., to demise houses, lands, and tenements in B., upon building or repairing leases, for one, two, or more lives, or to continue during 99 years, to be computed from the day of the date of such lease, or for any term of years not exceeding 99 years, to take effect either in possession or reversion, or to make f. f. grants, so as in all such grants, demises, and leases, there be reserved to continue payable during the continuance of them the best rent to be got without fine, and so as in every such lease or grant there be a clause or condition of re-entry for non-payment of the rent thereupon reserved, and authorised leases under other restrictions of the other premises comprised in it, beside the houses and buildings at B. D. made a lease in 1767 of land and quays in B., with liberty to receive quayage usually payable, and the free use of a canal, *habendum* for three lives and the life of the survivor, and after his death for 99 years from the date of the lease, yielding £8 until 1791, when a subsisting lease of some of the quays would fall in, and £50 for the residue of the term demised; with covenants for building and improving, and a clause of re-entry upon



non-payment of the rent for three months, or breach of the covenants.

*Semble*—This was a good building and repairing lease, though including quayage and the use of the canal, which alone would not be subjects of such a lease.

That the term for lives and years concurrent was within the power; that the rent was well reserved, though the higher sum was not payable for the entire term; and that the clause of re-entry was sufficient, though neither immediate on non-payment, nor in the usual form.

A settlement authorised a tenant for life to make leases and accept fines, to be applied in raising a sum to pay incumbrances, provided that the full amount of the fine should be stated in each lease, and should be all paid to trustees named, or their order. It was agreed that the receipt of the trustees, either in the lease or separately, should be a full discharge to the tenant paying such fine, and no person obtaining such receipt should be answerable, nor his lease liable to impeachment for the misapplication of the fine, or a breach of trust or excess by the trustees. *Held*, no objection to a lease containing a receipt from the trustees for the fine, that the fine was paid in bills or notes, or that it was paid into the hands of a third person, agent for the tenant for life, but who acted for the trustees.

A lease, made under a power requiring the rent to be reserved payable during the continuance of the lease, bore date in June 1827, and reserved the first half-year's rent on the 1st of May then next. *Held*, that the lease was not thereby avoided, though no rent appeared payable from June to Nov. 1827, especially since the objection was not mentioned in the bill; for, if it had been mentioned, debt. might have made a case to explain it, or to be relieved against it.

A power required that in leases of premises then in lease the rent reserved should not be less than the rent then payable out of the same premises. A lease of 1767 had demised quays and other premises, with liberty to receive quayage not exceeding two pence per ton. A lease of 1827, made under the power, demised the quays and premises described as in the lease of 1767, together with the wharfage and quayage of all ships and vessels resorting to the quays and docks (without any limitation of the rate per ton), at a rent of the same amount as was reserved in 1767; to which it was objected that the same rent was not reserved, as the renewal included additional premises. *Held*, not a valid objection, as the rent was not reserved out of the quayage, and by the removal of the restriction the lessor passed nothing new.

By a subsequent lease of 1831, reciting that the unlimited quayage was included by mistake in that of 1827, the premises as originally leased were demised at the same rent and fine as in the lease of 1827, and the unlimited quayage at a small additional fine and rent. *Held*, that the lessee could rely on the lease of 1831, which would have been valid if made in 1827 when the principal sum was paid,

though perhaps impeachable if originating in 1831.

The nature of a right of quayage or wharfage considered.—*Marquis of Donegal v. Grey*, 13 I. E. R. 12. (C.)

1. By settlement, made on the marriage of K. with R., the lands of C., held by lease for lives renewable for ever, were limited to K. for life, with remainder to the sons of the marriage successively in *quasi* tail; and in default of sons, to the daughters as tenants in common, with the usual power to K. to make leases in possession for any term not exceeding three lives, or thirty-one years. There were issue of the marriage two daughters. R. died, and K. married M., by whom he had several children. K., a few days before his death, "being," as the petition stated, "in a very weak state of health, and knowing that he had but a short time to live, and with a view of making a provision for the said M. and her children, and in order to enable them to support themselves by their industry after his death," executed an agreement in the following terms:—"I agree to give a lease of the lands of C., now in my possession, to Messrs. J. and P. B., of S., in the county of D., for the term of thirty-one years, or three lives, for the sum of £1. 10s. per Irish acre; said lease to be for the benefit of my wife, M. K., and her children; and the lives to be J., N., and R. K., my three sons—T. K. Witness present, J. K.—J. M." This agreement did not appear to have been delivered to the trustees during the life of K., and was not set up by them, or M., and her children, until some months after his death; but the rent reserved by it did not appear to be under the value of the lands. *Held*, that M. and her children were entitled to have a lease executed by the daughters of K., pursuant to the terms of the agreement.—*King v. Roney*, 5 I. C. R. 64. (C.)

2. The Court has not power, under the Settled Estates Act (19 & 20 Vic., c. 120), to grant a power to lease in reversion.

The Court's order, granting leasing powers under that Act, does not dispense with the necessity of the party, who takes a lease, investigating the title.—*Ex parte Henchy*, 3 I. Jur. N. S. 73. (R.)

3. Lands were vested in three trustees, upon trusts, in strict settlement, with a leasing power to be exercised by two out of the three trustees, with the consent of the tenant for life. A lease was executed in 1808 by one of the trustees, with the consent of the tenant for life. D., the first tenant in tail, attained age, and, in 1819, the property was resettled. In 1831 the tenant for life died, and D. received the rent reserved by the lease of 1808 up to 1843, when he purchased the lessee's interest, and took possession of the lands comprised in the lease, but did not take a conveyance. On an ejectment brought by a judgment creditor of the lessee, judgment for the ptf. was given for one-third. *Held*, that D. was entitled to a perpetual injunction

against the judgment creditor, relying on the legal estate in the one-third derived by him from the trustee.—*Denny v. Busteed*, 7 I. C. R. 201; 3 I. Jur. N. S. 377. (C.)—[*Affd.*, 8 I. C. R. 49. (C.A.)]

1. A., tenant for life, with a leasing power, remainder to B. in tail, executed a disentailing deed, whereby they conveyed the estate to the use of A., for life, remainder to the use of B., in fee. *Held*, that A.'s leasing power was not extinguished.

A remainderman is not bound by a contract for a lease with the tenant for life, unless it be binding within the provisions of the Statute of Frauds, and within the power of the tenant for life. He is not affected by part performance by the tenant for life.

A written proposal was sent to a tenant for life, for a lease for three lives or thirty-one years, at a rent. He replied that he had not power to execute such a lease; but "If you choose to take the lease in the usual way, I will allow you £20 to get up a cottage, and a lease for your own life." *Held*, that as the answer was not a simple acceptance, but introduced new terms, the proposal and answer were not a sufficient agreement within the Statute of Frauds.—*O'Fay v. Burke*, 8 I. C. R. 225. (R.)—[*Affirmed, ibid.*, 511. (C.A.)]

2. B. recovered a verdict for £500 against C., as tenant for life, who had power to make leases for three lives or thirty-one years, at the best rent and without fine. C., in consideration of B.'s releasing him from the amount of the verdict, made such a lease to him at a reduced rent. The leasing power was contained in a settlement which empowered C. to raise £500 out of the lands. *Held*, that this power authorised the acceptance of a fine upon the making of a lease.—*Scanlan v. M'Carthy*, 6 I. Jur. N. S. 145. (C.)

#### V. WHAT ARE CONSTRUED USUAL POWERS.

##### VI. POWER TO APPOINT TO CHILDREN.

3. A marriage settlement conveyed freeholds upon trust to permit and suffer them to be enjoyed for ever by the issue male of the marriage, in such shares and proportions as the father should appoint.

The father, by indenture, reciting the settlement, in consideration of his eldest son waiving and relinquishing all claim and demand whatsoever, or right as one of the issue male of the marriage, under the power of appointment, and which he did thereby waive and relinquish, and for ever quit claim, and discharge the father thereof, conveyed other lands to a trustee for the son and his issue. *Held*, that the father was entitled to that share of the settled property, to which the eldest son was entitled in default of appointment.—*Barron v. B.*, 2 Jon. 798. (E.E.)

4. When a power is given to appoint a fund among the children as the parent shall direct, and one child is advanced by the parent out of his own funds a portion equivalent to the

share which such child would have taken in the settled fund, if no appointment had been made, the effect of it is to increase the shares of the other children, and not to make the advanced child's share part of the parent's assets.—*Brownlow v. The Earl of Meath*, 2 I. E. R. 383. (C.)

5. By marriage settlement lands were conveyed to A. (the intended husband), his heirs, and assigns; and if A. died, leaving one son or more sons on the body, &c., the elder of such sons, and the heirs male of his body, to be always preferred before the younger; with power to A. "to make such reasonable provision as he should think fit for such younger child or children;" and if A. died leaving no son, but leaving one or more daughters, then to her or them (on attaining age respectively), their heirs and assigns, share and share alike. A., having four sons and four daughters; by will, charged the lands with £1500 to be divided amongst the younger children as therein directed. The first taker disputed A.'s right to charge in favour of daughters, one of whom thereupon filed a bill to raise her share of the £1500. *Held*, that the power was well exercised; and that, since the intent of the settlement evidently was to provide, for all the children, the Court would effectuate it, and support the appointment, by transposing the clause creating the power, and that containing the limitation to the daughters in the event of there not being a son; by which transposition the words "such younger children" would include both sons and daughters.—*Fenton v. F.*, 1 Dr. & Wal. 66. (C.)

6. A., having a power to appoint a sum amongst his children, by will gave a share of it to his daughter "to have him properly buried, and to pay what small debts he might owe at his death." *Held*, a bad appointment.—*Hay v. Watkins*, 5 I. E. R. 273; 3 Dr. & War. 339; 2 Con. & L. 157. (C.)

7. By marriage settlement lands were settled upon the husband for life; remainder to the use of all and every or such one or more of the children of the marriage, for such estate, not exceeding an estate in tail male, as the husband should appoint; in default of appointment, to the first and other sons of the marriage in tail male.

By deed poll the father, A., appointed the settled lands in tail male to his eldest son, B., who had just attained age. Four days later, A. and B. demised part of these lands for lives renewable for ever. The consideration for the lease was £1600, which the lease stated to be applied in paying debts affecting A.'s estate, and renewal fines then due.

In 1807, B., in consideration of the several debts paid for him by A., and of the trust and confidence reposed in him by A., conveyed the settled lands, and all his interest therein, to A., his heirs and assigns.

B. died intestate and without issue. A. survived, and devised the lands, charged with legacies, to the use of his two surviving sons in equal shares, as tenants in common. Four-

teen years after A.'s death, the third son filed this bill to carry into execution the trusts of that will.

The House of Lords, reversing the decree of the Court below, declared, that, before any adjudication could be had on A.'s title to dispose of the lands, an enquiry should be instituted into the validity of the appointment.

The Master enquired, and reported that, at the time of the execution of the appointment and lease, there appeared upon record as against A., judgments to the amount of £2400; that they were all satisfied on the same day, being a day after the execution of the lease; but that he could not state how the consideration money for the lease had been applied, no evidence of the manner of its application having been laid before him, save so far as the statements in the deed of appointment, and in the conveyance of 1837 relative thereto, and the facts relating to the judgments, might be deemed evidence thereof. The report then found that the deed of appointment was valid.

The cause coming on to be heard upon this report. *Held*, that the deed of appointment and the conveyance of 1807 were fraudulent and void, as constituting a dealing by a father for the benefit of himself, and not of the appointee, his son; and that they ought to be set aside.

When a power is vested in a father, and he, in exercising it, makes a stipulation for his own benefit, this Court considers such a disposition as a fraud upon the power. The fraud consists, not in the selection by the father of one child in preference to another, but in the arrangement which makes the appointment, though in form to the child, in effect an appointment to the father himself.

To render such an appointment fraudulent, it need not be wholly for the father's benefit: that it is partly so, suffices.

*Semble*—That the father's will could not be supported as an execution of the power reserved by the marriage settlement.

If the appointment failed—*Quære*, as to the operation of the conveyance of 1807? How far was the power affected by the union of both estates in the father?—*Jackson v. J.*, Dr. Rep. temp. Sugden 91. (C.)

1. Lands, devised to three sons in such shares, &c., as A. should appoint; in default of appointment, as tenants in common, were settled by A.'s direction thus:—each son's share on himself for life, remainder (if he married with A.'s consent, but not otherwise) to secure a jointure, subject to A.'s appointment, to such woman or women as the son should so marry; with a power to the son (if he married with such consent, but not otherwise) to charge £500 for his younger children; remainders in strict settlement. One son married twice; on the first occasion, with A.'s consent; on the second, after A.'s death. *Held*, that consent to the first marriage did not dispense with the necessity of consent to the second; but that, on the apparent intention (A.'s death having rendered the condition impossible of fulfilment), the powers had not ceased, and might be exercised in favour of

the second wife and the children of the second marriage.

A., having power to charge £500, and appoint it among his younger children, by articles on his first marriage, charged it for the benefit of the younger children of that marriage. He married again. There were younger children of both marriages. By will, A. appointed nominal shares to the children of the first marriage; and the bulk to those of the second. *Held*, that the power included all younger children; that after the second marriage, the articles became invalid as an appointment; and that the power might be re-exercised; but that the power was controlled by the articles, which amounted to a contract to exercise it substantially in favour of the children of the first marriage; that the testamentary appointment was invalid; and that the fund should be divided equally among the younger children of the first marriage and those of the second, as a class.—*Greene v. G.*, 8 I. E. R. 473; 2 Jon. & L. 529. (C.)

2. When a power of appointing amongst his children is vested in a father; and he, in exercising it, makes a stipulation for his own benefit, this Court considers that disposition a fraud upon the power. The fraud consists, not in the father's selection of one child in preference to another, but in the arrangement being, though in form to the child, in effect an appointment to the father himself.

To render such an appointment fraudulent it need not be wholly for the father's benefit, that it is partly so suffices.—*Jackson v. J.*, Dr. Rep. temp. Sugden, 91. (C.)

3. Estates were settled, after the death of the husband and wife, to trustees for a term, and, subject thereto, to the husband in fee. The trusts of the term were, if the wife died in the life of the husband leaving children living at her death, to raise £8000 for the portions of such children, to be divided between them in such shares as the husband should by deed or will appoint. The husband died, leaving the wife and several children him surviving; and by will devised part of the settled lands to his eldest son, in strict settlement, with powers of jointuring and charging portions for his younger children; other part of the settled lands to his second son in like manner; and, after reciting that he had, by his settlement, a power of appointing £8000 amongst his children, he, in pursuance of said power, and of every other power to him reserved, gave and appointed the £8000 amongst his children, in certain proportions, and charged it upon the lands. *Held*, that although the contingency upon which the power was given, and to provide for which the particular fund, the £8000, was created, never happened, the gift to the children by the will was good, and took effect out of the estate of the husband.—*Mandeville v. Roe*, 1 Jon. & L. 371; 7 I. E. R. 253. (C.)

4. A. was tenant for life, remainder to his children as he should appoint, remainder in

default of appointment among them equally. A. joined with his eldest son in fines and a recovery, and afterwards, by an innocent conveyance which the son signed, conveyed to a purchaser, the entire purchase money being paid to the father. *Held*, that as the transaction, if formal, would have been in fraud of the power, it could not be aided so as to give it operation, first, as an appointment, and then as a conveyance to a purchaser; but that whatever interest the son had at the time passed by the deed.

*Semble*—That as the parties intended to convey wholly independently of the power, the deed could not be construed as an appointment to the son and a conveyance by him to the purchaser.—*Thompson v. Simpson*, 8 I. E. R. 55; 2 Jon. & L. 110. (C.)—[See the decree, 1 Dr. & War. 459. (C.)]

1. V., having a power to give a fund to all and every her child or children, and to exclude any one or more of them, in such shares and at such times she should by will appoint; after reciting by will that her daughter C. had entered a convent; bequeathed £1000, part of the fund, if C. should change her mind and return to her family and friends, in trust to pay the interest to C. for life; remainder to C.'s children, if any; and, if C. did not leave the convent, or, having done so, left no issue, that £1000 was to go to V.'s other children. C. continued in the convent. *Held*, that this was a gift on a contingency authorised by the power, and that C. was not entitled to the interest or any of it, as if the £1000 had remained unappointed; but that the interest went with the principal, which should be invested with liberty to the legatees in remainder to apply for it on C.'s death.—*Caulfield v. Maguire*, 8 I. E. R. 164; 2 Jon. & L. 141. (C.)

2. Strong suspicion that a father's appointment to his son was for the father's benefit, and was a fraud upon the power, does not suffice to avoid the transaction.—*Hamilton v. Kirwan*, 8 I. E. R. 278; 2 Jon. & L. 393. (C.)

3. A father having a power to appoint an estate to the use of all and every his child and children for any estates or interests, and in any shares, and subject to any charges and payments to one or more of them, devised the estate in trust to apply the rents, until the eldest son attained age, to the maintenance and education of all the children, and thereout to pay the interest of his debts and so much of the principal as the surplus would reach. He charged the estate with £3000 for the younger children, and if the eldest son should, by business, or marriage, or otherwise, be enabled to pay off the £3000, directed that the trustees should convey the lands to him, and if the eldest son should not pay it, to the second or third sons on the same conditions; and if none of the sons should take or accept the estate, that the trustees should sell the estate and pay off the father's debts, and divide the surplus among all the children. *Held*, that the will was a good equitable execution

of the power, the portion of it which exceeded the power being separable, and the £3000 being a charge, and not a personal condition.—*Richardson v. Simpson*, 9 I. E. R. 367; 3 Jon. & L. 540. (C.)

4. Three policies of insurance on the settlor's life were assigned by a voluntary deed on trust for A., and his other children, in such shares, &c., as he should appoint. He, on A.'s marriage, appointed to her £2000 out of the sums secured by the policies. He made a similar appointment on B.'s marriage. By will he appointed £2000 to each of the other children. Two of the policies having dropped before his death—*Held*, that the sums given to A. and B. should be paid in full, according to the priorities of the appointments, and the entire loss fall on the other objects.—*Borough v. Close*, 11 I. E. R. 391. (C.)

5. £8000 were bequeathed in trust for E., for her separate use for life; and at the decease of E. that two-thirds of the sum should be and remain for the use of the child and children of the said E., and the remaining third thereof she should be at liberty to dispose of by her will; and failing such disposition, that the remaining third should go to the use of the said child or children in equal proportions. By settlement, executed upon E.'s marriage, she, according to her right and interest therein, and in consideration of the marriage, assigned the £8000 in trust, after the decease of the survivor of E. and her husband, if there should be issue one or more children, to pay it among such issue as they should by deed or will appoint; in default of appointment, to the issue in equal shares. E. covenanted for further assurance. There were two children. E., in virtue of the power given her by the will of her father, and of all other powers enabling her in that behalf, devised and bequeathed one-third of £8000 in trust to pay two legacies to strangers; and as to the residue of said one-third, in trust for the use of one of the children, whom she appointed residuary legatee. *Held*, that the will of E. was an ineffectual appointment of the one-third so far as it was inconsistent with the trusts of the settlement, and therefore the appointment of the two legacies to strangers was void; but that the appointment of the residue to the child of E. was valid.

The donee of a power, although to be executed by will only, may bind himself not to execute it, or not to execute it except under restrictions.—*In re Chambers*, 11 I. E. R. 518. (R.)

6. Two sums were charged on real estate. to be divided among the younger children of A.; one sum in such proportions, &c., the other in such shares, &c., manner and form, as he should appoint. A.'s will recited the powers, and directed his executors to raise the two sums, and apply them, together with the rest of his personal estate, in discharging legacies bequeathed to his younger children.

*Semble*—A good execution of the powers.—*Van Reitzenstein v. Magan*, 12 I. E. R. 415. (R.)

1. A power of appointment under a will enabled R. to "charge and incumber the lands, &c., for his younger children, lawfully begotten, with a sum not exceeding £2000." R. was tenant for life, and in embarrassed circumstances, and his creditors were in possession of the rents. In pursuance of the power, R. charged £2000 for his two daughters, share and share alike, with interest from the date of the deed until payment. Bill filed after the death of R., by the survivor of the daughters, to raise her share and that of her sister to whom she was personal representative. *Held*, that R. being dead, and it appearing that there was no other issue, the power was legally exercised, and the ptf. entitled to a decree, with arrears of interest for six years before the filing of the bill.—*Hinds v. H.*, 2 I. Jur. 105. (C.)

2. By marriage settlement of 1809, lands were limited to M. for life, remainder to his first and other sons in tail, and a portion was provided for younger children, subject to appointment. In 1834, M., and G. his eldest son, joined in a recovery of part of the lands, which were then charged with a large sum; and limited them to M. for life, remainder to G. for life, and to his first and other sons in tail, remainder to S., the second son. In 1837 M. appointed part of the sum provided for younger children, by the deed of 1809, to his daughter L., and the remainder to S. In 1843 G. died, and S. thereby became entitled to the estate under the deed of 1834. *Held*, that he did not thereby lose his right to the portion provided by the settlement of 1809, and appointed by the deed of 1837.—*Tennison v. Moore*, 2 I. Jur. 195. (C.)—[*Affg. s. c.*, 13 I. E. R. 424. (R.)—Followed: *In re Norcott's Estate*, 14 I. C. R. 315. (L.E.C.)]

3. A deed of appointment is not invalid because executed for the purpose of making title; but is invalid if a pecuniary benefit results directly from its execution to the donee of the power.—*Weir v. Chamley*, 4 I. Jur. 1. (C.)

4. £8000 were charged on K. by a marriage settlement, as portions for children, to be divided between them in such proportions, and to vest in and be paid to such children respectively, at and upon such age, days, or times, and to be subject to such charges, provisoes, and limitations (such charges or limitations being for the benefit of some or one of them), and in such manner as W., the younger, by any deed or deeds, instrument or instruments in writing, or by his last will, should direct or appoint; in default of appointment to be equally divided among such children, share and share alike, the shares of sons to be paid at twenty-one, and the shares of daughters at twenty-one or marriage. W., by will, bequeathed £2000 to his wife, and the interest of the remainder of the money of which he might die possessed, for her own use and for the maintenance and education of his two daughters; and charged K., as he was entitled to do by his marriage settlement, with

£8000, which, together with the residue of his fortune, he wished to be divided in equal shares between his two daughters. He left the residue of his fortune in money, after paying the £2000, to his wife, together with the sum of £8000 charged upon K., to be equally divided between them; the entire to belong to either of his daughters, should the other not arrive at the age of eighteen years. *Held*, that the will operated as an execution of the power under the settlement, and that the portions of the daughters vested at the testator's death, and bore interest from that date. *Murphy v. M.*, 3 I. C. R. 95; 4 I. Jur. 273. (C.)

5. A power to appoint to and amongst children, in such shares and proportions, or to appoint a sum "to be divided to and amongst children in such shares," &c., as the donee of the power shall appoint, does not authorise the exclusion of any of the children.

The statute as to illusory appointments (1 W. 4, c. 46) validated in Equity an appointment of a nominal or illusory share, which was legally valid; but did not validate in Equity an appointment which, because some of the objects of the power were excluded, was invalid, both at Law and in Equity.

When a power of appointment does not warrant the exclusion of any of its objects, an appointment to some of them, and if they die under age, and without issue, to the others, is invalid.

A fund was, by a marriage settlement, directed to be divided among children, as the husband or wife, or the survivor of them, should, by any deed or writing, or by his or her will appoint. The wife made an appointment by will, which the husband wrote and proved. *Held*, that the will was inoperative, either as a joint appointment, or an appointment by the survivor.—*Minchin v. M.*, 3 I. C. R. 167. (R.)

6. A father, having a power of appointment over property, consisting of money and land, in favour of his two children, A. and B., by deed-poll, reciting that £1000 had been paid to A., as a marriage portion, out of the trust fund, and that it was intended as her share of the trust fund, and a satisfaction of her claim thereon, appointed and declared that the £1000 should be the full share of A.; and appointed the remainder of the property to B. By a deed, executed five days afterwards, reciting a mortgage by the father, of property not the subject of the power, to secure a portion of the trust fund lent to him; and that the father was indebted in another sum of £200, and that he had agreed to convey his equity of redemption, in consideration of B., the son, securing an annuity to his mother, and charging the equity of redemption with the debt of £200; the father conveyed the equity of redemption to B., and B. charged it, and the trust property which had been appointed to him, with an annuity for his mother, and with the debt of £200. *Held*, in the absence of evidence of the value of the

equity of redemption, that the appointment could not be impeached by A., as against a purchaser without notice from B.—*Mills v. Spear*, 3 I. C. R. 304. (C.)

1. A marriage settlement recited an intention to secure a jointure for the wife. The property (which was the husband's) was vested in trustees to secure it, subject thereto, upon such uses, and for such persons as the husband should appoint by deed or will; in default thereof, for the children of the marriage, share and share alike. *Held*, that the power was a general one, and not restricted to children of the marriage, by the subsequent limitation in their favour.

The settlor, by will, referred to the settlement; confirmed the jointure; and bequeathed the lands *nominatim*, and all his other property to trustees for the benefit (in the events that happened) of his only daughter (who afterwards died under age, &c.), with remainders over; but did not refer to the power. *Held*, that the power was well executed by the will in favour of the first remainderman.—*Lanauze v. Malone*, 3 I. C. R. 354. (C.)

2. Very informal documents *held*, in favour of a child, to amount to the exercise of a power of appointment.—*Blake v. French*, 5 I. C. R. 246; 1 L. Jur. N. S. 60. (C.)

3. By indenture executed upon his marriage, A. covenanted to convey lands to uses in strict settlement. The indenture provided that, if there should be one or more child or children of the marriage, besides an eldest or only son, such child or children should have the sum of £2000, to be payable as A. should appoint; in default of appointment, to be equally divided among such younger child or children, on their respectively attaining age, or marrying. A. afterwards conveyed the lands to re-lessees, to hold to the uses and upon the trusts declared by the articles. There was issue an eldest son and several younger children. All the younger children, save one, died, without having attained a vested interest in the fund. *Held*, that the younger child, who attained twenty-one, was entitled to have the entire sum of £2000 raised for her benefit.—*In re Martin's Trusts*, 6 I. C. R. 211. (C.A.)

4. M. bequeathed £4000, upon trust for his wife, for life; after her decease, amongst such of his children as should be then living, or the issue of such of them as might be then dead, in such shares and proportions as his wife should appoint; in default of appointment, amongst such of his children, except F. and B. (who should not be entitled to any share thereof), as should be then living, and amongst the issue of such of them as should be then dead. *Held*, that an appointment excluding any of the children could not be made under the above power.

That F. was an object of the power.—*Woodlock v. Mahony*, 6 I. C. R. 236; 2 I. Jur. N. S. 276. (C.)

5. A., by marriage settlement, in Nov. 1823, conveyed lands to trustees for a term, upon trust, to raise £20,000, of the late currency, to be paid to and divided amongst the children of the marriage, in such shares, manner, and form, at such ages, days, and times, and subject to such restrictions, as A. should by deed or will appoint. There were eight children, some of whom were born after 1834. On the 7th of Sept. (April in the judgment) 1843, A., by will, after referring to his power, appointed that the interest of the £20,000 should be paid to his wife, until his children severally attained age, to be applied to their maintenance in such proportions as she should judge right; provided that his eldest son, S., should, on his attaining the age of twenty-three, be paid an annual sum of £45; and each of the remaining children, on attaining such age, the annual sum of £30, out of the interest of the said £20,000; and that his children, on respectively attaining the age of twenty-three years, or marrying under that age, with consent, should be paid the following sums out of the said charge—viz., S., £600, and to each of the other children £2540; and if any of them died under the age of thirty-three years, or married without consent, that the share of the child so dying or marrying, should, together with the residue of the sum, be distributed equally amongst the younger children, who should attain the age of thirty-three years, or marry with consent, subject to the payment of the annual sums before mentioned, which he intended to be paid to each of them until he or they received their portion of the charge. *Held*, a valid appointment of the shares in which the children were to take.—*Grogan v. Dopping*, 6 I. C. R. 265; 2 I. Jur. N. S. 171. (C.)

6. A testator, having a power of appointment among his children, over a fund, and also having other property, by will, after making bequests, directed that if his property exceeded £4000, the excess should be divided between his remaining children; and should either of them be dead, leaving a family, then his or her portion was to be given to her children. *Held*, that the will was not an execution of the power.—*In re Dennis's Trusts*, 6 I. C. R. 422. (R.)

7. By the marriage settlement of L. a fund was vested, upon trust, after the decease of L. and his intended wife, for their children, as L. should appoint; in default of appointment, equally. There was a hotch-pot clause, but no advancement clause in the settlement.

The fund produced £4700, and was, with £300 belonging to L., invested on mortgage. There were five children. In 1844, on the marriage of A., one of these children, L. settled £1000 of his own upon A., her husband, and issue. In 1845, L. made his will, and thereby appointed and bequeathed the £5000, invested upon mortgage, as to £1000 to J., another of his daughters, and as to the residue among his remaining children, except A. By the will he also bequeathed £1200 to the

trustees of A.'s settlement, for her benefit. In 1848, L., on the marriage of J., gave £1000 of his own, and secured £1200, upon trusts, for J., her husband, and issue. By a subsequent codicil, L. revoked the appointments and bequests made to J. by his will, in consequence of what he had paid and secured on her marriage. *Held*, that the sum appointed to J., and revoked by the codicil, was to go as in default of appointment.

That A. and J. were not excluded from sharing in the said sum.

That L. could not be taken to be a purchaser of the shares of A. and J. in the unappointed part of the settled fund.—[*Folkes v. Western* (9 Ves. 456) approved of.]—*Noblett v. Litchfield*, 7 I. C. R. 575; Dr. Rep. temp. Napier, 158. (C.)

1. R., having power to appoint settled lands among his children, by will, in 1794, which was not decided to be a due execution of his power, devised the settled and unsettled lands to his eldest son, and provided for his daughters charges of £500 each. H., one of the daughters, married in 1806, having then lately attained age. No evidence of her having been aware of the will of R., before her marriage, was given, but a receipt in 1807 for a half-year's interest, signed by her husband, and a copy of the will, in his handwriting, were produced. *Held*, on a bill filed in 1833, that the Court might infer that, at the time of her marriage, H. knew of the will and acquiesced in its provisions.—*Hall v. Raymond*, 8 I. C. R. 83; Dr. Rep. temp. Napier, 80. (C.)

2. By marriage articles, it was agreed that the interest of the amount of a policy of assurance, effected on the husband's life, should be applied, first, in payment of an annuity to the wife, and that the remainder of the interest should be paid among the issue of the marriage, in such shares as the husband and wife, or the survivor of them, should by deed or will appoint; in default of appointment, share and share alike; and that the principal, after the death of the wife, should remain to the use of their issue, in such manner, and in such shares and proportions amongst them as the husband and wife, or the survivor of them, should by deed or will appoint; for want of such appointment, share and share alike. The articles contained a covenant to execute all acts necessary to carry them into execution. The husband survived the wife; but by a codicil to his will in 1854, and in her life, he willed and devised that whatever property he should die possessed of, or be entitled to, either freehold or otherwise, after the payment of his just debts and funeral expenses, should be equally divided amongst his sons and daughters which he then had, or might have, by his said marriage; and that, on the death of either of his sons or daughters by that marriage, before they attained age, the share or shares of him or her should be equally divided amongst the survivors; and he declared it to be his will and desire that, in the event of his being entitled to any property not named in his will, which contained an exclusive, and there-

fore invalid appointment of the principal of the policy, his wife should be his residuary legatee. *Held*, that the will and codicil did not amount to a valid execution of the power.

That if a settlement had been executed, it should have contained a clause that, in the event of any of the children dying under age and unmarried, the share of the child so dying should go to the survivors.—*Cronin v. Roche*, 8 I. C. R. 103. (R.)

3. By settlement, executed on the marriage of B. in 1811, the S. estate was conveyed to trustees to the use of A. for life, remainder to B. for life, remainder to the first and other sons of B. in tail; subject to a term, the trusts of which were, that in case there should be an eldest or only son, and one or more younger children of the marriage, to raise £2000 for the portion or portions of all and every such younger child or children; the whole to be paid to such child, and, if two or more, to be divided as B. should by deed or will appoint, &c.; for default of appointment, to be equally divided. Provided that, if any of the said younger children died before his portion became payable, or that any younger son should become an eldest son before he attained age, the portion or portions of such of them so dying, or becoming an eldest or only son, should go to and be equally divided among the survivors or survivor, or others or other of them.

By the same settlement £2000 were charged on the X. estate (which was not otherwise the subject of that settlement), upon trust, after the decease of B., for the same purposes as were thereinbefore declared concerning the £2000 charged on the S. estate. There were six children, the two eldest of whom were C. and D. In 1836, C. being of age, the S. estate was disentailed, and resettled by a deed under which C. and D. took life estates; remainder to their issue male. In 1839, on the marriage of D., B. by deed appointed the £2000 charged on the S. estate, and £500 of the £2000 charge on the X. estate, upon trusts in favour of D. and his children, provided that if, under the limitations contained in the settlements of 1811 and 1836, or either of them, D. should succeed to an estate tail in possession in the S. estate, the appointment should not take effect, and the £2500 should belong to the remaining younger children of B., as he should appoint; in default of appointment, equally. In 1841, the S. estate was resettled, in pursuance of a power of revocation in the deed of 1836, to B., for life, remainder to C. for life, remainder to his first and other sons in tail; remainder to D. for life, remainder to his first and other sons in tail.

In 1853, C. died without issue, whereupon D. became entitled to the estates under the last mentioned deed. *Held*, that supposing the appointment of 1839 to have been avoided by D. having become an eldest son, his share in the two sums of £2000, in default of appointment, had not been divested, as he had not become an eldest son before he attained age.

That the X. estate, not being subject to the settlement of 1811, the appointment of £500

of the £2000 charged on that estate was not devested by D. having as eldest son succeeded to the S. estate.

That D. having as eldest son succeeded to an estate for life, under the deed of 1841, and not to an estate tail under the deeds of 1811 and 1836, the appointment of 1839 was not defeated.

*Semble*—The Court would not, on a petition under the Trustee Relief Act to draw out the £2000 charged on the X. estate, and in the absence of minors claiming under the appointment of 1839, determine the right to the fund adversely to them. — *Ex parte Smyth*, 12 I. C. R. 487. (R.)

1. A. bequeathed all his estate, on trust to pay the rents and dividends to his wife for life; and directed that, after her death, his real and personal estate, and all moneys which might have been got in, or might be still due, should go to and be paid in such manner as he should by a codicil or codicils appoint; in default of such appointment, to his wife, as his residuary devisee and legatee; her heirs, executors, &c. By a codicil he left an annuity of £600 to W. for life; and directed that if W. married, and had children, the £600 per annum should go to them in whatsoever manner W. might think proper; but, should he not leave any issue, the £600 per annum should go to E. and his family, to be so divided as E. might think proper. *Held*, that W. had power to dispose of it among his children as a perpetual annuity, and that there was a trust for them in default of appointment. — *Warren v. Wright*, 12 I. C. R. 401. (R.)

2. In 1772, L., upon his marriage, settled renewable freeholds to the use of himself for life, remainder upon trust for the eldest son of the marriage, till he should attain twenty-one; on his attaining twenty-one, upon trust to convey to him absolutely. There was a power in the deed for the settlor to revoke the limitation to the eldest son; and to relimit to the sons of the marriage in such priority as he should think fit. P., the eldest son, attained his age before 1802. In 1801, by deed reciting the settlement, L. and P. conveyed the lands comprised in that settlement to trustees, and their heirs, to the use of L., for life, remainder, as to part, to the use of such younger son or sons of L. as he should by deed or will appoint. *Held*, that L. could not, under this power, appoint to his younger sons any estates greater than for life. — *Lamphier v. Drapes*, 14 I. C. R. 33. (C.)

3. By marriage settlement lands were limited (amongst other uses) to the trustees for 500 years; and, subject to the term, to the use of A. for life, remainder to the use that A.'s intended wife should receive a jointure; subject to those limitations, to the use of the first son of the marriage in tail male; remainders over. The trusts of the term were, first, to secure the payment of the jointure; and upon trust, after the decease of A., or in his life, with his consent in writing, to raise

£10,000, late Irish currency, as portions for younger children, to be divided between them as A. should appoint. There were issue, an eldest son and two younger children. A., by two deeds poll, appointed the whole of the £10,000, to his two younger children, in certain proportions, and directed that it should be raised, with interest, immediately.

Before the registration of the deeds poll, A. had, in conjunction with his eldest son, executed a mortgage of the lands in fee, and had also confessed judgments to a large amount prior to the mortgage, some of which A. also charged by mortgage on his life estate. The aggregate amount of the judgments and the mortgage in fee exceeded the value of A.'s life estate. One of A.'s younger children presented a petition for the sale of A.'s life estate of her appointed share of the £10,000; but the petition was dismissed at the instance of the creditors on A.'s life estate. A petition was then presented by the same younger child to raise her portion by a sale of the reversion expectant on the determination of A.'s life estate; but on cause shown against the conditional order for payment by the remainderman, and various mortgagees and judgment creditors—*Held*, that the petition must be dismissed with costs; that the power given to A. to raise the £10,000 in his life, was a power appendant to his life estate, and was suspended by his acts; that it was inequitable for him to exercise it, as the effect would be to throw exclusively on the estate of the remainderman the payment of the interest which accrued during A.'s life, and for the payment of which his life estate was the primary fund.

That this equity does not apply to judgment creditors; for, as they do not acquire any security by contract, there is nothing inequitable in diminishing their security by a power of charging. When cause, shown by different parties who represent but one estate, is allowed, the costs awarded, are to be paid to the person first showing cause. — *In re Greene's Estate*, 14 I. C. R. 325; 8 I. Jur. N. S. 348. (L.E.C.)

4. Appointees were parties to indentures of appointment made under a power to appoint to children, with a limitation to those children, equally, in default of appointment. One appointee accepted and took the appointed sum as and for, and in lieu and discharge of her share or portion. The other appointee accepted the appointed sum as and for her share and proportion of the property, the subject of the power, and in lieu, bar, and full satisfaction of all claim which she might have as one of the children, or otherwise. *Held*, that each appointee was precluded thereby from receiving any share in default of appointment. — *Clune v. Appohn*, 17 I. C. R. 25. (R.)

#### VII. POWERS OF SALE.

1. *In general.*
2. *Implied.*



VII. 1. *Powers of Sale generally.*

1. A., being tenant for life of lands, remainder to his daughter, B., in fee, articles were entered into on the marriage of B., a minor, with C., an adult, to settle her remainder. It was provided that the trustees should be empowered to sell, with the consent of B. and C., "the said lands of the said B.," the produce to be laid out in lands to be settled to the uses thereupon declared. In the settlement carrying those articles into execution A. joined. The lands were limited to A. for life, remainder to the uses declared by the articles. The trustees were empowered to sell, with the consent of B. and C., "the said B.'s estate and interest in the said lands." *Held*, that this power authorised a sale of the reversion in A.'s lifetime.—*Blackwood v. Burrows*, 4 Dr. & War. 441; 2 Con. & L. 459. (C.)

2. The trustees of a marriage settlement were empowered to raise, upon the request of the tenant for life, such sum of money as might be necessary to purchase a mansion-house, with a demesne attached, as a residence for him; and it was declared that the mansion-house or lands, when purchased, should be conveyed to the trustees, upon and for the same trusts, &c., and with, under, and subject to the same powers, &c., as were in and by "these presents declared and contained, of and concerning the said hereditaments and premises herein before granted." The settlement contained a power to the trustees, with the consent of the tenant for life, to sell by public auction or private contract, or to exchange the settled lands for such price in money, or equivalent in other lands, as to them should seem reasonable; or to re-sell the lands which might be so purchased, and to give discharges for the purchase-money; and, in order to effectuate such sales, to revoke the uses and trusts of the settlement, and to appoint to any uses and trusts which should be thought necessary or expedient for effectuating such sale or exchange. The trustees were authorised to invest the purchase-money in lands, which were to be settled to the same uses, and upon and for the same trusts, &c., and subject to such and the same powers, &c., as were declared as to the settled lands. In 1857, the trustees, with the consent of the tenant for life, purchased for £1200 a mansion-house, which was conveyed to them subject to such and the same trusts, &c., and subject to the same powers, &c., of and concerning the lands of L. In 1858, the trustees, at the request of the tenant for life, sold the mansion-house by auction to the respondent. *Held*, in a suit for specific performance of the contract for sale, that the trustees could make a good title to the mansion-house; and that the purchasers were bound to accept it.

Deeds are to be read in their grammatical and ordinary sense; and the Court should not transpose the words of a clause, unless it is absurd, or repugnant to or inconsistent with the rest of the deed.—*Clements v. Henry*, 10 I. C. R. 79. (R.)

3. V. devised all his estate to his brother, "by discharging all his bequests and just debts, at the direction of his executors;" if not, the estate was to be sold by auction, at the discretion of his executors, whom he wished to discharge his just debts. *Held*, that the executors took no interest in V.'s real estate, but had merely a power to sell.

There is not any Irish statute corresponding with the 21 Hen. 8, c. 4, (*Eng.*). Therefore, if two executors have a power to sell real estates, and one of them renounces, the power cannot be exercised by the other.

*Quære*—Whether a power to sell real estate is sufficient to entitle a party to sue for a specific performance of an agreement for a partition of it?—*Thompson v. Todd*, 15 I. C. R. 337. (R.)

4. A will directed that no part of the testator's property, except the interest in a house, should be sold or disposed of for ten years only, if thought advisable by the executors; and bequeathed his property to testator's son, a minor. The executor sold the interest in the house to the respondent, who had notice of some restriction on the executor's power to sell. There were not any debts. In a suit to impeach the sale—*Held*, that the respondent was bound to prove that the sale, being a breach of trust, was at the full value.—*McMullen v. O'Reilly*, 15 I. C. R. 251. (R.)

VII. 2. *Implied Powers of Sale.*VIII. *POWERS OF REVOCATION.*

5. A. being seized for life of estates X. and Y., remainder to his son B. in tail, they joined in suffering a recovery, and conveyed the estates to trustees; as to estate X., in fee, on trust to sell and pay debts; and as to estate Y., on trust to secure an annuity to B.; and subject thereto to the use of A. for life, remainder to secure a jointure, remainder for a term to secure portions, remainder to the use of B. for life, remainder to his first and other sons in tail. The deed contained a proviso that A. should have power to make leases of the premises or any part thereof, and that A. and B. should have power to revoke all or any of the use or uses, estate or estates therein limited, of or concerning the lands or premises, or any part thereof, except the jointure and term. No creditors were parties to the deed. *Held*, that the power of revocation was, by construction, confined to estate Y.

That, the creditors not being parties, A. and B. could revoke the uses of estate X. without the aid of any power of revocation.

*Semble*—The communication of the existence of such a trust to the creditors, if acted on, would prevent its revocation by the debtors. *Browne v. Cavendish*, 7 I. E. R. 369; 1 Jon. & L. 606. (C.)

6. In 1829 estates were settled, subject to previous charges, with a joint power of revocation and new appointment, to A. and B. In 1833

A. and B. exercised the power, and appointed the estates for a term, in trust to raise £20,000, and subject thereto as A. should by deed appoint; in default of appointment, to A. for life, with remainder to A. in fee; provided, that if the £20,000, secured by the term, should not be raised within twelve months, or A. should die before it was raised, the provisions of the deed should cease and be void; and a fine, which was levied in pursuance of it, should enure to confirm rentcharges to B., and the "several other estates and interests" subsisting before the execution of the deed. The £20,000 was never raised. *Held* that, along with the previous uses, the power of revocation and new appointment to A. and B. was restored.—*Lord Langford v. Little*, 8 I. E. R. 546; 2 Jon. & L. 613. (C.)

1. W., having made a settlement with a general power of revocation, made a will by which, after reciting that he had been induced to execute the settlement contrary to his intentions, and that it was fraudulently and wickedly obtained from him, he directed the trustees and executors of the will to use their best exertions and take all steps necessary to have the deed set aside and cancelled; and then disposed of the property included in the deed. *Held*, a good revocation under the power.

In a suit between claimants under a will and an inconsistent deed executed by the testator, the costs are not to be paid out of the assets, on the ground that the difficulty was created by the testator, but are subject to the ordinary rule in adverse suits.

Costs given against a trustee under a trust deed which was held revoked, where he had also a beneficial interest and insisted on its validity.—*Irwin v. Rogers*, 12 I. E. R. 159. (C.)

2. By ante-nuptial articles, husband and wife covenanted that £2000 should be assigned to A. and B., in trust, for the younger children of the marriage, as the husband and wife should jointly, or as the survivor should by deed appoint; in default of appointment, in trust for all the younger children, sons at twenty-one, and daughters at twenty-one or marriage; if no child should attain a vested interest, in trust, for the survivor of the husband and wife; and that the settlement to be made in pursuance of the articles should contain a power to the husband and wife to revoke all or any of the trusts, powers, &c., in such settlement contained, of all or any part of the trust fund; and by the same or any other deed or deeds to declare other trusts of the trust premises, the trusts of which should be so revoked. No settlement was executed. The husband and wife, by deed, reciting the power of revocation in the articles, revoked the trusts as to the £2000, and declared that it should be held in trust, to be forthwith assigned to C. and D., whose receipt should be a good discharge. *Held*, that the trusts of the marriage articles were revoked, and that the £2000 became the property of the wife.

A. had power to charge real estates with any sum not exceeding £20,000, for portions

for his younger children; that, or such less sum as should be charged, to be vested in, and to be paid to, or shared between and amongst, all and any such children or child, or any one or more of them, exclusively of the others or other of them, at such age or time, or respective ages or times, or, if more than one, in such proportions, and upon such terms and conditions, and in such manner as he should think proper, and should by deed or will appoint. A., by will, reciting the power, charged £20,000 on the estate, and bequeathed it, share and share alike, to his four younger children. *Held*, that the shares of the younger children became vested on the death of A., and bore interest from that time.

A. directed that the rents, issues, and profits of property should be invested in the funds and kept there until his second son should attain age; when the sums so invested should be divided between his younger children. *Held*, that the shares in the accumulated fund vested at A.'s death.

*Semble*—In a special case under the Court of Ch. Reg. (Ir.) Act 1850, parties having conflicting rights should not be made co-petitioners.—*In re Charleville*, 13 I. C. R. 6. (R.)

#### IX. LIMITATIONS IN DEFAULT OF APPOINTMENT.

3. A., having by will charged £6000 on his real estate, and directed it to be paid among such of his younger children, in such proportions as his wife should appoint; and the wife having by her will directed "three of the £6000, I wish to have given to the two elder girls." *Held*, a good appointment of the £3000, and that the appointees took as tenants in common and not as joint-tenants.

As to the remaining £3000—*Held*, that it was to be divided amongst all the objects of the power equally, including those to whom an appointment of the other £3000 had been made; and that they were not bound to bring their shares into hotch-pot, there being no express clause, in the instrument creating the power, so requiring. That direction should be always inserted to prevent such accumulation.

There is nothing better established than that any portion of a fund, the subject of a power, which is not appointed effectually, goes as it would have done in default of any appointment.—*Alloway v. A.*, 4 Dr. & War. 380; 2 Con. & L. 517. (C.)

#### X. POWER OF ATTORNEY.

4. A power of attorney, in the proper form, was executed at Brussels, where there was no officer of the Court authorised to take affidavits. It was attested by two witnesses, by one of whom an affidavit verifying the execution of it was sworn before the Secretary of the British Legation at Brussels. The affidavit, when produced, appeared to be under the seal of the Legation. The signature of the party executing the power was verified by the affidavit of his attorney here. There was no affidavit verifying the signature of the Sec. of Legation; but an attorney stated in open

Court, that he knew the handwriting of the Sec. of Legation, and that the signature affixed to the verifying affidavit was his. The Court, deeming it sufficiently verified, acted upon it.—*O'Connor v. Bernard*, 4 I. E. R. 689. (E.E.)

1. The Messrs. M. got a general power of attorney from the administrator, authorising them to act for him. They stood in his place, and, therefore, were answerable for any misapplication of the assets. No doubt, any man who gets assets into his hands may commit a *devastavit* by a wrongful appropriation of them to his own purposes, but I am not speaking of a wrongful act in that sense; but of a misapplication of them without any dishonest intention; and I say, that the Messrs. M., situated as they were, could not make themselves parties to any *devastavit* for which they would not be personally responsible.—*Langford v. Mahony*, 5 I. E. R. 580. (C.)

2. A power of attorney to receive rents, accompanied by an agreement that it should be irrevocable until the principal and interest of a loan, and the premiums on a policy of assurance effected to secure it, should be paid by instalments as specified in the agreement, is irrevocable, and amounts to an equitable mortgage. The mortgagee is entitled to priority over a subsequent creditor by judgment affecting the legal estate, in possession by a receiver.

*Whitworth v. Gauvain* (8 Hare 421) approved of.—*Abbott v. Stratton*, 9 I. E. R. 233; 3 Jon. & L. 603. (C.)

3. A., entitled to a life estate in lands, with remainder to his wife, B., for life; and C., entitled to an annuity, and D. having a judgment against A., and a policy of insurance, A., B., C., and D., in consideration of £350 advanced to A., conveyed to E. the lands, annuity, and policy of insurance, respectively, subject to redemption. It was provided that A. should become tenant to E. of these lands, at a yearly rent, in case of non-payment of the interest and premiums on the policy; and A., B., and C. appointed F. irrevocably their attorney, to receive the rents of the mortgaged premises and the annuity, to pay (after receiver's fees and outgoings) the interest and premiums on the policy; and for the purpose, out of the annuity, of investing a sum to form a fund to pay the principal, and to pay the balance of the annuity to C., and of the rents to A. The sums secured by the judgment and policy of insurance when they should be paid, after deducting the £350 and interest, were to be applied by E., to pay D. any demand due to her by A., and the balance to A. It was provided that F. should not act as receiver until the interest or premium on the policy should be in arrear. F. entered into receipt of the rents (as he alleged) under a subsequent power of attorney from A., and of the annuity, no portion of which he invested to form the fund to pay the annuity. He applied the rents for the purposes of A., and in paying the interest of a mortgage, due to himself (F.), by the directions of A., and the annuity in payment of the interest on the

£350 with the consent of C., who had, before such consent, taken the benefit of the Insolvent Act. *Held*, that F., as agent of C., as to the annuity, was liable to account with her assignee. That A. could not revoke the power of attorney in the mortgage deed. That F. was agent or trustee as to the lands, and therefore was not bound to account to her assignee for bygone rents.

*Semble*—B., being only a surety, her life estate is not liable, after the death of A., to repay the sums paid out of the annuity of C., for interest and premiums on the policy.

*Quere*—Whether F. should have credit for payments out of the annuity, contrary to the directions of the mortgage deed, made with the consent of C., after her discharge as an insolvent?—*M'Dowell v. Reede*, 14 I. C. R. 190 (R.)

[*Held*, that F. was not bound to pay the assignees the sums received by him after the insolvency.—*M'Dowell v. Reede*, 16 I. C. R. 430. (R.)]

#### XI. MERGER, EXTINGUISHMENT, AND SUSPENSION OF POWERS.

4. The Lagan Navigation Act created a joint-stock company, and enacted that it should be lawful for every subscriber and person advancing money under the Act, and through whose estate the navigation passed, to charge his real estate, for the use of his younger children, with the payment of such sums or other interest in the joint-stock as he should assign or bequeath to his heir, it being deemed fit that the proprietors of estates through which the navigation passed should have an interest in it. A., through whose estate the navigation passed, being tenant for life under a deed of 1761, with powers of jointturing and leasing, with remainder in tail to his eldest son, B., made advances, and took shares prior to 1791. In that year A. and B. suffered recoveries, and limited the estates anew, subject to a joint power of appointment, under which, in 1792, they appointed the estates, subject to all powers vested in A., to X., in order that he might join in a re-settlement. By a re-settlement in 1792, reciting A.'s powers under the deed of 1761, and an agreement to re-settle the estate, subject to the powers thereafter mentioned, they were conveyed to A. for life, remainder to B. for life, remainder to his first and other sons in tail, subject to a term and jointure under the deed of 1761, but with no saving of any other powers; and giving a new power to jointure, and new and different leasing powers to A., and other usual powers to him and B. A. made further advances, and by his will devised his shares in the navigation to B., and charged their amount on the estate for his younger son. *Held*, that the power to charge, as given by the Act, would not be destroyed by the recovery alone, unless the parties intended it.

That the re-settlement in 1792 amounted to a contract not to exercise the power as to past advances, and the power to charge could be exercised by A. only as to subsequent advances.

That the direction to give the shares to his heir was complied with, and the power well exercised by giving them to B., though he was only tenant for life in remainder.

The younger son, in whose favour the charge was made, being also A.'s executor, got possession of debentures representing A.'s shares, and having lost them, joined in an application for new shares, which were granted, on the face of them, in lieu of the old ones, and delivered them over to B., the tenant for life. *Held*, that there being no fraud, this transaction did not affect his right to the charge under A.'s will.—*Stewart v. Donegal*, 8 I. E. R. 621; 2 Jon. & L. 636. (C.)

1. The donee of a power, though to be executed by will only, may bind himself not to execute it at all, or not to execute it except under certain restrictions.—*In re Chambers*, 11 I. E. R. 518. (R.)

2. A sum was bequeathed to trustees for the use of E. for life; at her decease two-thirds of this sum to go to the use of any child or children of E., who was given the power of disposing of the remaining third part by will; and that in default of such disposition, this third part should go in equal shares between her children. By settlement upon her marriage E. purported, for the considerations therein, to assign the entire sum in trust for herself and husband, for life; after their decease to pay it over to their issue in such proportions as she or her husband should by deed or will appoint; in default of appointment, in equal shares, with covenant for further assurance. There was issue. E., by will, by virtue of the power given her by the will of the testator, devised one-third of the original sum, in trust to pay a portion in legacies to strangers; and, as to the residue, for the use of one of her children. *Held*, that the appointment by her marriage settlement was no extinguishment of her power.—*Stuart v. Kennedy*, 3 I. Jur. 305. (C.)

## XII. GENERAL CONSTRUCTION OF POWERS.

3. The donee of a testamentary power to charge a sum on B.'s estate "as and for a provision" for the donee's "lawful issue" exercised the power by a deed which merely charged the estate with the specified sum "as a provision for my lawful issue." He had one child born before the testator's death; others born before the deed's date; others born afterwards. *Held*, that all the children were entitled to shares, which vested *seriatim* on their successively attaining 21: the share of each being proportioned to the number of children *in esse* when it vested and then unprovided for: the dates at which the children respectively attained 21 being deemed new successive periods of distribution, though this decision produced considerable inequality in the shares, and would wholly disappoint any child born after all the others had attained 21. The grandchildren were considered as having been provided for by their parents' shares.—*Norman v. N.*, Beat. Rep. 430. (C.)

4. B., on his second marriage, settled, by deed, lands on trust for himself for life: then to secure a jointure, subject thereto to the use of B.'s first and every other son by his second wife. The settlement empowered B., if he had more than one son, to prefer such son by deed or will to the whole or part of the lands, subject to the jointure, and subject to such other sums, not exceeding £4000, as B. might think fit to charge. B. charged the lands with £4000 in favour of the children of his former marriage; and afterwards devised estate whereof he was seized to the deft., the only surviving son of his second marriage, reciting the above power, and its exercise, and declaring that "inasmuch as he had by the deed of the 3rd Sept. 1819, fully provided for the sons of his first marriage," B. "left the residue of his real and personal estate to his son by his second marriage." One of the children of the first marriage having assigned his share, his assignee filed a bill. *Held*, that the power could be exercised only in favour of the children of the second marriage.

That the power was not an absolute one, but depended on the event of there being more sons than one of the second marriage, and any one of such sons being preferred to the settled lands according to the terms of the primary power.—*Cooke v. Briscoe*, 1 Dr. & Wal. 596. (C.)

5. When a tenant for life had a general power of jointuring, without limit as to amount, and appointed by will a jointure of £300 per annum, payable half-yearly, and directed that the first payment should be made on the day of his death—*Held*, a good exercise of the power.

*Quere*—Whether it would have been so held, had not the jointress outlived the first gale-day?—*Purcell v. P.*, 1 Con. & L. 371; 2 Dr. & War. 217. (C.)

6. A., being tenant for life of lands, remainder to B., his daughter, in fee, articles were entered into on the marriage of B., a minor, with C., an adult. To settle her reversion, it was provided, that the trustees should have a power, with the consent of B. and C., to sell "the said lands of the said B.," the produce to be laid out in lands to be settled to the uses thereupon declared. In the settlement carrying those articles into execution, A., the tenant for life, joined; and the lands were limited to A. for life, remainder to the uses declared by the articles, and a power was given to the trustees to sell, with the consent of B. and C., the "said B.'s estate and interest in the said lands." *Held*, that this power authorised a sale of the reversion in A.'s lifetime.—*Blackwood v. Burrowes*, 2 Con. & L. 459; 4 I. E. R. 609. (C.)

7. A settlement contained a power to appoint new trustees if any of those first appointed became incapable or unfit to act. *Held*, that the bankruptcy of a trustee rendered him "unfit to act" within the meaning of the power.

The power directed the trust property to be

vested in the new trustees jointly with the surviving or continuing trustee. The surviving trustee was a bankrupt. *Held*, that, nevertheless, a valid appointment and transfer of the estate to the new trustee might be made under the power.—*In re Roche*, 2 Dr. & War. 287; 1 Con. & L. 306. (C.)

1. In equity, a power to appoint an estate amongst a class will be executed by giving the whole of the estate to one of the class, and a part of the produce thereof, or money charged thereon, to the others.

In considering whether a will is a valid execution of a power, the testator's intention must always be considered, and effectuated as far as possible.

*Semble*—That the remainders after an estate, which is void because it is an excessive execution of a power, are not void; but are accelerated by the extinction of the intermediate void estate.—*Crozier v. C.*, 5 I. E. R. 540; 3 Dr. & War. 373; 2 Con. & L. 294. (C.)

2. The authorities as to a power being merely a power of selection, do not apply to cases where the property to be appointed is personality.—*Alloway v. A.*, 2 Con. & L. 509. (C.)

3. A power to appoint money (to be paid to the donor's younger children), in such shares and proportions as the donee should by will or deed appoint, authorises the donee to give portions of this sum to two or more of the objects of the power, as joint tenants thereof.

Such power would authorise the donee to create contingent remainders in the subject of the power, provided such were given to and amongst the objects of it.—*Alloway v. A.*, 2 Con. & L. 518. (C.)

4. A., having a power to give a fund to all and every her child or children, and to the exclusion of any one or more of them, in such shares and at such times as she should appoint, by will, after reciting that her daughter had gone into a convent, bequeathed £1000, part of the fund, if her daughter should change her mind and return to her family and friends, in trust to pay her the interest for life, remainder to her children, if any; but in case of her either not leaving the convent or not leaving issue, then the £1000 to go to the testatrix's other children. The daughter continued in the convent. *Held*, that this was a gift on a contingency authorised by the power, and that the daughter was not entitled to the interest, or any part of it, as being unappointed, but that it went with the principal which should be invested, with liberty to the legatees in remainder to apply for it on her death.—*Caulfield v. Maguire*, 8 I. E. R. 178; 2 Jon. & L. 141. (C.)

5. The execution of a power to appoint a jointure and portions for children by deed, was supported in equity, though executed by will.

Marriage articles provided for the intended wife and children, and empowered the hus-

band to appoint a jointure for any wife or wives whom he might marry, and in like manner to appoint portions for younger children.

*Held*, that that power was confined to a jointure for a second or subsequent wife, and portions for the children of a second or subsequent marriage.—*Mills v. M.*, 8 I. E. R. 192. (C.)—[*See s. c.*, 9 I. E. R. 299; 3 Jon. & L. 242].

6. Bequest of the use of plate, with power to dispose of such portion thereof as the legatee might think proper, preceded by an absolute gift of other chattels to the same person—*Held*, to give a life interest only in the plate, with a power of disposition over part of it.—*Espinasse v. Luffingham*, 9 I. E. R. 129; 3 Jon. & L. 186. (C.)

7. A power was given by will, to successive tenants for life, to limit a rentcharge "for any woman or women whom they may respectively marry," by way of jointure and in bar of dower, "to be in proportion to the marriage portion they shall respectively receive with their respective wife or wives; i. e., £100 jointure for every £1000 they shall so actually receive as a marriage portion with their respective wife or wives, if they shall so think fit," not to exceed £500; "such grant, limitation, or appointment" to be made either before or after marriage. *Held*, that the wife of a tenant for life, who afterwards came into possession, but who had been married previous to the will, was not an object of the power, there being no grounds from the rest of the will for giving a past meaning to the words of futurity. *Semble*—That money of the wife, settled to her separate use, with remainders to the husband and children of the marriage, was not "received" by the husband within the meaning of the power.—*Dillon v. D.*, 11 I. E. R. 423. (C.)

8. The last previous lease of premises included in a renewal is not the only evidence receivable of what are usual clauses within the meaning of a power requiring the usual clauses to be inserted in renewals. The Court refused to set aside a renewal impeached for varying from the previous lease, when the objection was not made by the bill so as to lead the deft. to explain it.—*Marquis of Donegal v. Greg*, 13 I. E. R. 12. (C.)

9. A., having by will, in 1837, bequeathed legacies, proceeded as follows:—"To my son, I give, devise, and bequeath all my lands and tenements, rights and credits, *subject to the legacies aforesaid and my debts; the remainder of my property* to be disposed of by him to and amongst his children, in such shares and proportions as he shall think proper." The words in italics were inserted by interlineation. By the last clause in the will the interlineations, as well as the original text, were declared to be in the handwriting of the testator. In 1839 he added a codicil, by which he merely made a declaration with reference to one of the legacies. In 1845 the son died, in the life of A., and without having made any appointment

amongst his children. A. having died—*Held*, that the will gave the son a power, coupled with a trust; and that accordingly his children were entitled as well to the real as to the personal estate of A. in equal shares.

*Semle*—The general personal estate of A. would have passed under the words "rights and credits" alone, even if the interlineations had not been made.

The effect of interlineations in a will considered.—*Hutchinson v. H.*, 13 I. E. R. 332. (C.)

1. A., by will makes D., his eldest son, tenant for life of his real estates, with a power of jointuring if he marries with the consent of the executors and guardian appointed by the will; appoints A., B. and C. executors; and nominates C. guardian. A. and B. renounce; C. alone takes probate. D., while a minor, without any consent, married, without banns or license, E., who was under age. Some days after, he obtains C.'s consent to his marriage, and a marriage ceremony is regularly solemnized between D. and E. D. executes a post-nuptial settlement, in which, for value, he appoints a jointure to E. *Held*, that the consent of C. alone to the marriage gave rise to the power; and, that C.'s consent to a subsequent valid marriage was sufficient, although a marriage voidable under the 9 G. 2, c. 11, and 23 G. 2, c. 10 (*Ir.*), had been previously celebrated between D. and E.—*Dobbyn v. Adams* 1 I. Jur. N. S. 400; 6 I. C. R. 170. (R.)—[On appeal—*Held*, that the power could not be exercised in favour of S.—7 I. C. R. 193; 2 I. Jur. N. S. 143. (C.)—[See *Adams v. A.*, 8 I. C. R. 41. (C.)]

2. A settlement limited a fund in trust, after the death of the survivor of the husband and wife, for the benefit of the child or children, or other issue of the marriage then in being, as the husband and wife should jointly appoint by deed; and, in default of such appointment, as the survivor should by deed or will appoint; in default of any appointment, to pay the fund to such of the children of the marriage as should be living at the decease of their surviving parent, at the age of twenty-one, or marriage. *Held*, that those children only, who survived both parents, were objects of the power.—*Cooney v. Holland*, 7 I. C. R. 201. (R.)

### XIII. TRANSFER OF POWERS BY DELEGATION OR ACT OF LAW.

#### POWER OF ATTORNEY.

See POWERS, X.

#### PRACTICE.

\*.\* The printed titles of this subject are arranged alphabetically in large Roman capitals. Those to which asterisks are prefixed, and which are printed in small Roman capitals, are merely heads of reference.

- *On Supersedeas in Bankruptcy.* See BANKRUPTCY, VI.
- *On Staying Certificate.* See BANKRUPTCY, VI.
- *On Bankruptcy Petitions generally.* See BANKRUPTCY, VII.
- *In Charity Suits.* See CHARITY, IV.
- *In Lunacy Cases.* See LUNACY, IX.
- *On Bills to Redeem.* See MORTGAGE, V.
- *On Bills to Foreclose.* See MORTGAGE, VI.
- *On Account before Master, and generally.* See ACCOUNT, VII—PRACTICE—ACCOUNT.
- See INFANT, II—LEGACY, VIII—PLEADING.

#### I. ABATEMENT AND REVIVOR. See PLEADING, II, 5, 6, 7—PRACTICE, APPEAL—PRACTICE, SEQUESTRATION.

##### 1. Abatement.

- a. *Generally—its Effect.*
- b. *By Death.*
- c. *By Bankruptcy or Insolvency.*
- d. *By Marriage.*
- e. *By Infant coming of age.*

##### 2. Revivor.

- a. *By and against whom: its Effect.*
- b. *For Costs.*
- c. *How and when Suits are Revived.*

##### 1. Under the Old Practice.

##### 2. Under The Chancery Regulation (Ireland) Act 1850.

##### 3. Under The Chancery (Ireland) Act 1867.

\* ACCOUNT. See ACCOUNT, ante.

\* ACCOUNTANT-GENERAL. See PRACTICE, OFFICERS OF COURT.

\* ADJOURNMENT OF CAUSE. See PRACTICE, CAUSE, ADJOURNING, &c.

\* ADVANCE TO PARTIES OUT OF FUNDS IN COURT. See PRACTICE, FUND IN COURT.

\* ADVANCING CAUSE. See PRACTICE, CAUSE, ADJOURNING, &c.

#### II. ADVERTISEMENT TO APPEAR, &c.

— *Of Bankruptcy in Gazette.* See BANKRUPTCY, VI—PRACTICE—CREDITOR'S SUIT.

##### \* AFFIDAVITS.

— *Generally.* See PRACTICE, EVIDENCE.

— *Of Petitioning Creditor's Debt.* See BANKRUPTCY, VI.

— *To support Petition to stay Certificate.* See BANKRUPTCY, XVI.

— *To support Bankruptcy Petitions generally.* See BANKRUPTCY, XVII.

— *Annexed to Bill.* See PLEADING, BILL.

— *In support of Attachment.* See PRACTICE, ATTACHMENT.

— *When read against Answer.* See PRACTICE, EVIDENCE.

— *When received and read generally.* See *ibid.*

— *In reply.* See *ibid.*

##### \* AMENDMENT.

— *Of Fiat.* See BANKRUPTCY, VI.

— *Of Bankruptcy Petitions.* See BANKRUPTCY, XVII.

— *Of Answer.* See PRACTICE, ANSWER.

— *Of Bill.* See PRACTICE—BILL, AMENDMENT OF.

— *Of Decree.* See PRACTICE, DECREE.

— *Of Demurrer.* See PRACTICE, DEMURRER.

— *Of Depositions.* See PRACTICE, EVIDENCE.

— *Of Discharge.* See PRACTICE, DISCHARGE.

- *Of Master's Report.* See PRACTICE, MASTER, REFERENCE, &c.
- *Of Order.* See PRACTICE, ORDER.
- *Of Plea.* See PRACTICE, PLEA.
- *Of Subpoena.* See PRACTICE, SUBPOENA.
- *Costs on.* See PRACTICE, COSTS.
- *Its Effect on Injunction.* See PRACTICE, INJUNCTION.

\* AMENDED BILL. See PRACTICE, BILL AMENDED.

### III. ANSWER.

- *Costs on, Insufficiency of.* See PRACTICE, COSTS.
- *When Affidavits can be read against.* See PRACTICE, EVIDENCE.
- See PRACTICE, TAKING PLEADINGS OFF THE FILE—PRACTICE, INJUNCTION.

[*Note.*—The cases from the I. C. Reports refer to the Practice under the Ct. of Ch. Regulation (Ir.) Act 1850. See also The Chancery (Ireland) Act 1867.]

1. *General Orders relating to, generally.*
2. *Form of.*
3. *Signature of.*
4. *Jurat, and Swearing of.*
5. *Schedules to.*
6. *In what time—Its filing.*
7. *Ordered to be put in within a given time.*
8. *Commissions to Take.*
9. *Time given to Answer.*
10. *Effect of Answer, and of its Want.*
11. *Further Answer.*
12. *Supplemental Answer.*
13. *Separate Answer.*
14. *To amended Bill.*
15. *Amendment of.*
16. *Evasive.*
17. *Exceptions to.*
  - a. *Form and Requisites of.*
  - b. *Their Effect.*
  - c. *When necessary or proper to be taken.*
  - d. *Within what time to be taken.*
  - e. *Filing generally, and nunc pro tunc.*
  - f. *Deposit on.*
  - g. *Further Exceptions.*
  - h. *Waiver of.*
  - i. *Submission, or otherwise, to.*
  - j. *Reference on Exceptions.*
  - k. *Argument and Hearing of.*
    1. *Allowance and Over-ruling of.*
18. *Reference for Scandal and Impertinence.*
19. *Sufficiency of Answer.*
20. *Who are bound by Answer.*
21. *Liberty to Withdraw.*
22. *Priority of Answers where Original and Cross Bills.*

### IV. APPEAL. See BANKRUPTCY, XX—PRACTICE, COSTS.

1. *Form of: to what Tribunal: steps necessary to be taken previously.*
2. *When, and on what grounds it lies: when barred: when on new matter.*
3. *Within what time.*
4. *Who may Prosecute.*
5. *Evidence on.*

6. *Abatement and Revivor of.*
7. *Effect of: Staying Proceedings during.*
8. *Practice on, generally.*
9. *Practice on in the House of Lords.*

### V. APPEARANCE.

1. *Generally: its Effect: Effect of its want.*
2. *When substituted: its Incidents.*
3. *Undertaking to appear.*
4. *Gratis.*
5. *Conditional.*

\* ARGUMENT. See PRACTICE, ANSWER—PRACTICE, DEMURRER—PRACTICE, PLEA—PRACTICE, HEARING—PRACTICE, COURT, PRACTICE IN.

### VI. ATTACHMENT. See PRACTICE, PROCESS.

1. *Its Effect.*
2. *When and in what Cases: Cause against.*
3. *Affidavits in support of.*
4. *Discharge from.*
5. *Against Prisoners.*
6. *Service of.*
7. *Entry of.*
8. *Execution of: Return to.*
9. *For want of Answer.*
10. *For Costs.*
11. *With Proclamations.*

### VII. ATTACHMENT AGAINST PROPERTY.

### VIII. BAIL. See PRINCIPAL AND SURETY. \* BILL.

— *Concerning Charity.* See PRACTICE, EVIDENCE, and References, ante.

### IX. BILL OR PETITION. See PRACTICE, INJUNCTION.

1. *Verifying.*
2. *Summary Order.*

### X. BILL, AMENDMENT OF. (See also PLEADING, II, 8).

1. *Generally: when necessary, when granted, and in what Matters allowed.*
2. *Effect of, and of Motion for Liberty to Amend.*
3. *Within what Time: Order to Amend in a given Time.*
4. *When of Course, when by Special Application only.*
5. *Motion to Amend: Necessary Steps on.*
6. *Motion to Amend without Prejudice, when granted.*
7. *Other Cases.*

### XI. BILL PRO CONFESSO. See PRACTICE, DECREE—PRACTICE, EVIDENCE—STATUTES, CONSTRUCTION OF, II, 8.

### XII. BILL OF DISCOVERY. See also PLEADING, II, 10, 11.

### XIII. BILL OR PETITION, DISMISSAL OF. See PRACTICE, COSTS.

1. *General Orders.*
2. *Generally: in what cases: what is a Ground for.*
3. *By Plaintiff.*
4. *By Consent.*
5. *Effect of, generally.*
6. *For want of Prosecution.*

7. *On behalf of Infants.*  
8. *Motion for.*

\* **BILL OF EXCEPTIONS.** *See PRACTICE, EXCEPTIONS, BILL OF.*

**XIV. BILL OF INTERPLEADER.** *See PLEADING, II, 12—PRACTICE, COSTS—PRACTICE, EVIDENCE—PRACTICE, PAYMENT INTO COURT.*

**XV. BILL TO PERPETUATE.** *See PLEADING, II, 14—PRACTICE, EVIDENCE.*

**XVI. BILL OF REVIEW—PROCEEDINGS AND EVIDENCE ON.** *See PLEADING, II, 8—PRACTICE, COSTS.*

**XVII. BILL OR PETITION OF REVIVOR.** *See PLEADING, II, 7.*

**XVII.\* BILL OR PETITION, SUPPLEMENTAL.** *See PLEADING, II, 3, 4, 5.*

**XVIII. CAUSE GENERALLY—ADJOURNING, ADVANCING, CONSOLIDATING, RESTORING, RETAINING, AND SPEEDING.**

1. *Generally.*
2. *Adjourning.*
3. *Advancing.*
4. *Consolidating.*
5. *Restoring.*
6. *Retaining.*
7. *Speeding.*

*Respecting Costs of a Cause standing over, or being struck out of the list. See PRACTICE, COSTS.*

*See PRACTICE, HEARING AND SETTING DOWN CAUSES—PRACTICE, BILL, DISMISSAL OF.*

**XIX. CAUSE, CONDUCT OF.**

**CAVEAT.**

**CERTIFICATE OF CHIEF CLERK.**

\* **CERTIFICATE OF MASTER.** *See PRACTICE, MASTER, REFERENCE TO, &c.*

**XX. CERTIORARI AND CERTIORARI BILL.**

**XX, a. CHANCERY.**

1. *Chancery Regulation (Ir.) Act 1850.*
2. *Summary Order. See JURISDICTION, XV.*

**XXI. CHARGE AND DISCHARGE.** *See ACCOUNT, VIII, 2—PRACTICE, ACCOUNT.*

**CHIEF CLERK.**

\* **CLERK IN COURT.** *See PRACTICE, OFFICERS OF COURT.*

\* **CLERK OF ENROLMENTS.** *See ibid.*

\* **COMMISSION TO TAKE ANSWER.** *See PRACTICE, ANSWER.*

**XXII. COMMISSION TO ASCERTAIN BOUNDARIES & VALUE OF LANDS.** *See BOUNDARIES.*

**XXII.\* COMMISSION IN AID.**

\* **COMMISSION OF BANKRUPTCY.** *See BANKRUPTCY, VI.*

**COMMISSION OF LUNACY.** *See LUNACY, IV.*

**COMMISSION TO EXAMINE.** *See PRACTICE, EVIDENCE.*

**XXIII. COMMISSION OF PARTITION.** *See ESTATE, VII—STATUTE, II.*

**XXIV. COMMISSION OF REBELLION.**

**XXV. COMMISSION OF REVIEW.** *See PLEADING, BILL OF REVIEW—PRACTICE, BILL OF REVIEW.*

**XXVI. COMMITMENT.**

\* **CONDUCT OF SUIT.** *See PRACTICE, CAUSE, CONDUCT OF.*

**XXVII. CONSENT IN COURT.** *See ACQUESCENCE—BARRISTER—HUSBAND—HUSBAND AND WIFE, III—PRACTICE, DECREE.*

**CONSOLIDATION OF CAUSES.** *See PRACTICE, CAUSE, ADJOURNMENT OF, &c.*

**XXVIII. CONTEMPT.**

— *Respecting Costs of. See PRACTICE, COSTS.*

1. *General Orders respecting Contempt: Contempt, generally.*
  2. *What constitutes: Process and Committal for.*
  3. *Effect.*
  4. *Discharge from: Effect of Discharge.*
- See 5 & 6 W. 4, c. 16; PRACTICE, ATTACHMENT, 4.*

**XXIX. COPIES.** *See PRACTICE, EVIDENCE.*

**XXX. COSTS.**

— *Proof for. See BANKRUPTCY, XIII.*

— *On Petitions in Bankruptcy. See BANKRUPTCY, XVII.*

— *Revivor for. See PRACTICE, ABATEMENT AND REVIVOR, infra.*

— *Of Attachment. See PRACTICE, ATTACHMENT.*

— *Of Appeal, and Re-hearing for. See PRACTICE, APPEAL—PRACTICE, RE-HEARING, infra—STATUTE, II—VENDOR AND PURCHASER, VIII.*

1. *Generally.*
2. *How lost.*
  - a. *Generally.*
  - b. *By Fraud.*
  - c. *By Tender of Demand.*
3. *Apportionment of, and Contribution for.*
4. *From what Fund payable, and in what order.*
4. a. *Of Counsel*
5. *Payment and Tender of, when necessary: their Effect.*
6. *Security for.*
7. *Setting off.*
8. *When stayed by or on Appeal.*
9. *Taxation of.*
  - a. *Generally.*
    1. *General Jurisdiction.*
    2. *Under Statutes.*
  - b. *Costs of Taxation of Costs.*
  - c. *Effect of: and of Costs not being Taxed, and of Appeal, Re-hearing, and Revivor for.*



- d. *When party shall pay Taxed Costs, or only Fixed Costs.*
- e. *Whether Costs in Cause, or Extra Costs.*
- f. *Allowances beyond Taxed Costs. Of Costs, whether as between Party and Party, or Solicitor and Client.*
- 10. *In cases of: in Suits for: or by or to whom.*
  - a. *Abandonment of Cause, or of Motion, &c., after Notice to Appear, &c.*
  - b. *Account.*
  - c. *Administration Suits: Suits Testamentary.*
  - d. *Amendment.*
  - e. *Appeal.*
  - f. *Attorney-General and Crown.*
  - g. *Bankrupt and Insolvent, and their Assignees.*
  - h. *Bank of England.*
  - i. *Bill or Petition, Dismissal of.*
  - j. *Cause standing over, or struck out of list: Costs of the day.*
  - k. *Charity.*
    - 1. *Commissioners.*
  - m. *Contempt.*
  - n. *Creditors. See PRACTICE, CREDITOR'S SUIT.*
  - o. *Cross-cause.*
  - p. *Decree for Administration of Assets.*
  - q. *Demurrer or Plea allowed, submitted to, overruled, or ordered to stand for answer.*
  - r. *Discovery.*
  - s. *Dower.*
  - t. *Executors, Administrators, Trustees, Committees, &c.*
  - u. *Exceptions allowed or overruled.*
  - v. *Heir-at-law and Next-of-kin.*
  - w. *Husband and Wife.*
  - x. *Incumbrancers, Mortgagors and Mortgagees, Equitable and Legal.*
  - x.\* *Incumbered Estates Court. See PRACTICE, LANDED ESTATES COURT, LIV, a.*
  - y. *Infant, Prochein Ami, and Guardian.*
  - y\* *Injunction.*
  - z. *Insufficiency of Answer.*
  - aa. *Interpleader.*
  - aa.\* *Intervenients.*
  - bb. *Irregularity of Process.*
  - cc. *Issue at Law.*
  - cc.\* *Landed Estates Court. See PRACTICE, LIV, a.*
  - cc.\*\* *Landlord and Tenant.*
  - cc.\*\*\* *Legatees.*
  - dd. *Lunacy.*
  - ee. *Misconduct: Vexatious and Unnecessary Proceedings.*
  - ff. *Parties improperly joined, or served with notice of motion, &c.*
  - ff.\* *Partition.*
  - ff.\*\* *Partnership.*
  - gg. *Pauper.*
  - hh. *Perpetuating Testimony; Commission to Examine.*
  - hh.\* *Probate.*

- ii. *Proof of Debts before Master.*
- ii.\* *Railway Company.*
- jj. *Receiver.*
- kk. *Review.*
- ll. *Separate Costs.*
- mm. *Solicitor, personally, to pay.*
- nn. *Specific Performance: between Vendor and Purchaser, and other Parties, generally, and in Sales Judicial.*
- nn.\* *Trustees. See supra, t.*
- oo. *Witness.*
- pp. *Generally, in other cases.*

XXX\*. *COUNTRY CAUSE. See PRACTICE, ANSWER.*

XXXI. *COURT, PRACTICE IN, AND GENERALLY.*

XXXII. *CREDITOR'S SUIT. See PLEADING, PARTIES—PRACTICE, COSTS—PRACTICE, DECREE.*

- 1. *In general.*
- 2. *Effect of.*
- 3. *Costs, Expenses, and Charges.*
- 4. *Distribution of Assets in.*

XXXIII. *CROSS BILL AND CAUSE. See PRACTICE, ANSWER—PRACTICE, COSTS.*

\* *CURSITOR. See PRACTICE, OFFICERS OF COURT.*

\* *DE BENE ESSE. See PRACTICE, EVIDENCE.*

XXXIV. *DECREE. See INTEREST, PECUNIARY, VI—PRACTICE, COSTS.*

- 1. *In general: extent of Relief given by.*
  - a. *In general.*
  - b. *Relief at Hearing: not prayed for by the Bill or Petition.*
  - c. *What Parties must be before the Court.*
- 2. *Frame and construction of.*
  - a. *In general.*
  - b. *On what Evidence made.*
- 3. *Effect of Decrees.*
  - a. *In general.*
  - b. *On Summary Order.*
- 4. *To account.*
- 5. *For Administration and Distribution of Effects.*
- 6. *Of Foreclosure, or Redemption of Mortgages. (See also MORTGAGE.)*
- 7. *Who are bound by.*
  - a. *Generally.*
  - b. *Infants.*
- 8. *Obtaining generally.*
- 9. *Obtaining by Fraud.*
- 10. *Obtaining by Consent.*
- 11. *Pro confesso, and by Default.*
- 12. *Service of.*
- 13. *Adding to, Altering, Rectifying, Producing, and Varying Decree, or Minutes of Decree.*
- 14. *Entry, Drawing up, and Enrolment of Decrees.*
- 15. *Of Suspending, Prosecuting, Enforcing, and Carrying into Execution Decrees.*
  - a. *Enforcing, Prosecuting, and Carrying into Execution Decrees.*
  - b. *Suspending, and Staying Execution of Decrees.*

16. *Impeachment, Discharge, and Reversal of Decrees.*
17. *Lost.*

\* **DEDIMUS POTESTATEM.** See PRACTICE, WRIT.  
 \* **DEFENDANT.** See PRACTICE, PARTY, &c.

**XXXIV. DELIVERY UP OF DEEDS BY PARTIES, AND OUT OF COURT.**  
 See PRACTICE, INSPECTION OF DEEDS—PRACTICE, PRODUCTION OF DEEDS.

**XXXVI. DEMURRER.** See PLEADING, III. PRACTICE, COSTS—PRACTICE, EVIDENCE.

1. *General Orders respecting.*
2. *Generally.*
3. *Time of Filing Demurrer: Entry and Enrolment of.*
4. *Amendment of.*
5. *Argument on: Setting down Demurrer for, and withdrawing it.*
6. *Effect of Allowing or Submitting to Demurrer.*
7. *Effect of Overruling Demurrer.*
8. *Demurrer ore tenus.*

\* **DEPOSIT.** See PRACTICE, ANSWER—PRACTICE, APPEAL, I.—PRACTICE, MASTER, REFERENCE TO, &c.—PRACTICE, SALES, JUDICIAL.

\* **DEPOSITIONS.** See PRACTICE, EVIDENCE.

\* **DISCHARGE.** See PRACTICE, CHARGE AND DISCHARGE.

**XXXVII. ELECTION, TO SUE AT LAW OR IN EQUITY.**

\* **ENLARGEMENT, OF TIME.** See MORTGAGE, V.—TIME.

**XXXVIII. EVIDENCE.** See BANKRUPTCY, VI., X—MARRIAGE, II—PRACTICE, APPEAL—TITHES, VI, X—WILL, X.

1. *Generally.*
2. *What is sufficient, generally.*
3. *Of what Facts Evidence is necessary or admissible, generally—Statements in Pleadings.*
  - a. *In general.*
  - b. *Declarations, Admissions, &c.*
4. *Parol Evidence, when admitted: when rejected.*
5. *Onus Probandi.*
6. *Entry of Evidence, as read.*
7. *Further Evidence, when admitted after Publication, or on Appeal, Re-hearing, &c.*
8. *Before Master.* See *infra*, 28, d.
9. *At Law.*
10. *Exhibits.*
11. *Affidavits.*
  - a. *Generally: their Incidents.*
  - b. *Filing, and Swearing of, generally.*
  - c. *Form of.*
  - d. *Their Effect respecting Information, Belief, &c.*
  - e. *In support of Injunction, or against it.*
  - f. *In support of Interpleader Bills.*
  - g. *In support of Motions and Petitions, generally.*
  - h. *On application for Liberty to sue in forma pauperis.*
  - i. *Of Service.*

j. *On application for Leave to Substitute Service.*

k. *On obtaining a writ of Ne Exeat Regno.*

l. *In support of application for Commission to Examine Witnesses.*

m. *When necessary in other matters.*

n. *When read against Answer.*

o. *When to be received and read as Evidence, generally.*

p. *In Reply.*

q. *To Verify Petition, &c.*

12. *Answer.*

a. *When Answer may be read as Evidence.*

b. *What Evidence is good against Answer.*

c. *Effect of Reading Answer.*

13. *Bills, generally, and when taken pro confesso.*

14. *Taken on Bill to Perpetuate.*

15. *Copies.*

16. *Taken in other Courts.*

17. *Decisions of other Courts.*

18. *Evidence of one Defendant read for or against another.*

19. *Decree in former Cause.*

20. *Taken in another Cause, &c., or Matter.*

21. *Deeds: Proof of: Loss of Deeds: Touching other Documentary Evidence.*

[*As to Production of. See PRODUCTION OF DEEDS, LXXV.*]

a. *In general.*

b. *Secondary Evidence.*

c. *Registers and other Records, Books, Entries, Letters, Maps, &c.*

22. *When admitted to expound Deeds.*

23. *Handwriting.*

24. *In Tithe Causes.*

25. *Will, Proof of.*

26. *When Admitted to Expound Wills.*

27. *Witness.*

a. *Generally: his Rights, Duties and Liabilities: of Subpœna to Testify.*

b. *Competency of.*

c. *Examination respecting his Credit.*

d. *Demurrer to Interrogatories—who and on what Matters Examenable.*

e. *Attesting Witness.*

28. *Examination.*

a. *Generally.*

b. *When and how taken.*

c. *Examination viva voce.*

d. *Before Master.* See *ante*, 8.

e. *Before Examiner.*

f. *Examination de bene esse.*

g. *Pro interesse suo.*

h. *Cross-examination.*

i. *Further, or Re-examination.*

j. *Of Parties to the cause.*

k. *Of Defendant on Interrogatories.*

l. *Commission to Examine.*

1. *General Orders.*

2. *Their Effect.*

3. *When granted—how obtained.*

4. *Second Commission.*

5. *How Discharged or Abated.*

6. *Execution of: respecting the Commissioners.*
7. *Return of.*
8. *When Lost.*
29. *Depositions.*
  - a. *Generally.*
  - b. *Taken de bene esse.*
  - c. *Amendment of.*
  - d. *Suppression of.*
30. *Publications.*
  - a. *Generally.*
  - b. *Enlarging Time for Publication.*
- \* *EXAMINATION. See PRACTICE EVIDENCE.*
- \* *EXAMINER. See PRACTICE EVIDENCE.*
- XXXIX. *EXCEPTIONS, GENERALLY.*  
*See PRACTICE, ANSWER—ARBITRATION, V—PRACTICE, COSTS—PRACTICE, MASTER, REFERENCE TO, &c.*
- XL. *EXCEPTIONS, BILL OF.*
- XLI. *EXCHEQUER, PRACTICE IN.*
- \* *EXHIBITS. See PRACTICE, EVIDENCE.*
- \* *FEEB. See PRACTICE, OFFICERS OF COURT; SUITORS' FEE FUND.*
- XLI.\* *FILING PLEADINGS. See PRACTICE, ANSWER—PRACTICE DEMURRER—PRACTICE EVIDENCE—PRACTICE, PLEA.*
- \* *FORM.*
  - *Of Answer. See PRACTICE, ANSWER.*
  - *Of Bills in Equity. See PLEADING, BILL.*
  - *Of Demurrer. See PLEADING, DEMURRER.*
  - *Of Plea. See PLEADING, PLEA.*
  - *Of Bankrupt Petitions. See BANKRUPTCY, XVII.*
  - *Of Exceptions to Answer. See PRACTICE, ANSWER.*
  - *Of Appeal. See PRACTICE, APPEAL.*
  - *Of Decree. See PRACTICE, DECREE.*
  - *Of Affidavits. See PRACTICE, EVIDENCE.*
  - *Of Injunction. See PRACTICE, INJUNCTION.*
  - *Of Issue. See PRACTICE, ISSUE.*
  - *Of Master's Report and Certificate. See PRACTICE, MASTER, REFERENCE TO.*
  - *Of Master's Report, and Exceptions to it. See PRACTICE, MASTER, REFERENCE TO.*
  - *Of Proceedings on Motion. See PRACTICE, MOTION.*
  - *Of Order. See PRACTICE, ORDER.*
  - *Of Subpœna. See PRACTICE, SUBPœNA.*
- \* *FORMER SUIT. See PLEADING, PLEA—PRACTICE, PLEA.*
- XLII. *FUND, IN COURT. ADVANCES THERE-OUT TO PARTY TO CARRY ON A SUIT, AND FOR OTHER PURPOSES.*
- XLIII. *FURTHER DIRECTIONS.*
- \* *GENERAL ORDERS.*
  - *Their Construction. See PRACTICE, ORDERS, CONSTRUCTION OF.*
  - *Respecting Answers. See PRACTICE, ANSWER.*
  - *Dismissing Bill. See PRACTICE, BILL, DISMISSAL OF.*
  - *Contempt. See PRACTICE, CONTEMPT.*
  - *Decrees. See PRACTICE, DECREE.*
  - *Demurrer. See PRACTICE, DEMURRER.*
- *Affidavits. See PRACTICE, EVIDENCE.*
- *Depositions. See PRACTICE, EVIDENCE.*
- *Commission to Examine. See PRACTICE, EVIDENCE.*
- *Injunctions. See PRACTICE, INJUNCTION.*
- *Motions. See PRACTICE, MOTION.*
- *Orders. See PRACTICE, ORDER.*
- *Plea. See PRACTICE, PLEA.*
- XLIV. *HABEAS CORPUS. Respecting Warrant of Commitment, see BANKRUPTCY, VIII—see STATUTES, CONSTRUCTION OF, II.*
- XLV. *HEARING—SETTING DOWN CAUSE FOR HEARING—PRELIMINARY OBJECTIONS. See PRACTICE, ANSWER—PRACTICE, CAUSE, ADJOURNMENT, &c.—PRACTICE, RE-HEARING.*
  1. *In general.*
  2. *On Objection for Want or Misjoinder of Parties, &c. See PLEADING, PARTIES.*
  3. *Before what Judge.*
- XLV.\* *HOUSE OF LORDS.*
- INCUMBERED ESTATES COURT. *See PRACTICE, L. E. COURT.*
- \* *INFORMATION. See CHARITY, IV—PLEADING, INFORMATION.*
- \* *IMPERTINENCE. See PRACTICE, ANSWER—PRACTICE, MASTER, REFERENCE TO.*
- XLVI. *INJUNCTION. See PRACTICE, EVIDENCE—PRACTICE, PAYMENT INTO COURT. See 25 G. 3, c. 51 (Ir.)*
  1. *Generally: General Orders respecting its Form.*
  2. *How and when to be obtained: Motion for.*
  3. *Obtained on Amended Bill.*
  4. *Special.*
  5. *Perpetual.*
  6. *Extent and Effect of.*
  7. *Service of, and of Order for.*
  8. *Breach of: what constitutes Breach: Commitment for.*
  9. *Reviving, Continuing, and Extending.*
  10. *Dissolving: Cause against Dissolving.*
  11. *Effect of Amendment: obtaining Leave to Amend without Prejudice.*
  12. *Against Proceeding at Law or in Equity.*
    - a. *Generally.*
    - b. *Against Ejectment.*
    - c. *To Stay Trial: Extending Common Injunction.*
    - d. *To Stay Execution and Distress.*
    - e. *To Stay Proceedings in other Courts.*
    - f. *When Money will be Ordered into Court on Granting.*
    - g. *In Cases of Fraud: on ground of Public Policy.*
    - h. *In Cases of Interpleader.*
13. *Against Darkening Ancient Lights.*
14. *Against Breach of Contract, Covenant, or Trust.*
15. *Against Infringement of Copyright and Patent.*
16. *Against setting up Legal Bars and Defences.*

17. *Against Nuisance.*
18. *Against Payment of Money, or Transfer, or Negotiation of Security or Estate.*
19. *To Quiet Possession.*
20. *Against Sailing of Ships.*
21. *Against Sale.*
22. *Against Trespass.*
23. *Against Waste.*
24. *In Partnership Matters.*
25. *Against Assuming or Using same Trade Marks, Names, &c.*
26. *In other Cases.*

**XLVII. INQUEST, GENERALLY.** *See* LUNACY, IV.

**XLVIII. INSPECTION OF DEEDS, &c.** *See* BANKRUPTCY, X—PRACTICE, PRODUCTION OF DEEDS.

**XLIX. INSPECTION, ORDER FOR.** *See* PRACTICE, PRODUCTION OF DEEDS.

\* **INSUFFICIENCY.** *See* PRACTICE, MASTER, REFERENCE TO—PRACTICE, ANSWER.

**L. INTERLOCUTORY ORDER.**

\* **INTERPLEADER.** *See* PLEADING, BILL—PRACTICE, BILL OF INTERPLEADER—PRACTICE, EVIDENCE—PRACTICE, COSTS—PRACTICE, PAYMENT INTO COURT.

**LI. INTERROGATORIES.** *Touching Demurrer to Interrogatories, see* PRACTICE, EVIDENCE, *passim*.

**LII. INTITULING PLEADINGS.**

**LII.\* IRREGULARITY.**

1. *What constitutes it, generally.*
2. *Its Effect.*
3. *Waiver of.*

**LIII. ISSUE AND ACTION AT LAW: CASE SENT FOR THE OPINION OF THE JUDGES.** *See* PRACTICE, COSTS.

1. *Form of Issue.*
2. *When directed.*
3. *Issue of devisavit vel non.*
4. *Practice on, generally; Trial; Verdict; Proceedings, Effect of.*
5. *Taking pro confesso.*

**LIV. JUDGMENT.** *See* JUDGMENT, *ante*—PRACTICE, DECREE—PRACTICE, HEARING, &c.—PRACTICE, SUBPENA.

**LIV, a. LANDED ESTATES COURT.**

[*L. E. Court Act: 12 & 13 Vic., c. 77; L. E. Court Act: 21 & 22 Vic., c. 72.*]

1. *Jurisdiction.*
2. *Owner.*
  - a. *Who is.*
  - b. *His Rights and Liabilities.*
3. *Petition, Preparing, Intituling, &c.*
4. *Sale, Order for: Staying Proceedings on, Carriage of, Bidders, Re-sale.*
5. *Service of Notice, Process, &c.*
6. *Abatement.*
7. *Incumbrancers.*
  - a. *Who are, &c.*
  - b. *Settling Schedule of.*

8. *Purchaser's Rights, Liabilities, &c.*

9. *Affidavits.*

10. *Costs.*

11. *Re-hearing and Appeal.*

\* **LETTER MISSIVE.** *See* LETTER MISSIVE.

\* **MASTER.** *See* OFFICERS OF COURT.

\* **MASTER EXTRAORDINARY.** *See* PRACTICE, OFFICERS OF COURT.

**LV. MASTER; PROCEEDINGS BEFORE.**

*See* ACCOUNT, VIII—PRACTICE, CHARGE AND DISCHARGE—PRACTICE, COSTS—PRACTICE, EVIDENCE—PRACTICE, STATE OF FACTS—CHANCERY, SUMMARY ORDER.

**LVI. MASTER, REFERENCE TO—HIS REPORT AND CERTIFICATE.** *See* ACCOUNT.

1. *Reference to.*

a. *On what Facts Enquiry is made: when Reference is directed.*

1. *Generally: his Jurisdiction.*

2. *Respecting Infants, &c.*

3. *In Matters Testamentary.*

4. *Preliminary Enquiries.*

b. *Proceedings on.*

c. *Respecting Title.*

d. *Respecting Scandal, Prolivity, Impertinence, and Insufficiency.*

e. *Whether two Suits are for the same objects.*

f. *Whether Suit is for Infant's Benefit.*

g. *To Appoint Guardian and Maintenance, Trustees, &c.*

h. *In Cases of Foreclosure and Redemption of Mortgage.*

2. *Report and Certificate.*

a. *Form of.*

b. *Settlement and Signature of: their Effect.*

c. *Filing and Obtaining, and in what Time.*

d. *Review of, and Amendment of.*

e. *Confirmation of, and its Effect.*

f. *Separate Report: what Acts may be done without waiting for General Report.*

g. *Certificate, when necessary.*

h. *Exceptions to.*

1. *General Orders.*

2. *When Proper and Necessary: obtaining Court's Leave.*

3. *Form of.*

4. *Deposit on.*

5. *Time for Filing, and Effect of.*

6. *Setting Down, Hearing, and Arguing.*

7. *Allowance of: Overruling: Effect of.*

**LVII. MESSENGER.** *See* BANKRUPTCY, VI.

**LVII.\* MISNOMER.** *See* AMENDMENT, and References there.

**LVIII. MOTION.** *See* PRACTICE, EVIDENCE, and the several Titles which form the subject of Motions.

1. *Generally.*

2. *What may be effected by.*

3. *Notice of.*

4. *Motion of Course: what effected by.*
5. *When and how made.*
6. *Form of, and Proceedings on.*

\* *NE EXEAT REGNO, WRIT OF.* See WRIT, 4.

#### LIX. NEW TRIAL.

1. *When granted.*
2. *How obtained: Proceedings on.*

#### LX. NOTICE IN PRACTICE. See NOTICE—PRACTICE, MOTION.

1. *Notice generally in Practice.*
2. *Notice, Denial of.*

#### LXI. OFFICERS OF COURT. See JURISDICTION—PRACTICE, SEQUESTRATION—Respecting Examiner, see PRACTICE, EVIDENCE—DEPUTY REMEMBRANCER, see *infra*.—MESSENGER, see PRACTICE, MESSENGER—SOLICITOR, see SOLICITOR.

1. *Generally.*
  - a. *Their Rights, Duties, Privileges, and Liabilities.*
  - b. *Mistakes and Errors of.*
  - c. *Their Fees, and Lien for.*
2. *Accountant-General.*
3. *Clerks, Chief.*
4. *Clerks, Junior.*
5. *Clerk in Court.*
6. *Clerk of Enrolments.*
7. *Clerk of Records and Writs.*
8. *Commissioners to Administer Oaths in Chancery in Ireland.*
9. *Cursitor.*
10. *Master and Deputy Remembrancer.*
11. *Master Extraordinary.*
12. *Messenger.*
13. *Registrars.*
14. *Registrars, Assistant.*
15. *Secretary to the Lord Chancellor.*
16. *Secretary to the Master of the Rolls.*
17. *Six-clerks.*
18. *Stockbrokers.*
19. *Under Clerks.*
20. *Usher.*
21. *Waiting Clerks.*

#### LXII. ORDERS.

1. *General Orders concerning: Orders generally; their Form.*
2. *Construction and Effect of.*
3. *Entry and Drawing up of.*
4. *Showing Cause against: Suspension or Discharge of.*
5. *Service of.*
6. *Amendment of.*
7. *Short-day Order.*
8. *Stop Order.*

#### LXII.\* OUTLAWRY. See OUTLAWRY.

\* *PARTIES.* See PLEADING, V—PRACTICE, PRODUCTION OF PARTIES.

#### LXIII. PARTY; PLAINTIFF AND DEFENDANT, AND STRANGERS. See PRACTICE, EVIDENCE.

1. *Party Plaintiff, Rights, Duties, &c.*
2. *Party Defendant, Rights, Duties, &c.*
3. *Strangers: when they may be heard:*
4. *Attorney-General.*

#### LXIV. PAUPER. See PRACTICE, COSTS—PRACTICE, EVIDENCE.

#### LXV. PAYMENT, ORDER FOR.

#### LXVI. PAYMENT INTO COURT. See PRACTICE, INJUNCTION.

1. *On Admissions.*
2. *By, and in cases of Executors, &c., Trustees and Receivers.*
3. *On Interpleaders.*
4. *On obtaining and continuing Injunction against Proceedings at Law, and Commission to Examine Abroad.*
5. *In cases of Partners.*
6. *In cases of Vendor and Purchaser.*
7. *In other cases, and generally.*

#### LXVII. PAYMENT OUT OF COURT.

\* *PERPETUATING TESTIMONY.* See PRACTICE, BILL TO PERPETUATE.

#### LXVIII. PETITION. See BANKRUPTCY, VI, XVI, XVII—CHARITY, IV. [See also PLEADING, PETITION.]

1. *General Orders concerning.*
2. *What effected by.*
3. *Proceedings on, generally.*

\* *PLAINTIFF.* See PRACTICE, PARTY, &c.

#### LXIX. PLEA. As to Pleas in Answer to the Suit, see PLEADING, VII—see PRACTICE, COSTS.

1. *When proper; Filing, and Leave to Plead, when necessary.*
2. *Jurat of: Attestation and Signature of.*
3. *Setting down, and Argument of.*
4. *Withdrawing and Waiver of.*
5. *Allowance and Overruling: when, and Effect of.*
6. *Amendment of.*
7. *Of former Suit: Reference on.*
8. *When ordered to stand for Answer: Practice on.*

\* *PRELIMINARY OBJECTIONS.* See PRACTICE, HEARING.

#### LXX. PRIORITY OF SUIT. See PRACTICE, CROSS-BILL.

#### LXXI. PRISONER. See PRACTICE, ATTACHMENT—PRACTICE, HABEAS CORPUS.

#### LXXII. PRIVILEGE FROM ARREST. See BANKRUPTCY, VII—PRACTICE, WRIT—SOLICITOR.

#### LXXII.\* PRIVY COUNCIL.

#### LXXII.\*\* PROBATE, COURT OF, PRACTICE IN. See PLEADING IN THE COURT OF PROBATE.

[WILLS ACT, 1 Vic., c. 26—PROBATE ACT, 20 & 21 Vic., c. 79. See 21 & 22 Vic., c. 56.]

1. *Jurisdiction.*
2. *Administration or Probate Grant, or Recall of: Renunciation of Probate.*
3. *Affidavits.*
4. *Appeals.*
5. *Appearance.*
6. *Caveat.*
7. *Citation.*

- a. *Generally.*
- b. *When proper or necessary.*
- 8. *Costs.*
- 9. *Judgment.*
- 10. *Jury.*
- 11. *Notice.*
- 12. *Parties.*
- 13. *Petition.*
- 14. *Pleadings, Defences, Issues.*
- 15. *Sealing, Resealing.*
- 16. *Suits, Transfer of to Assistant-Bar-  
rister.*
- 17. *Trial, New.*
- 18. *Venue, Changing.*
- 19. *Will, Execution of.*

**LXXIII. PROCESS.** See LETTER MISSIVE—PRACTICE, ATTACHMENT—PRACTICE, COMMITMENT—PRACTICE, CONTEMPT—PRACTICE, COSTS—PRACTICE, HABEAS CORPUS—PRACTICE, WRIT.

\* **PROCEEDINGS AT LAW.** See PRACTICE, INJUNCTION.

**LXXIV. PROCHEIN AMI.** See PRACTICE, COSTS.

**LXXV. PRODUCTION OF DEEDS, BOOKS, &c.** See PRACTICE, INSPECTION OF DEEDS—PRACTICE, ORDER FOR INSPECTION.

- 1. *Generally.*
- 2. *By Solicitor: of Documents within the doctrine of Privilege.*
- 3. *In favour of Heir.*
- 4. *Upon what Admission or Evidence of Possession.*
- 5. *Court and Public Documents, Wills, &c.*
- 6. *By Purchaser, &c., without Notice.*
- 7. *On Defendant's Motion.*

**LXXVI. PRODUCTION OF PARTIES.**

**LXXVII. PROHIBITION.** See COURTS, INFERIOR.

\* **PRO INTERESSE SUO.**

\* **PUBLICATION.** See PRACTICE, EVIDENCE.

**LXXVIII. RECEIVER.** See BANKRUPTCY, X.—LEGACY, V—MORTGAGE, III, IV—PRACTICE, COSTS—PRACTICE, PAYMENT INTO COURT.

- 1. *Generally.*
- 2. *Appointment of.*
  - a. *Generally: in what cases made.*
  - b. *Before Appearance or Answer.*
  - c. *Who may be.*
  - d. *Against Executors, Administrators, and Trustees.*
  - e. *Over Infant's Estate.*
  - f. *Against Joint Tenants and Tenants in Common.*
  - g. *Against Mortgagor or Mortgagee, and other Incumbrancers.*
  - h. *In Partnership Cases.*
  - i. *Pendente Lite.*
  - j. *Against Vendor and Purchaser.*
  - k. *Judgment and Custodiam Creditors; under the Sheriff's Act, 5 & 6 W. 4, c. 55.*
  - l. *In other Cases.*

3. *Powers, Duties, and Liabilities of Receiver.*

4. *Security by: Rights and Liabilities of Sureties for.*

5. *Accounts and Allowances to.*

6. *Discharge and Removal of.*

7. *As respects Rents, Lands, and Tenants under the Court.*

a. *Generally, respecting Letting, Abatement to Tenants, &c.*

b. *Attachment, Distress, &c.*

\* **REFERENCE.** See PRACTICE, MASTER, REFERENCE TO, &c.

\* **REFERENCE FOR SCANDAL, &c.** See PRACTICE, ANSWER—PRACTICE, MASTER, REFERENCE TO.

\* **REGISTRAR.** See PRACTICE, OFFICERS OF COURT.

**LXXIX. RE-HEARING.** See PRACTICE, HEARING, &c. — PRACTICE, APPEAL—PRACTICE, EVIDENCE.

**LXXX. REJOINDER.**

**LXXX.\* REPLEVIN.**

**LXXXI. REPLICATION.**

\* **REPORT.** See PRACTICE, MASTER, REFERENCE TO, &c.

\* **RESTORING CAUSE.** See PRACTICE, CAUSE, ADJOURNING, &c.

\* **RETAINING CAUSE.** See PRACTICE, CAUSE, ADJOURNING, &c.

\* **REVIEW.** See PRACTICE, BILL OF REVIEW—PRACTICE, COMMISSION OF REVIEW.

\* **REVIVOR.** See PRACTICE, ABATEMENT AND REVIVOR—PRACTICE, SEQUESTRATION.

**LXXXI.\* RIGHT AND AUTHORITY TO SUE.**

**LXXXII. SALES JUDICIAL.** See BANKRUPTCY, X—MORTGAGE, VII—PARTICULARS OF SALE—PRACTICE, COSTS.

1. *Sale, when directed, on what Terms, where to take place.*

a. *By the Court of Chancery.*

b. *By the Incumbered Estates Court, or Landed Estates Court.*

2. *Who may Purchase at.*

3. *Vendor's Duties and Liabilities.*

4. *Purchaser's Rights, Liabilities, and Duties: touching the Title.*

5. *Sale, when completed: of putting Purchaser into Possession.*

6. *Discharge of first Purchaser: substitution of another.*

7. *Opening Biddings.*

a. *Generally.*

b. *Deposit on.*

c. *Re-sale.*

8. *The Conveyance.*

9. *Setting Sale aside.*

10. *Other Cases.*

\* **SCANDAL.** See PLEADING, ANSWER—PLEADING, BILL—PRACTICE, ANSWER—PRACTICE, MASTER, REFERENCE TO, I.

**LXXXIII. SEAL AND SEAL-DAY.** See BANKRUPTCY, VI.

may revive the suit by a mere bill of revivor.—*Pakenham v. Casey*, 8 I. E. R. 524. (E.E.)

1. If there be an irregularity in the reviving of a judgment, relief must be sought in the Court of Law, and not as a defence in a suit in Equity to raise the judgment.

A revivor against the heir and terre-tenants of one estate of the conuzor has no operation to keep the judgment alive against another estate of his originally bound by it.—*Franks v. Mason*, 9 I. E. R. 358. (C.)

2. When a sole petitioner dies after the petition has been filed, and notice thereof has been served, leave will be granted to file a petition in the nature of a petition of revivor referring to the original petition, and to be annexed thereto.—*Long v. L.*, 6 I. Jur. 194. (R.)

3. A cause petition having abated by the death of a sole petitioner, after an order had been made for substitution of service thereof, an order was made giving the executor of the deceased petitioner liberty to file a petition of revivor, and to substitute service of notice thereof in the same manner as had been directed by the previous order for the substitution of service of the original petition.—*Synge v. S.*, 7 I. Jur. 101. (R.)

4. A cause petition was filed by a minor, by her next friend. The minor married and made a settlement. The Court gave liberty to file a petition of revivor and supplement, to bring before the Court the husband of the minor, and the trustee of the settlement.—*Bowes v. Watson*, 7 I. Jur. 138. (R.)

5. In an administration suit the final decree ascertained the rights of the parties entitled to the assets, in five shares, subject to certain payments made to them; and directed the petitioner's costs to be paid by the respondents, the two executors; and that the respondents' costs should be paid in certain proportions out of the several shares. The assets had been paid into Court, except a small sum which the decree ordered one respondent to pay. After final decree, and before his costs were taxed, the sole petitioner died. *Held*, that the suit might be revived against both respondents.—*Fortune v. Walsh*, 16 I. C. R. 482. (R.)

6. A suit to revive a final decree to pay money cannot be sustained if not commenced within twenty years from the day on which the decree was made; no payment or acknowledgment having been made in the meantime.—*Dunne v. Doyle*, 10 I. C. R. 502; 5 I. Jur. N. S. 208. (C.)

#### I. 2. b. Revivor for Costs.

7. *Semble*—A suit may be revived for untaxed costs when it has abated by the death of the party entitled to receive them, or of the party bound to pay, before taxation.—*Barry Stawell*, 3 I. E. R. 18; *Flan. & K.* 1. (R.)—[*Affd.*: 3 I. E. R. 146. (C.)]

8. Decree against debts, with costs to be paid by them. One debt., who was liable to part of the costs solely, and to part jointly with other debts., died, the decree having been then fully performed in all respects except as to the payment of the costs, which were untaxed. A bill of revivor having been filed against the personal representative of the deceased debt. for payment of the costs.—*Held*, upon plea, that the suit could not be revived for the untaxed costs alone.—*Bowyer v. Beamish*, 7 I. E. R. 7. (R.)—[*Affirmed*: 8 I. E. R. 63; 2 Jon. & L. 228. (C.)]

9. A bill was filed to set aside a f. f. grant, and a subsequent sale to the grantee of the reserved rent. The decree declared the grant void as against ptf., but that he was not entitled to impeach the sale of the rent. It was decreed that W. and other debts., and all proper parties, should join in conveying the lands to ptf., and that he and all proper parties should join in proper clauses and covenants therein, or by a separate deed, as the Master should approve, to secure the rent; and that W. and other debts. should pay ptf. the costs of setting aside the grant. Further directions were reserved. W. died. Ptf. filed a bill of revivor and supplement against his personal representative, who demurred. *Held*, that the Court would not assume that nothing remained to be done by debt. under the decree, since the final decree might direct an account of the rents, or that debt. should join in the conveyance; and, therefore, the case came within the exception to the rule against revivor for untaxed costs.—*Fitzmaurice v. Sadlier*, 12 I. E. R. 136. (R.)

10. A motion was refused, with costs, to three ptf.s. Before the costs were taxed, two of the ptf.s. became bankrupt. The costs were taxed, and a subpoena issued in the name of the three ptf.s. *Held*, that the solicitor, and not the bankrupts, was beneficially entitled to the costs, which therefore did not pass to the assignees; and that the subpoena was regular without a bill of revivor, or a supplemental bill, being filed.—*Driscoll v. Blake*, 2 I. C. R. 139. (R.)

#### I. 2. c. How and when Suits are Revived.

##### 1. Under the Old Practice.

11. A suit, in which there has been a decree to account, may be revived at any time within twenty years after the last step taken in the original cause, if there has not been such a variation of rights as to work an injury.

A settlement, *pendente lite*, though after a decree to account, and an abatement of the suit, will not prevent the revivor.—*Higgins v. Shaw*, 2 Dr. & War. 356; 1 Con. & L. 400. (C.)

12. An insolvent's provisional assignee, having been made debt. in a suit, died. *Held*, that the new provisional assignee might be made debt. by bill of revivor merely.—*M'Colburn v. Crawford*, 6 I. E. R. 217. (E.E.)

1. When an insolvent's provisional assignee, being deft. in a suit, dies, the new provisional assignee may be made a deft. by bill of revivor merely.—*O'Brien v. Mahon*, 7 I. E. R. 601; 2 Jon. & L. 201. (C.)

2. In suit by Dean and Chapter, upon abatement by death of Dean, the suit may be revived by his successor by mere bill of revivor.—*Pakenham v. Casey*, 8 I. E. R. 524. (E.E.)

3. When a deft. dies after injunction obtained against him, upon revival of the suit against his personal representative, the injunction stands continued without further order.—*Kennedy v. Lloyd*, 8 I. E. R. 581. (R.)

4. A cause abated by the ptf.'s death in 1829. A bill of revivor was filed in 1836, and an order to revive made in 1841. Held, that it could not be objected that the cause was not effectually continued.

*Semle*—There is no rule requiring a bill of revivor for any purpose to be filed within six years of the abatement.—*Foster v. M'Mahon*, 11 I. E. R. 287. (C.)

5. When a suit abated by the death of the ptf., a minor suing by his next friend, the order to revive, or that the bill be dismissed, will be made without costs.—*Ross v. R.*, 2 I. Jur. 251. (R.)

## 2. Under the Court of Chancery Regulation (Ir.) Act 1850.

6. A cause may be revived by suggestion under the Court of Ch. Reg. Act, although the cause is out of Court, because no proceeding in it has been taken for more than a year.—*M'Conkey v. Gwynn*, 2 I. C. R. 142. (R.)

7. No order to revive is necessary after service of notice of a suggestion under the 29th sec. of the Ch. Reg. Act, if the parties served are not under disability.—*Wildridge v. M'Kane*, 2 I. C. R. 333. (R.)

8. Practice on reviving a cause petition matter abated by the death of a sole petitioner. — *Nason v. Peard*, 2 I. C. R. 553; 5 I. Jur. 347. (R.)

9. When a sole plaintiff dies, and his administrator seeks to revive the suit, he should file a cause petition, praying such revivor, and set down the case for hearing; as the 29th sec. of the Ch. Reg. Act, and the 28th G. O. of July 1851, are inapplicable to such a case.—*Purcell v. Gibbings*, 2 I. C. R. 480. (C.)

10. When a suit by bill has abated by the death of one of the co-ptfs., whose interest is transmitted to another party, it cannot be revived by filing a suggestion under the 29th sec. of the Ch. Reg. Act. An order of the Court must be obtained to file a petition of revivor and supplemental petition.—*Gurly v. G.*, 6 I. Jur. 218. (R.)

11. When a petition matter under the Mortgage Act has abated, it cannot be revived by motion, without a petition.—*Burke v. Mahony*, 5 I. C. R. 345. (R.)

12. When a person, not a party to the cause, who had proved a demand in the office, obtains an order for re-hearing the decree, that order may be revived on petition. Form of order for such revival.—*Guinness v. Darley*, 6 I. C. R. 21; 2 I. Jur. N. S. 401. (C.A.)

13. A commission issued against a bankrupt, in 1833, upon which no proceedings had been since taken. The application to revive those proceedings should be made to the Court of Bankruptcy and Insolvency. The power of the Lord Chancellor to renew the commission was taken away by the 20 & 21 Vic., c. 60.—*In re Dickie*, 3 I. Jur. N. S. 183. (B.)

14. Practice in reviving by suggestion against a minor deft. — *Ffrench v. Ff.*, 3 I. Jur. N. S. 336. (R.)

15. A petition of supplement and revivor, when the original suit has been referred under the Ch. Reg. Act, s. 15, may be referred under that sec.—*De Bury v. Cooke*, 7 I. C. R. 273. (C.)

16. A suit to revive a final decree for payment of money cannot be sustained if not commenced within twenty years from the day on which the decree was made; no intervening payment or acknowledgment having been made.

A decree in an administration suit instituted against husband and wife, executor and executrix, directed payment by them of money. The husband having died, the wife surviving is personally liable for the amount.—*Dunne v. Doyle*, 10 I. C. R. 502; 5 I. Jur. N. S. 208. (C.)

17. A case showed a pressing necessity for immediately raising a personal representative to revive in Ch. an abated suit, pending for hearing in the Chancellor's list. The Court limited the time for extracting administration to less than fourteen days.—*Phillips v. Hassard*, 7 I. Jur. N. S. 126. (P.)

18. In an administration suit the final decree ascertained the rights of the parties entitled to the assets, in five shares, subject to certain payments made to them; and directed the ptf.'s costs to be paid by the respondents, the two executors, and that the respondents' costs should be paid, in certain proportions, out of the several shares. The assets had been paid into Court, except a small sum which the decree ordered one respondent to pay. After final decree, and before his costs were taxed, the sole petitioner died. Held, that the suit might be revived against both respondents.—*Fortune v. Walsh*, 16 I. C. R. 482. (R.)



II. 3. *Under the Chancery (Ireland) Act 1867, see 30 & 31 Vic., ss. 141-143.*

I.\* ACCOUNT. See ACCOUNT.

— *As to Mode of taking Account.* See ACCOUNT, II & VIII.

— *As to Mode of Pleading Account.* See PLEADING, BILL, AND PETITIONS.

#### ACCOUNT.

1. Ptf. is not entitled, as of course, to a decree for an account when the deft. does not appear; ptf. must make out his case.—*Hayes v. Brierley*, 3 Dr. & War. 274; 2 Con. & L. 153. (C.)

ACCOUNTANT-GENERAL. See PRACTICE, OFFICERS OF COURT.

ADJOURNMENT OF CAUSE. See PRACTICE, CAUSE, ADJOURNING, &c.

ADVANCE TO PARTIES OUT OF FUNDS IN COURT. See PRACTICE, FUND IN COURT.

ADVANCING CAUSE. See PRACTICE, CAUSE, ADJOURNING, &c.

#### II. ADVERTISEMENT TO APPEAR, &c.

— *Of Bankruptcy in Gazette.* See BANKRUPTCY, VI.—PRACTICE—CREDITOR'S SUIT.

#### AFFIDAVITS.

— *Generally.* See PRACTICE, EVIDENCE.

— *Of Petitioning Creditor's Debt.* See BANKRUPTCY, VI.

— *To support Petition to stay Certificate.* See BANKRUPTCY, XVI.

— *To support Bankruptcy Petitions generally.* See BANKRUPTCY, XVII.

— *Annexed to Bill.* See PLEADING, BILL.

— *In support of Attachment.* See PRACTICE, ATTACHMENT.

— *When read against Answer.* See PRACTICE, EVIDENCE.

— *When received and read generally.* See *ibid.*

— *In reply.* See *ibid.*

#### AMENDMENT.

— *Of Fiat.* See BANKRUPTCY, VI.

— *Of Bankruptcy Petitions.* See BANKRUPTCY, XVII.

— *Of Answer.* See PRACTICE, ANSWER.

— *Of Bill.* See PRACTICE—BILL, AMENDMENT OF.

— *Of Decree.* See PRACTICE, DECREE.

— *Of Demurrer.* See PRACTICE, DEMURRER.

— *Of Depositions.* See PRACTICE, EVIDENCE.

— *Of Discharge.* See PRACTICE, DISCHARGE.

— *Of Master's Report.* See PRACTICE, MASTER, REFERENCE TO, &c.

— *Of Order.* See PRACTICE, ORDER.

— *Of Plea.* See PRACTICE, PLEA.

— *Of Subpœna.* See PRACTICE, SUBPœNA.

— *Costs on.* See PRACTICE, COSTS.

— *Its Effect on Injunction.* See PRACTICE, INJUNCTION.

AMENDED BILL. See PRACTICE, BILL AMENDED.

#### III. ANSWER.

[See Gam. Ch. Or., pp. 25-38; 30 & 31 Vic., c. 44, ss. 64, 65, 68, 70, 72, 73, 74, 81, 84, 86, 161; G. O. 1867, 56-78.—*Note.* The cases from

the I. C. R. refer to the Practice under the Court of Ch. Reg. (Ir.) Act 1850.]

— *Costs on, Insufficiency of.* See PRACTICE, COSTS.

— *When Affidavits can be read against.* See PRACTICE, EVIDENCE.

See PRACTICE, TAKING PLEADINGS OFF THE FILE—PRACTICE, INJUNCTION.

1. *General Orders respecting; Answer, generally.*

2. *Its Form.*

3. *Signature of.*

4. *Jurat, and Swearing of.*

5. *Schedules to.*

6. *In what time—its Filing.*

7. *Ordered to be put in within a given time.*

8. *Commission to Take.*

9. *Time given to Answer.*

10. *Effect of Answer, and of its Want.*

11. *Further Answer.*

12. *Supplemental Answer.*

13. *Separate Answer.*

14. *To amended Bill.*

15. *Amendment of.*

16. *Evasive.*

17. *Exceptions to.*

a. *Their Form and Requisites.*

b. *Their Effect.*

c. *When necessary or proper to be taken.*

d. *Within what time to be taken.*

e. *Filing generally, and nunc pro tunc.*

f. *Deposit on.*

g. *Further Exceptions.*

h. *Waiver of.*

i. *Submission, or otherwise, to.*

j. *Reference on Exceptions.*

k. *Argument on, and Hearing of.*

l. *Allowance and Over-ruling of.*

18. *Reference of, for Scandal and Impertinence.*

19. *Sufficiency of Answer.*

20. *Who are bound by Answer.*

21. *Liberty to withdraw Answer.*

22. *Priority of Answers when there are Original and Cross Bills.*

#### III. 1. G. Orders respecting: Answer, generally.

[As to the New Practice—See G. O. (1867), 56-78.]

2. The answer of a sole defendant, filed within two days after a decree *pro confesso* had been obtained, was allowed to stand, and that decree set aside upon terms, though the affidavit to ground the application did not particularly show any grounds of defence upon the merits.—*Daly v. Duggan*, 1 I. E. R. 315. (R.)

3. Bill to carry a decree into execution. A. was made a notice party. At the hearing, liberty was given to amend by adding parties. A. was made an answering party. Upon motion to take a demurrer by A. off the file—*Held*, that he was entitled to demur.—*Rowland v. M'Donnell*, 13 I. E. R. 365; 2 I. Jur. 107. (R.)

[Under the Court of Ch. Reg. Ir. Act 1850, respondent's answer was made part of his evi-

dence, and required to be on affidavit.—See PRACTICE, AFFIDAVIT.]

### III. 2. Form of Answer.

1. *Quare*—Whether it is necessary in the answer to rely on the Statute of Limitations, in order to entitle the party to set it up in the office?—*Drought v. Jones*, 2 I. E. R. 303. (C.)—[See also *Carey v. Doyne*, 5 I. C. R. 104. (R.); *Baldwin v. B.*, 3 I. Jur. 53. (C.)]

2. Conversations which go to the gist of the action should be put in issue.—*Donohoe v. Conratty*, 8 I. E. R. 679; 2 Jon. & L. 688. (C.)

3. Husband and wife entered a joint appearance. He alone answered. *Held*, that the answer was a nullity, and that the plaintiff might proceed as for want of an answer.—*Thompson v. Lockwood*, 8 I. E. R. 367. (R.)

[As to form under the Court of Ch. Reg. Ir. Act, see Gen. Orders of 1857, 4.]

### III. 3. Signature of.

#### III. 4. Jurat and Swearing of.

Under the Court of Ch. Reg. Ir. Act 1850—see *Bennett v. Cooper*, 3 I. Jur. 3. (C.); *Ex parte Griffith*, 1 I. C. R. 21. (C.); *Montgomery v. Eyre*, 1 I. C. R. 120; *Byrne v. Coleman*, 7 I. Jur. 63; *Porter v. Archbold*, 2 I. C. R. 572.

#### III. 5. Schedules to Answer.

4. Bill against an agent for an account. Two schedules of great length, containing copies of agreements, leases, and accounts, &c., relating to the estate, were annexed to the answer. Upon motion to take the answer off the file for prolixity, or that the schedules might be expunged, an order was made to expunge part of one schedule and the entire of the other.—*Preston v. Lovelock*, 3 I. Jur. 278. (R.)

#### III. 6. Time for Answering: Filing of Answer.

5. If a bill be amended, and notice given that the plaintiff does not require an answer to the amendments, the defendant, if he desires to answer them, must do so within the time allowed for answering when an answer is required. In such a case the plaintiff acts irregularly in filing a replication before he has returned to the defendant his copy of the bill amended. An answer filed after such a replication is regular.

If the defendant is entitled to answer amendments made after his former answer, he may answer fully the case made by the original bill.—*Cathcart v. Hewson*, H. & J. 540. (E.E.)

6. A sole deft.'s answer, filed within two days after a decree *pro confesso* had been obtained, was allowed to stand; and that decree set aside upon terms, though the affidavit to ground the application did not particularise

any grounds of defence upon the merits.—*Daly v. Duggan*, 1 I. E. R. 315. (R.)

7. The Court will not, without an affidavit of merits, permit a defendant to file an answer, after an order to take the bill *pro confesso* against him.—*Delany v. Dowlan*, Flan. & K. 182. (R.)

8. It is not the deft.'s right to file his answer after a decree on sequestration against him, on paying the costs thereof.—*M'Cartney v. O'Neill*, 5 I. E. R. 159. (E.E.)

9. The only cause against a conditional order for a receiver on process is an answer on the file.—*M'Cartney v. O'Neill*, 5 I. E. R. 494. (E.E.)

10. Notwithstanding the 34th G. O. of March 1843, leave given to defendant to file his answer after an order to take the bill as confessed against him, although more than three years had elapsed after the order to take the bill as confessed was pronounced, and the cause was in the Lord Chancellor's term list of causes for hearing; the plaintiff having been himself guilty of delay, there being a full affidavit of merits, and the deft. being put under terms, so as not to postpone the hearing of the cause.—*Cruise v. Shell*, 6 I. E. R. 132. (R.)

11. When a defendant filed his answer to a bill after the cause had been set down for hearing as *pro confesso*, the answer was received; the defendant paying the costs of setting down the cause, and of the hearing.—*Woodhouse v. Boyd*, 8 I. E. R. 512. (E.E.)

12. Until the defendant in the original cause has answered, he is not entitled to call on the plaintiff to answer the cross bill. Before the defendant in the original cause has answered, he cannot stay the proceedings in that cause till the defendant in the cross cause (the plaintiff in the original), though out of the jurisdiction, shall answer the cross bill. But after answering the original bill, the plaintiff in the cross cause can stay publication in the original cause till the cross bill be answered.—*Raikes v. Cherry*, 9 I. E. R. 140. (R.)

13. Appearance on the 26th April; order on the 8th May, staying proceedings until security for costs should be given. Security given on the 4th December; cause set down *pro confesso* on the 24th Jan., the 23rd being Sunday. *Held*, irregularly, the defendant having the whole of the 24th to answer.—*White v. W.*, 12 I. E. R. 425. (R.)

Under the Court of Ch. Ir. Reg. Act 1850.

[See Gen. O. of Nov. 1852, No. 2; June 18 1856, No. 2; Gen. Or. May 1857, Nos. 5, 6, & 7.]

14. When the time for filing affidavits in answer to a cause petition has expired, the M. R. will not make a consent, between the parties to allow them to be filed, a rule of

Court.—*Gibnore v. Clarke*, 3 I. Jur. N. S. 53. (R.); *Graham v. McDermot*, 6 I. Jur. 381; *Millett v. Mansergh*, 1 I. Jur. N. S. 147; *Cassan v. Carr*, 2 I. C. R. 377; *Carey v. Browne*, 6 I. Jur. 349; s. c., 4 I. C. R. 210.

1. Applications for liberty to file answering affidavits in a cause petition matter transferred to his Honor's list, in which no affidavit has been filed, should be made at the Rolls.—*Barton v. Major*, 8 I. C. R. 25. (R.)

2. When an order, giving further time to file additional affidavits, was made upon consent—*Held*, that this did not extend the time for setting down the petition, but that the two terms ran from the filing of the answering affidavits.—*Wynne v. Knox & Swan*, 8 I. Jur. N. S. 341. (R.)

### III. 7. Ordered to be put in within a given Time.

#### III. 8. Commission to Take.

#### III. 9. Time given to Answer.

3. A rule, for time to answer, entered as of course on an infant's behalf is irregular.—*Smithwick v. S.*, H. & Jon. 599. (E.E.)

4. When the plaintiff amends his bill under the 52nd G. O., and gives notice to the defendant, the latter should send his copy to be amended in two days. The plaintiff should return it amended in two days after, requiring, if necessary, an answer; and the month will run from the date of the return of the bill and notice, and *exclusive* of it. If the defendant neglect to send his copy for amendment in two days after requisition, and the plaintiff return it in two days after he gets it, the month will commence to run *on*, and from the sixth day after the defendant was served with notice to furnish his copy.—*Greer v. G.*, 7 I. E. R. 72. (R.)

5. When a defendant filed his answer to a bill after the cause had been set down for hearing as *pro confesso*, the answer was ordered to stand, the defendant paying the costs of setting down the cause, and of the hearing.—*Woodhouse v. Boyd*, 8 I. E. R. 512. (E.E.)

6. A judgment creditor, out of the jurisdiction, having been served with notice, discovered for the first time after replication filed, that it was necessary for his interest to answer. The Court permitted him to do so on terms.—*Lyster v. Blake*, 8 I. E. R. 579. (R.)

7. The Court will not, as a matter of course, grant liberty to a respondent to file affidavits in answer to a cause petition, after the time limited for so doing by the 2nd G. O. 1852 is passed; but upon an affidavit of merits such liberty will be granted pursuant to the 3rd G. O. 1852.—*Irvine v. Balje*, 5 I. Jur. 273. (R.)

8. In analogy to the old practice respecting decrees *pro confesso*, leave will, on a proper

affidavit of merits, and on proper terms as to costs, &c., be given to a respondent who has not filed any answering affidavit, to file one after the proper time for answering has elapsed.—*Tuthill v. Latouche*, 5 I. C. R. 53; 1 I. Jur. N. S. 297. (C.)

#### III. 10. Effect of Answer: and of its Want.

9. An order for time to answer stops all process. Pending such time plaintiff cannot have a conditional order for a receiver previously obtained.—*Connell v. Godwin*, H. & Jon. 114. (E.E.)

10. To enforce a defendant's equity, by impeaching securities, a cross bill is necessary under the English practice.

*Semble*—In Ireland it may be done by answer.—*Carter v. Palmer*, 8 Cl. & F. 660.—[See 1 I. E. R. 289; 1 Dr. & Wal. 722. (C.)]

11. A party, having been supposed to be the personal representative of a deceased defendant, was served with subpoena to revive and answer. He did not discover the character in which he was made a party until after the time to plead had expired. The Court permitted him to plead, notwithstanding the 64th G. O., as an answer would not prevent the suit being revived against him.—*Lewin v. L.*, 9 I. E. R. 638. (R.)

#### III. 11. Further Answer.

12. Liberty given on motion, after hearing and re-hearing, to amend the bill's prayer, by praying the benefit of proceedings stated in it; a satisfactory reason being given why leave was not asked at the hearing, the defendant being allowed to answer anew.—*Blake v. Foster*, Beat. Rep. 464. (C.)

13. If a bill be amended and notice given that the plaintiff does not require an answer to the amendments, the defendant, if he desires to answer them, must do so within the time allowed for answering when an answer is required. If the defendant is entitled to answer amendments made after his former answer, he may answer fully the case made by the original bill.—*Cathcart v. Hewson*, H. & J. 540. (E.E.)

#### III. 12. Supplemental Answer.

14. A defendant in a foreclosure suit, who had filed an answer and disclaimer, in ignorance of her rights to the equity of redemption, applied, after a decree to account, for liberty to withdraw the disclaimer, and amend the answer, or to file a supplemental answer, stating her claims to the equity of redemption. The Court refused the order, without prejudice to any application which the defendant might make, after satisfaction of the plaintiff's demand under the decree.

*Semble*—The effect of an answer or disclaimer upon the record may, with the leave of the Court, be got rid of.—*Glenny v. Murdock*, Flan. & K. 277; 3 I. E. R. 443. (R.)

1. To support an application for liberty to file a supplemental answer putting in issue documents in support of the case made by the former answer, the defendant must satisfy the Court that it was not for want of reasonable diligence on his part, that the documents were not put in issue by the former answer.—*Young v. O'Reilly*, 5 I. E. R. 521. (E.E.)

2. After witnesses had been examined, but before publication, the Court permitted the defendant to file a supplemental answer to put in issue a material document found since the former answer was sworn; it appearing that there was not a want of due diligence to put it in issue by the former answer.—*O'Keefe v. Allen*, 5 I. E. R. 523. (E.E.)

3. In a suit by a judgment creditor to administer assets, leave to file a supplemental answer was refused, the application having been made after a consent to admit documents had been made a rule of Court, and the rule for publication entered.—*Beavan v. Massey*, 2 I. Jur. 3. (R.)

4. A defendant was permitted to file a supplemental answer, putting in issue a settlement by which an estate tail was created, and denying that any fine had been levied or recovery suffered, the existence of the settlement having come to the defendant's knowledge since the filing of the original answers.

Notice of motion for liberty to file a supplemental answer should state in precise terms the matters required to be put in issue.—*Martin v. O'Flaherty*, 2 I. Jur. 11. (R.)

5. A defendant, claiming as heir-at-law, by answer admitted agreements stated in the bill. The cause having gone into the office the Master found that the agreements gave to the testator chattel interests in the lands, and that they formed part of his personal estate. After the report was confirmed, the original agreements having been discovered, it was ascertained that they gave to the testator freehold interests in the lands, descendible to the defendant as heir-at-law. Upon motion to have the report sent back to the Master to be reviewed, and for liberty to file a supplemental answer—*Held*, that the defendant should be at liberty to file a charge, stating the agreements correctly.—*Carbery v. Cox*, 2 I. Jur. 25. (C.)

6. Leave given to a mortgagee defendant to file a supplemental answer to a cause petition, varying in some measure the statement of his title to the mortgage as put forward in his original answer, and putting in issue a deed under which he claimed, but which he had forgotten to mention in his original answer.

*Semble*—Mere inconsistency between the proposed matter of defence and the original defence is not sufficient ground for refusing leave to a defendant to file a supplemental answer.—*Glascock v. Ross*, 1 I. C. R. 50; 3 I. Jur. 115. (C.)—[Followed: *Kirwan v. Lindsay*, 2 I. C. R. 23. (C.)]

### III. 13. *Separate Answer.*

7. When husband and wife are sued jointly, a separate answer by the husband, filed without an order for that purpose, is irregular. Ptf. moved to set aside such an answer, and for process against the husband and wife. The husband stated a case, showing that an order to answer separately would have been granted, if applied for. *Held*, that the husband's separate answer should not be set aside; but that the wife should answer separately, or else process should issue against her.—*Rooney v. Fox*, 1 Jones' Rep. 437. (E.E.)

8. Three testamentary trustees were made defendants to a bill; and, although in the same interest, answered separately. The Lord Chancellor said that circumstances might justify the defendants in putting in separate answers; and directed the Master, in taxing the costs, to allow to the trustees the costs as of one answer only, unless he should find that any one had properly put in a separate answer, and then to allow his reasonable costs accordingly.—*Dudgeon v. Corley*, 4 Dr. & War. 158. (C.)

9. When a married woman lives apart from her husband, who resides out of the jurisdiction, and has not any interest in the subject of the suit, the Court will, on ptf.'s motion, and the wife's assent, allow her to file a separate answer.—*O'Brien v. Bernard*, 7 I. E. R. 180. (R.)

10. Husband and wife entered a joint appearance. Husband only answered. *Held*, that the answer was a nullity, and that ptf. might proceed as for want of an answer.—*Thompson v. Lockwood*, 8 I. E. R. 367. (R.)

11. Husband entitled to an estate tail in remainder in right of his wife, was resident out of the jurisdiction. Order that the wife should enter an appearance and answer separate from the husband.—*Rigney v. O'Connell*, 2 I. Jur. 186. (R.)

### III. 14. *To Amended Bill.*

12. If the bill be amended, with notice that no answer is required, deft. must, if he desires to answer, do so within the time allowed when an answer is required. It is irregular for ptf. to file a replication before returning deft.'s copy of the bill amended. After such replication has been filed an answer is regular. Deft., if entitled to answer amendments after his former answer, may then answer the case made by the original bill.—*Cathcart v. Hewson*, H. & Jon. 540. (E.E.)

13. In general, amending a bill is a waiver of exceptions to the answer; but, under the G. O. of 13th June 1730, deft. in such a case must answer not only the amendments, but also the exceptions.—*Burroughs v. M'Ilveen*, 3 Dr. & War. 150; 2 Con. & L. 94. (C.)

14. Leave to answer an amended bill after replication is not subject to all the rules which

regulate leave to file a supplemental answer. In a special case, the Court may permit deft. to file an answer to the amended bill notwithstanding the replication, although the notice of motion does not set out the contents or substance of the intended answer.

A bill was amended on the 1st of April, and notice was served on deft. that she was not required to answer. At that time deft. was charged by ptf. with two criminal offences. On the 9th bills were found. The trials lasted from the 18th until the 21st, when deft. was acquitted. Ptf.'s solicitor was his agent for the prosecution. Replication was filed on the 22nd. The Court allowed deft. to answer the amended bill, though she had not, under G.O. 53, served notice of her intention to answer the amendments, and though the time for answering them had expired.—*Scott v. S.*, 9 I. E. R. 461. (R.)

### III. 15. Amendment of Answer.

[See Subdivisions 12 and 14, ante.]

1. The Court will not amend an error in the name of a defendant in the title of his answer. The proper course is to apply to have the answer taken off the file, that it may be amended and re-sworn.—*Nolan v. N.*, 10 I. E. R. 234. (R.)

2. Leave given to a mortgagee defendant to file a supplemental answer to a cause petition, varying in some measure the statement of his title to the mortgage as put forward in his original answer, and putting in issue a deed under which he claimed, but which he had forgotten to mention in his original answer.

*Semble*—Mere inconsistency between the proposed matter of defence and the original defence is not a sufficient ground for refusing leave to a defendant to file a supplemental answer.—*Gluscock v. Ross*, 1 I. C. R. 50; 3 Ir. Jur. 115. (C.)—[Followed: *Kirwan v. Lindsay*, 2 I. C. R. 23. (C.)]

### III. 16. Evasive.

#### III. 7. Exceptions to.—[See G. O. (1867), 68-78.]

- a. *Their Form and Requisites.*
- b. *Their Effect.*
- c. *When Necessary or Proper to be taken.*
- d. *Within what Time to be taken.*
- e. *Filing, generally, and nunc pro tunc.*
- f. *Deposit on.*
- g. *Further Exceptions.*
- h. *Waiver of.*
- i. *Submission or otherwise to.*
- j. *Reference on Exceptions.*
- k. *Argument on, and Hearing of.*
- l. *Allowance and Overruling of.*

#### III. 17. a. Their Form and Requisites.

3. At the foot of exceptions taken to an answer, counsel's certificate need only state

that the exceptions are proper and necessary, and not taken or served for delay, according to the 72nd G. O. (Nov. 1834); but need not state "that he has read the bill and answer, and has read and approved of the exceptions," according to the old rule.—*Adamson v. Jameson*, 1 I. E. R. 199. (R.)

4. Exceptions to an answer were filed without having the certificate of counsel annexed. An application for liberty to amend the exceptions by adding the certificate was refused.—*O'Flynn v. Wall*, 2 I. Jur. 170. (R.)

#### III. 17. b. Their Effect.

#### III. 17. c. When Necessary or Proper to be taken.

#### III. 17. d. Within what Time to be taken.

5. Under G. R. 75, ptf. has six weeks to except, for insufficiency, to the answer to an amended bill.—*Garvey v. Hayes*, 11 I. E. R. 270. (R.)

6. The time for excepting to an answer for insufficiency, limited by the 75th G. O. (1843), will not be extended after the six weeks have expired; the rule is binding unless there is fraud or accident.—*Thompson v. Beamish*, 2 I. Jur. 13. (R.)—[On appeal the order was made extending the time.—2 I. Jur. 33. (C.)]

#### III. 17. e. Filing, generally, and nunc pro tunc.

#### III. 17. f. Deposit on.

#### III. 17. g. Further Exceptions.

#### III. 17. h. Waiver of Exceptions to Answer.

7. A motion to continue an injunction upon equity confessed by the answer, without any saving of the right to except, is a waiver of all objections to the answer for insufficiency. Plaintiff served notice to continue an injunction upon equity confessed without reserving a right to except, and afterwards filed exceptions to defendant's answer. *Held*, that the exceptions were irregular, and should be taken off the file.—*Crofts v. Lord Egmont*, 3 I. E. R. 227; Fl. & K. 82. (R.)

8. A plaintiff, by moving for a receiver upon an answer, without reserving a right to except, is not thereby deprived of his right to do so.—*Irvine v. St. George, Flan. & K.* 622. (R.)

9. In general, amending a bill is a waiver of exceptions to the answer, but, under the Order of 13th June 1730 (see 54th G. O., 27th March 1843), the defendant, in such case, is bound to answer not only the amendments but the exceptions.—*Burroughs v. McCreight*,

2 Con. & L. 95; nom. *Burroughs v. M'Ilween*, 3 Dr. & War. 150. (C.)

III. 17. i. *Submission to, or otherwise.*

III. 17. j. *Reference on Exceptions.*

III. 17. k. *Argument on, and Hearing of.*

III. 17. l. *Allowance and Overruling of Exceptions.*

1. The Court may allow an exception to an answer in part, and overrule it in part.—*Flanagan v. Williams*, 2 Jon. 557. (E.E.)

III. 18. *Reference of, for Scandal and Impertinence.*

2. If a party suffers the Court to make an order upon an affidavit, he cannot afterwards refer it for prolixity, though he himself has not taken any subsequent step in the cause.—*Robinson v. Warner*, Jon. & Car. 50. (E.E.)

3. When the answering affidavit contains irrelevant or scandalous matter, tending to injure the character of the petitioner, the proper course is to refer the affidavits to the Master to enquire as to their impertinence.—*Finnegan v. Keappock*, 4 I. Jur. 285. (C.)

III. 19. *Sufficiency of Answer.*

4. When deft.'s answer is excepted to for insufficiency under the 75th New Rule, it is not to be deemed sufficient until either the Master reports, disallowing the exceptions, or, if the report be not obtained within the time limited by the Rule, until the termination of three weeks from the delivery of the exceptions.—*Raymond v. Evans*; *Wise v. Palmer*, 1 I. E. R. 428. (R.)

5. The 45th G. O. applies as well to cases in which there is but one defendant, as to those in which there are more than one defendant to a suit. A sole defendant is not bound to answer more than the interrogatories contained in the bill.—*Millar v. M.*, 6 I. E. R. 308. (R.)

6. Husband and wife entered a joint appearance. He alone answered. *Held*, that the answer was a nullity; and that the plaintiff might proceed as for want of an answer.—*Thompson v. Lockwood*, 8 I. E. R. 367. (R.)

7. Bill to establish a right of dues for weighing and stallage of goods in a market under a grant by the lords thereof.—*Held*, that the grant did not pass the dues, &c., and, therefore, that plaintiff could not except for insufficiency to the answer, in that it did not give discovery in aid of an account, the right to which depended on the title.—*Russell v. Beakey*, 8 I. E. R. 559. (R.)

8. A defence of purchase for value, without notice, is no answer to a suit to perpetuate testimony.—*Talbot v. Kennedy*, 7 I. Jur. N. S. 50. (C.)

III. 20. *Who are bound by Answer.*

III. 21. *Liberty to withdraw Answer.*

III. 22. *Priority of Answers when there are Original and Cross Bills.*

IV. APPEAL. See BANKRUPTCY, XX—PRACTICE, COSTS. [See 13 & 14 Vic., c. 89; ss. 80, 83; 12 & 13 Vic., c. 77; 21 & 22 Vic., c. 72, s. 41; Ch. Ap. Court (Ir.) Act, 1856; 19 & 20 Vic., c. 92; Gam. Ch. Or., pp. 470-484.]

1. *Its Form: to what Tribunal: previous steps necessary.*
2. *When, and on what grounds it lies: when barred: when on new matter.*
3. *Within what time.*
4. *Who may Prosecute it.*
5. *Evidence on.*
6. *Abatement and Revivor of.*
7. *Its Effect: Staying Proceedings during.*
8. *General Practice on Appeals.*
9. *Practice on in the House of Lords.*

IV. 1. *Its Form: to what Tribunal: previous steps necessary.*

9. It is not necessary that the £10 lodged on appeal motions should be lodged before serving the notice of appeal.—*Mannix v. Drinan*, 11 I. E. R. 398. (C.)

10. The M. R. declined to make a consent a rule of Court, on the ground that the effect of the consent was to vary a decree of the Lord Chancellor, and that he had no jurisdiction to vary such a decree. The motion was removed before the Lord Chancellor.—*Held*, that a copy of the Rolls order must be taken out; and that the new motion was in fact an appeal.—*Tennant v. T.*, 5 I. C. R. 228. (C.)

11. Application for liberty to re-hear a cause after the lapse of three months ought to be made to the Lord Chancellor; not to the Court of C. A.—*Peyton v. Lambert*, 6 I. C. R. 31. (C.A.)

12. Since the passing of the 20 & 21 Vic., c. 79, appeals from the Prerogative Court, standing in the Court of Delegates, have been transferred to the Probate Court.—*Anderson v. Preston*, 3 I. Jur. N. S. 183. (P.)

13. When, after a decree, material evidence is discovered, and a supplemental petition, in the nature of a bill of review, is filed to vary the decree, that petition ought to be set down to come on before the Court of C. A. along with the hearing of the appeal from the original decree.—*Barton v. Sampson*, 10 I. C. R. 161. (C.A.)

1. The Court of C. A., has not power to refuse to a bankrupt, who has passed his final examination, his certificate.—*In re Scotts*, 5 L. Jur. N. S. 52. (C.A.)

2. It is not necessary, on an appeal from the L. E. Court, to deposit with the officer of the Court any sum of money.—*In re Rea's Estate*, 14 L. C. R. 195. [C.A.]

IV. 2. *When and on what grounds it lies: when barred: when it lies on new matter.*

3. In 1839, the ptf. in the fifth cause obtained at the Rolls an order for the transfer of funds to the credit of all the causes; and, in 1840, a further order to pay him the fund then in Court, in part discharge of his demand.

In 1843, the ptf. in the fourth cause appealed against those orders. *Held*, that the appeal could not be entertained, because of their acquiescence, and the lapse of time.—*Murtagh v. Tisdall*, and four other causes, Dr. Rep. temp. Sugden 250. (C.)

4. The rule against re-hearing an appeal motion is not inflexible; but it is a sufficient ground for refusing it, that the case has been already anxiously considered.—*Lady Langford v. Mahony*, 11 L. E. R. 319. (C.)

5. Entering into a consent does not preclude a party from appealing.—*Delacherois v. —*, 2 L. Jur. 89. (C.)

6. The Court of Ch. will not expunge, from an order of the Rolls, recitals which reflect on the character of a party, unless there has been some miscarriage in the proceedings, or some injustice done. An appeal motion for this purpose dismissed with costs.

In a suit for tithe rentcharge, several of the debts were struck out of the bill by side-bar rule, on payment of their proportion, and the costs of subpoena and appearance. The bill was set down against the other eight debts., who then entered into a consent to pay whatever costs were taxed against them. They paid £26 on account. The general costs of the suit were taxed against them to £36. 2s. 10½d. On motion to the Rolls, in Jan. 1854, the Court directed the Taxing Master to review his taxation, and report what amount of costs would be properly charged against those eight remaining debts., if the other sixty-three debts. had been charged with the proportion of the costs of the suit to which they would have been liable under the 1 & 2 Vic., c. 109, s. 28. A report was made. In pursuance of it, his Honor directed the ptf.'s solicitor to refund to the eight debts £17. 6s. 3d. out of the £26 paid by them for costs; and that the ptf. should pay to those eight debts. the costs of the motion of January 1854, and the proceedings thereunder. On appeal, against the payment of costs directed by the order, it was affirmed, and the appeal dismissed with costs.—*Chaine v. Dungannon*, 7 L. Jur. 89. (C.)

7. *Semble*—An appeal lies to the House of Lords from an order made under the Ren.

Lease. Conv. Act (12 & 13 Vic., c. 105).—*Loyard v. Donegal*, 4 L. C. R. 450. (R.)—[See, 8 H. L. Cas. 460.]

8. An order was made by the M. R., on motion before the passing of the Ch. Ap. Court (Ir.) Act 1856 (19 & 20 Vic., c. 92); and was reversed by the Lord Chancellor. A motion by way of appeal from the latter decision to this Court—*Held*, to be in the nature of a second re-hearing; and, there being no special grounds, the Court declined to hear it.—*Dobbys v. Adams*, 6 L. C. R. 170; 2 L. Jur. N. S. 217. (C.A.)

9. An appeal does not properly lie upon the rulings of a Master: the order itself ought to be made up before the appeal is brought.—*Jones v. Stokes*, 2 L. Jur. N. S. 42. (R.)

10. *Quære*—Can a married woman validly consent to a particular form of order?

A married woman having, during her husband's life and after his decease, acted upon such an order, was nevertheless permitted to make it a ground of appeal to the House of Lords.—*Boyse v. Rosborough* 2 L. Jur. N. S. 265. (H.L.)—[S. c., 6 H. Lds. Cas. 2.]

11. The Court will not hear an appeal against a Master's rulings in a case under the Ch. Reg. Act, s. 15. The order must be made up.—*Cullen v. Nicholson*, 3 L. Jur. N. S. 212. (R.)

12. An application for liberty to appeal to the House of Lords, from an order of the Court of C. A., ought, after the lapse of a year from the date of the order, to be made to the Chancellor.

Leave to appeal, notwithstanding the lapse of time, may be given, if there be a *bona fide* ground for appealing; and the delay has arisen from bringing forward further matter to make the whole record complete.—*In re Reilly*, 8 L. C. R. 455; 4 L. Jur. N. S. 187. (C.)

13. Cases decided in the Court of C. A. are not to be re-heard.—*Falkiner v. Hornidge*, 9. L. C. R. 168. (C.A.)

14. No appeal lies against granting a certificate to a bankrupt, unless the appellant's objection be made in writing at the final examination.—*In re Woodroffe*, 7 L. Jur. N. S. 49. (C.A.)

15. A bankrupt stated and settled with his partner an account which the Court of Ch. decreed ought not to be re-opened. This Court refused to sanction the continuance, by the bankrupt or his assignees, of litigation by way of appeal, with a view to go behind that decision, since there could not be shown, on the face of the account, manifest error undiscovered during the Ch. proceedings; nor that substantial benefit would result to the creditors.

The Master in Ch. having been of opinion that the account should be re-opened—*Held*, that the bankrupt was not, by filing a bill for

an account, guilty of wanton litigation.—*Re Sim*, 7 I. Jur. N. S. 282. (R.)

#### IV. 3. *Within what Time Appeal must be brought.*

[See 19 & 20 Vic., c. 92, s. 11.]

1. An appeal against orders of the Court refused to be entertained, on the ground of acquiescence and length of time.—*Murtagh v. Tisdall*, Dr. Rep. temp. Sugden, 250. (C.)

2. The Court will not entertain a motion for liberty to prosecute an appeal to the House of Lords, the time prescribed by the 13 & 14 Vic., c. 89, s. 33, having elapsed, unless very cogent grounds to account for the delay be shown.—*Lysaght v. L.*, 5 I. Jur. 23 (C.)

3. The fourteen days allowed for appealing from an order of the Master, by the 30th sec. of the Ch. Reg. Act, are to be reckoned from the day of filing the order in the Registrar's office.—*Brereton v. Kennan*, 5 I. C. R. 345. (R.)

4. Liberty to appeal to the House of Lords, after the expiration of a year from the date of the decree, will not be granted when the Lord Chancellor is satisfied that the decree is right, and the only reason alleged for the delay is the pendency of negotiations, not with the parties to the cause, but with persons represented by them, which have not misled the person aggrieved by the decree, nor prevented proceedings being had under the decree, which would prove useless if the decree were reversed.—*Att.-Gen. v. Corp'n. of Belfast*, 6 I. C. R. 27. (C.)

5. The I. E. Court refused to grant a re-hearing *pro forma*, to enable a party to appeal to the Ch. Ap. Court, under the 19 & 20 Vic., c. 92; such party having suffered the month allowed by the I. E. Court Act (12 & 13 Vic., c. 77) to elapse, under a mistaken idea that the period within which an appeal could be brought had been extended to three months by the former Act.—*In re Ashe*, 6 I. C. R. 33. (I.E.C.)

6. An appeal from an order of the I. E. Court, to the Court of C. A. is an appeal under the 12 & 13 Vic., c. 77, s. 51; and must therefore be brought within one month after the making of the order appealed from.—*Ashe v. Dwyer*, 6 I. C. R. 177; 2 I. Jur. N. S. 217. (C.A.)

7. Notwithstanding the 13 & 14 Vic., c. 89, s. 30, the time, for appealing to the H. L. against a decree or order of the Court of Ch. in Ir., is still to be calculated from the time of the enrolment of that decree or order, not from the day on which it was pronounced in Court.—*Lambert v. Peyton*, 7 H. L. Cas. 423.—[See *Peyton v. Lambert*, 6 I. C. R. 9. (R.); 6 I. C. R. 31. (C.A.); *Lambert v. Peyton*, 8 H. L. Cas. 1.]

8. Application for liberty to appeal to the House of Lords from an order of the Court of C. A., after the lapse of a year from the date of the order, ought to be made to the Lord Chancellor.

Leave to appeal, notwithstanding the lapse of time, may be given, if there be a *bona fide* honest ground for bringing the appeal, and the delay has arisen from bringing forward further matters to make the whole record complete.—*In re Reilly's Estate*, 8 I. C. R. 455; 4 I. Jur. N. S. 187. (C.)

9. The three months "within" which every appeal must be entered from the date of any decision or order, excludes the day on which the order is pronounced, and includes the day on which the appeal is entered.—*Kennedy v. Cruise*, 6 I. Jur. N. S. 11. (C.A.)

10. The three months within which an appeal from an order or decision of the L. E. Court must be entered, in accordance with the 41st sec. of the L. E. Court Act (21 & 22 Vic., c. 72), are to be computed exclusive of the day of the date of such order or decision, and inclusive of the day on which the appeal is entered.—*In re Kennedy's Estate*, 11 I. C. R. 298; 6 I. Jur. N. S. 11. (C.A.)

11. Application to extend the time to appeal must be made before the expiration of the three months within which the appeal must be brought.—*In re Johnstone's Estate*, 7 I. Jur. N. S. 36. (L.E.C.)

12. The M. R. has jurisdiction to re-hear cause petitions heard before himself, within the limits and restrictions contained in the 30th sec. of the Ch. Reg. Act.

A petition was filed for an injunction, and an account of the profits of a coal mine. On the 27th of May a decree granted the injunction, but not the account. On the 21st of June an action at law was brought for the profits, but stayed by injunction on the 4th of July. An order for a re-hearing was granted, on a motion made early in Nov.—*Sloan v. M'Callen*, 13 I. C. R. 357. (R.)

13. The time for appealing from a Master's order is to be reckoned from the date of its signature.—*Cooke v. Franklin*, 16 I. C. R. 469. (R.)

#### IV. 4. *Who may prosecute an Appeal.*

14. The H. L. will not give relief to an appellant against an order of which he complains by petition, unless he has taken the proper course to obtain relief in the Court below.—*Tommey v. White*, 6 Cl. & F. 786.—[See *Tommey v. White*, 6 I. E. R. 303. (R.); and s. c., 1 H. L. Cas. 160; 5 I. Jur. 321, H. L.; 3 H. L. Cas. 49; 4 H. L. Cas. 313.]

15. W. owned fee-simple estates in Ireland, which, on his marriage, he charged with a jointure. There was issue, a son, H. After W.'s death, the jointure fell into arrear for



some years. Under the settlement, the jointress entered into possession of the estates, and received the rents. H. becoming insolvent, the customary assignments were executed. Afterwards, H. mortgaged his interest in the estates to B., without giving B. notice of the insolvency. As a further security, H. gave a bond and warrant of attorney, providing that B., on redemption, should reconvey the lands, and sign satisfaction on any judgment which might have been entered upon the warrant. The mortgage, having been duly registered, took priority under the Irish Acts over the unregistered assignments. B. filed a bill for foreclosure or redemption, and made the jointress, H., and the assignees parties. The jointure was decreed to be the first charge on the estates, and the mortgage to be the second. Accounts were directed to be taken accordingly. The assignees did not appeal against this decree. H. did. *Held*, that H. ought not to have been made a party to the suit, and therefore could not appeal against the decree. — *Rochfort v. Battersby*, 2 H. L. Cas. 388; 14 Jur. 229. — [Affg. *Battersby v. Rochfort*, 9 I. E. R. 191; 2 Jon. & L. 431. (C.) Revg., on re-hearing, 8 I. E. R. 284. (C.)]

1. A trustee filed a cause petition to recover a portion of the trust property. This petition was dismissed. The trustee was, by order of the Court, removed from being trustee. *Held*, that he could not maintain an appeal from the order dismissing his own petition. — *Leach v. Wallace*, 9 I. C. R. 147. (C.A.)

#### IV. 5. Evidence on Appeals.

2. Evidence, rejected by the Master in the early stages of a suit cannot be used upon appeal; nor can its rejection be questioned, unless made a ground of appeal. — *In re M'Kenna's Estate*, 6 I. Jur. N. S. 330. (C.A.)

3. On appeal, the Court may admit documentary evidence which was not before the Master when he made the decretal order appealed against. — *Boag v. Bradford*, 11 I. Jur. N. S. 226. (R.)

#### IV. 6. Abatement and Revivor of.

[See PRACTICE, ABATEMENT.]

#### IV. 7. Effect of Appeal: Staying Proceedings during it.

4. A deft. will not be compelled to convey an estate to the ptf. pursuant to a decree, when there is a *bona fide* intention to prosecute an appeal against that decree. — *Patten v. Wallace*, 5 I. E. R. 809. (E.E.)

5. After dismissal of a bill with costs, the debts were stayed from enforcing them, pending an appeal to *Dom. Proc.*, the ptf. giving security and paying interest upon them. — *M'Carthy v. M'C.*, 11 I. E. R. 399. (C.) — [See 9 I. E. R. 620. (C.): 1 H. L. Cas. 703.]

6. A *quo warranto* being brought to try the right to an office in the Court of Ch., the relator succeeded in the Court below. Pending a writ of error to the Court of Exch. Chamber, the Court refused to appoint the relator to the office. — *Ex parte Kelly*, 1 I. Jur. 1. (C.)

7. It is a matter entirely for the discretion of the Court, whether it will stay proceedings pending an appeal to the House of Lords. — *In re Browne*, 7 I. C. R. 79. (I.E.C.)

8. Proceedings to compel payment of costs will not be stopped pending an appeal, if it appear that the respondent is *bona fide* in possession of property. — *Spread v. Neve*, 12 I. C. R. 335; 7 I. Jur. N. S. 71. (C.A.)

#### IV. 8. General Practice on Appeals.

9. A deft. will not be compelled to convey an estate to the ptf. pursuant to a decree, when there is a *bona fide* intention to prosecute an appeal against that decree. — *Patten v. Wallace*, 5 I. E. R. 309. (E.E.)

10. It is not necessary that the £10 lodged on appeal motions should be lodged before serving notice of the appeal. — *Mannix v. Drinan*, 11 I. E. R. 398. (C.)

11. There is no principle in the English law that a suitor has a right to one Court of Appeal in every case. — *Von Stentz v. Conyn*, 12 I. E. R. 622. (C.)

12. On an appeal from an order allowing a demurrer, counsel for the ptf. begins. — *M'Namara v. Blake*, 12 I. E. R. 362. (C.)

13. On an appeal only appellant's counsel can be heard in support of his case, but not counsel for parties in some other interest who have not appealed. — *Stewart v. Marquis of Donegal*, 13 I. E. R. 106. (C.)

14. The M. R. has not jurisdiction to stay the proceedings under a decree of the Lord Chancellor, pending an appeal to the House of Lords. Petitioner having moved for an attachment against a respondent for not executing a deed pursuant to a decree, pending an appeal to the House of Lords from the decree, the motion was directed to stand over, with liberty to the respondent to apply within a week, to the Lord Chancellor, to stay the proceedings pending the appeal. — *Osborne v. Smith*, 7 I. Jur. 221. (R.)

15. It is not open to counsel, upon appeal from the ruling of a Commissioner in Chamber, to argue questions not raised below, and not appearing upon the notice. — *In re Brownrigg's Estate*, 2 I. Jur. N. S. 363. (I.E.C.)

16. Liability to creditors is not the test of contribution under the Joint-stock Companies Winding-up Acts 1848, 1849. The partnership deed of a Joint-stock Bank provided that the transferor of shares should, from the date of the transfer, have no claim or demand

whatsoever, either at Law or in Equity, upon or against the society, or any of the proprietors thereof for the time being (other than the transferee), except for dividends declared previously to the transfer; and on payment of any further instalment or instalments which might have been previously called for, should be for ever discharged from all further liabilities and obligations in respect of the shares transferred, and from all further claims and demands on account of the same. *Held*, that shareholders who had transferred their shares *bona fide*, and for valuable consideration, should not be placed on the list of contributories, although they were still liable to the creditors of the bank, the three years from the transfer within which creditors might proceed against them, under the Bankers Act, (6 G. 4, c. 42, s. 9), not having expired.

The Master placed the name of an original shareholder, who had transferred his shares, on the list of contributories, as a qualified contributory. The shareholder moved, by way of appeal, that his name should be omitted from the list. The official manager did not appeal. *Held*, that the latter could not, on the hearing of the appeal motion, contend that the transfer was informal, and that the shareholder's name should be placed on the list as a contributory, without any qualification.—*Ex parte Stirling*, 6 I. C. R. 180; 2 I. Jur. N. S. 403. (C.A.)

1. When, after a decree, material evidence is discovered, and a supplemental petition in the nature of a bill of review filed for the purpose of varying the decree, the supplemental petition ought to be set down to come on before the Court of Appeal, along with the hearing of the appeal from the original decree. *Barton v. Sampson*, 10 I. C. R. 161. (C.A.)

2. Two counsel only are to be heard on each side in the Court of Ch. Appeal.—*Bentley v. Robinson*, 10 I. C. R. 287; 5 I. Jur. N. S. 7. (C.A.)

3. When the appeal is from the whole of the decree or order, the petitioner's counsel begins.—*Brereton v. Barry*, 10 I. C. R. 376. (R.)

4. When there has not been at any stage of a cause petition an oral examination of witnesses, oral cross-examination will not be permitted on appeal.—*Farran v. Mercer*, 6 I. Jur. N. S. 26. (C.A.)

5. A will, which had been lodged in Court, handed out to a solicitor for the purpose of proceedings in the House of Lords.—*Massy v. —*, 6 I. Jur. N. S. 340. (R.)

6. When an appeal to the House of Lords has been lodged on a decree against which decrees sought to be enrolled would be evidence, the Court of Ch. will not refuse permission to enrol them, or put under terms the party seeking to do so.—*Spread v. Neve*, 7 I. Jur. N. S. 95. (C.)

7. Unless clearly satisfied that the decree of

the Court below, made after deliberation, is erroneous, the Court of Appeal will be slow to reverse it. Lord Wensleydale's judgment in *Vernon v. Wright*, 7 H. of Lords Cases, 66, approved of.—*Uppington v. Tarrant*, 7 I. Jur. N. S. 199. (C.A.)

8. The Court, adopting the rule at law on a motion to set aside a verdict as against the weight of evidence, will not on appeal reverse the Master's decision on a question of fact, or direct a further enquiry, merely because a doubt may exist that the decision was right.—*Gillespie v. Croker*, 15 I. C. R. 182. (R.)

9. On the hearing of an appeal from the whole of an interlocutory order, the appellant's counsel is entitled to begin.—*Skelton v. Flanagan*, 15 I. C. R. 303. (C.A.)

#### V. 9. Practice on in the House of Lords.

10. The H. L. will not give relief to an appellant against an order of which he complains by petition, unless he has taken the proper course to obtain relief in the Court below.—*Tommey v. White*, 6 Cl. & F. 786.—[See *Tommey v. White*, 6 I. E. R. 303. (R.); and s.c., 1 H. L. Cas. 160; 5 I. Jur. 321. (H. L.); 3 H. L. Cas. 49; 4 H. L. Cas. 313.]

11. The Court of Ch. in Ir. having directed an enquiry into the value of an estate at the time of its assignment, and touching the amount of the interest therein of B. (a purchaser from the assignee), the H. L. reversed the order directing the enquiry, and, without making any order, remitted the case with a declaration of the nature and extent of B.'s rights, leaving it to the Court below to carry that declaration into effect.—*Simpson v. O'Sullivan*, 7 Cl. & F. 550.—[See the case afterwards, at the hearing on the report and merits, 3 Dr. & War. 456. (C.)]

12. Matter not printed in the papers cannot be made the subject of argument before the H. L.

The H. L., in remitting a cause to the Court below to carry its directions into effect, will, if necessary, not merely declare the principle of its order, but state those directions fully on the face of its order.—*McCan v. O'Ferrall*, 8 Cl. & F. 30.—[See 5 I. E. R. 105. (R.)]

13. When there are a cause and a cross-cause, and an appeal is taken against the decree in the cause only, the cross-cause is not in any respect before the House.—*Callaghan v. C.*, 8 Cl. & F. 374.—[See 4 I. E. R. 441; 8 I. E. R. 572.]

14. The first decree in suits, which had been in existence for some years, was made in 1818. The litigation continued; and other decrees were made, on the footing of that decree, between the parties and others who were interested in the same transactions. In 1838, there was made a decretal order to revive and execute all former decrees and orders. These decrees and orders, as well as the decretal order of 1838, were appealed against.—*Held*,

that, after so great a delay, and under such circumstances, the H. L. would not set aside any of the original decrees or orders, upon technical objections, which did not affect the merits of the case.

A decretal order, not alleged to have been made on the appearance of all the proper parties, was therefore irregular to that extent. It directed the revival and execution of several decrees and orders, but the suit in which it was made was regular for some purposes at least. *Held*, that the decretal order should be reversed, with directions, and the case remitted to the Court below to deal with the suit so as to advance the justice of the case, regard being had to the decision of this House touching the earlier decrees and orders, which the House had sustained as valid.—*Lawrence v. Blake*, 8 Cl. & F. 504.

1. When no appellant appears to support an appeal, the only order that the H. L. can make is to dismiss the appeal for want of prosecution, with costs.—*Scanlan v. Usher*, 8 Cl. & F. 561.

2. When no person appeared on the appellant's behalf when his appeal was called on, and the agent only of the respondent appeared, but alleged that he had retained counsel, and prayed that the appeal be dismissed with costs, it was dismissed with costs.—*Murphy v. Conway*, 9 Cl. & F. 73.

3. The Court of Ch. in Ir. having pronounced against P. a decree, with costs, he paid those costs, and appealed to the H. L., which gave judgment in his favour, and reversed that decree, with costs. P. thereupon applied for an order directing the re-payment of the costs which he had already paid. The H. L. refused to make such an order, and left P. to apply to the Court below on the judgment now pronounced.—*Clarke v. Smith*, 9 Cl. & F. 126.

[P., having originally paid those costs to the solicitor of the opposite party, subsequently applied to the Court of Ch. in Ir. for an order on that solicitor to repay him the amount. The solicitor had, with his client's assent, applied them in paying costs due to him by the client. *Held*, that P.'s motion should be refused.—*Smith v. Clarke*, 5 I. E. R. 423; 3 Dr. & War. 344. (C.)]

4. The H. L., in reversing a decree, which directed immaterial enquiries, and ordering the bill to be dismissed, as at the hearing, with costs, will not relieve the appellant from his costs of prosecuting the enquiries before he appealed.—*Siree v. Kirwan*, 9 Cl. & F. 716.

5. While a case was pending in the H. L., the deft. in a similar case made an offer to the ptf. to be bound by the decision of the House in the pending case. Ptf. took no notice of the offer, but compelled the deft. to proceed with his defence. Judgment was given against deft., who appealed to this House, and prosecuted the appeal to a hearing after an adverse

decision in the previously pending case. Judgment being given against him, he was ordered to pay respondent's costs.—*Farrell v. Gleeson*, 11 Cl. & F. 702.

6. When the H. L. varies a decree, but only on a point which had not been raised in the Court below, nor made a ground of appeal, the appellant must pay the costs of the appeal.—*Wallace v. Patten*, 12 Cl. & F. 491.—[See *Wallace v. Patten*, 5 I. E. R. 309; Long. & T. 479. (E.E.)]

7. Any document or evidence that has been before the Court below, may, on appeal to the House of Lords, be properly brought under the notice of the house, but no others.—*Geraghty v. Malone*, 1 H. L. Cas. 89.—[See 5 I. E. R. 549; 3 Dr. & War. 239. (C.)]

8. The House will not grant the costs of an appeal, to come out of the estate, on a mere miscarriage of the Court below, when the subject of litigation, though in the result decided by the Court, was one which might have required to be tried as a question of fact.

The House strongly condemned the custom of each party printing an appendix to his case, and desired, that, in future a joint appendix only should be printed.—*Piers v. P.*, 2 H. L. Cas. 331; 18 Jur. 569.—[Rev. *Piers v. P.*, 10 I. E. R. 341. (C.)—See *Piers v. Tuite*, 1 Dr. & Wal. 298. (C.); *Piers v. P.*, 11 I. E. R. 358. (R.)]

9. The circumstance, that a person has been made a party to a suit in the Court below, will not, if he was improperly made a party, entitle him to appeal to the H. L. against a decree in that suit.

An objection to the competency of an appeal ought to have been presented to the Appeal Committee, but was not noticed until the hearing at the bar of the House. The objection was, in its nature, a fatal one. *Held*, that the appeal should be dismissed, but without costs, since the objection had not been taken till so late a stage in the proceedings.—*Rockfort v. Battersby*, 2 H. L. Cas. 388; 14 Jur. 229.—[Affg.: 9 I. E. R. 191; 2 Jon. & L. 431. (C.); which reversed, on re-hearing, 8 I. E. R. 284. (C.)]

10. On an appeal from a decree made by the Court of Ch. in Ir., no one appeared on behalf of the appellant; but counsel appeared on behalf of the respondent. Without calling on the respondent's counsel, the H. L. dismissed the appeal, with costs.—*Martin v. D'Arcy*, 3 H. L. Cas. 698.

11. The House of Lords will reverse its own order made upon a misrepresentation, though the misrepresentation be inadvertent, the order reversed having itself reversed a decision of the Court of Ch. Ireland, and being made behind the back of interested parties, and enabling a fraud to be committed by the party presenting the petition on parties who were not present at the making of the order.—*Tommey v. White*, 5 I. Jur. 321. (H.L.)

[See *Tomney v. White*, 6 I. E. R. 303. (R.); and s. c., 6 Cl. & F. 786; 1 H. L. Cas. 160; 3 H. L. Cas. 49; 4 H. L. Cas. 313.]

1. *Semble*—A decree appealed from, but not adjudicated on further than dismissing the appeal generally, may be included in a future appeal.

*Semble*—Decrees and orders, which have not been enrolled, may, after any length of time, on being enrolled, be brought under appeal with a recent order, made in the same cause, and duly enrolled.

A judgment of the H. L. is conclusive, and cannot be reversed or corrected, except by Act of Parliament.—*Tomney v. White*, 3 H. L. Cas. 49. [See references to the next case.]

2. A judgment of the H. L., given on an appeal, cannot be reversed. But, if that appeal and judgment have been obtained by suppression and misrepresentation, the H. L. will afterwards discharge the order granting the leave to appeal, and also the order constituting the judgment thereon.

In Jan. 1835, the Court of Ch. in Ir. pronounced a decree, which was enrolled in the following May. The proper time for appealing having elapsed, a petition, for leave to appeal against that decree, was presented in Feb. 1839; but its prayer was refused. In 1844, the party, who was dissatisfied with the decree, filed a bill of review. That bill was demurred to for want of equity, and the demurrer was allowed. In 1846, the order allowing the demurrer was appealed against; and, in this appeal, the original decree was expressly complained of. In July 1847, the appeal was dismissed *generally* by an order, which specially mentioned the order which had allowed the demurrer, but which did not mention the original decree. In 1848, there was presented a petition for leave to appeal against the original decree and against certain other orders, which had been made in the course of the proceedings, but which had not then been enrolled. That petition stated that "it appeared by the order of July 1847 that the decree of Jan. 1835 had not been complained of, and therefore that their Lordships had not made any declaration with respect to it." The petition further stated that "the said decree had never been adjudicated upon by their Lordships."

Other proceedings having been taken, leave was given, on this petition, to include in the appeal the decree of Jan. 1835. The appeal was heard *ex parte*; and, in June 1850, that decree was reversed. *Held*, that this reversal had been obtained by suppression and misrepresentation.

The parties, whom that reversal affected, having petitioned for relief, the H. L. discharged the order, which gave leave to appeal against the decree of Jan. 1835, and also discharged the order which had reversed that decree, but without costs.—*Ex parte White v. Tomney*, 4 H. L. Cas. 313.—[See *Tomney v. White*, 6 I. E. R. 303; 6 Cl. & F. 786; 1 H. L. Cas. 160; 5 I. Jur. 321. (H.L.); 3 H. L. Cas. 49.]

3. Though an appellant comes to London so long before attendance at the hearing of his cause requires his presence that he would not be discharged out of custody, if then arrested, he will nevertheless be discharged, if not arrested until his cause is actually on the paper.—*Perasse v. P.*, 5 H. L. Cas. 671.—[See s. c., 7 Cl. & F. 279; 3 I. C. R. 196. (C.); 5 H. L. Cas. 682.]

4. Notwithstanding the 13 & 14 Vic., c. 89, s. 30, the time for appealing to the H. L. against a decree or order of the Court of Ch. in Ir., is still to be calculated from the time of the enrolment of that decree or order, not from the day on which it was pronounced in Court.—*Lambert v. Peyton*, 7 H. L. Cas. 423.—[See *Peyton v. Lambert*, 6 I. C. R. 9. (R.); 6 I. C. R. 31. (C.A.); *Lambert v. Peyton*, 8 H. L. Cas. 1.]

5. An objection having been made to the competency of an appeal to the H. L., the Appeal Committee directed that that objection should be heard before the House, which gave judgment in favour of the appellant. The appeal was then heard, and was dismissed on the merits, with costs. The House directed that the costs, which had been incurred by reason of the objection to the competency of the appeal, should be deducted from the general costs.—*Lambert v. Peyton*, 8 H. L. Cas. 2.—[See s. c., 7 H. L. Cas. 423; 6 I. C. R. 31. (C.A.); 6 I. C. R. 9. (R.)]

6. The Appeal Committee cannot decide what documents are, and what are not necessary to be printed in the appendix to a case. A question on this point, though known by the parties to exist, was not made the subject of discussion during the argument on the appeal. The H. L. would not hear it discussed afterwards, and refused to make any order touching the costs of the appendix.

The decision appealed against was reversed, and the cause remitted. The Court below was left to deal with the general question of costs.—*Spread v. Morgan*, 11 H. L. Cas. 588. [See 9 I. C. R. 535; Dr. Rep. temp. Napier, 525. (C.)]

7. A conveyance, made under the 21 & 22 Vic., c. 72, is, under sec. 85, "for all purposes conclusive evidence" that all previous proceedings, leading to such conveyance, have been regularly taken.

Proceedings had been taken to sell estates, whereof the sale and re-sale had been directed, in a manner which, when presented to the notice of this House, was declared to be marked by great irregularity. The complainant, however, had not brought that matter before the Court of Appeal until after the conveyances had been executed. *Held*, that the statute precluded this House from affording to the appellant relief against the consequences of such irregularities.

When the appellant went before the Court of Appeal, his petition was dismissed with costs. The H. L. reversed the order for costs,

but affirmed the dismissal of the appeal.—*Power v. Reeves*, 11 H. L. Cas. 645.—[See *In re Power's Estate*, 11 I. C. R. 295. (C.A.)]

#### V. APPEARANCE.

[For practice under the Court of Ch. Reg. Ir. Act. see Gam. Ch. Orders, 30 & 31 Vic., c. 44, ss. 54, 55, 56, 57 157; G. O. (1867), 25-43, 113.

1. *Generally: its Effect: Effect of its Want*
2. *When substituted: its Incidents.*
3. *Undertaking to appear.*
4. *Gratis.*
5. *Conditional.*

##### V. 1. *Generally: its Effect: Effect of its Want.*

1. Notice of motion, to take a bill as confessed against some defendants under the 46th G. O., need not be given to another defendant for whom a parliamentary appearance has been entered.—*Tarrant v. Allen*, S. & Sc. 676. (R.)

2. If a party has appeared in a cause, it is unnecessary to apply for liberty to serve him with an order of the Court, although he resides out of the jurisdiction.—*Smith v. Rooney, Jo. & Car.* 104. (E.E.)

3. When a judgment creditor out of the jurisdiction has been served with subpoena and notice under the 22nd and 15th G. O., and the memorandum has been entered under the 16th G. O., it is not necessary to enter a parliamentary appearance, and take the bill *pro confesso* against the party, in order to bind him by the proceedings.—*Burroughs v. Molloy*, 7 I. E. R. 6. (R.)

4. The deft. resided out of the jurisdiction. An order was made on the 12th of Dec. to substitute service of subpoena and notice on W., the solicitor for the deft. in the transactions to which the suit related. It did not state when the deft. was to appear, as required by the 31st G. O. when the subpoena is served out of Ireland. The subpoena required the deft. to appear in eight days and to answer in two months. A side-bar rule having been entered by the ptf., a parliamentary appearance was entered on the 8th of January. On the 12th of March the deft. entered a common appearance. *Held*, that if the order of the 12th of Dec. was irregular in not stating where the defendant was to appear, the irregularity was waived by the common appearance.

*Semble*—The proceedings were regular; for where an order is made under the general authority of the Court, to substitute service on the solicitor of a deft. who resides out of the jurisdiction, the service is to be considered a service within the jurisdiction, and the deft. must appear and answer within the time limited by the 31st G. O., as mentioned in the notice.—*Johnston v. Tottenham*, 11 I. E. R. 271. (R.)

5. Some of the defts. had been served out of the jurisdiction with subpoenas, but did not appear, and none of the defts. had answered the bill, although the time allowed for that

purpose had expired as to all. *Held*, that the case came within the meaning of the 25th G. O. Parliamentary appearances were directed to be entered for the defts. who had been served out of the jurisdiction, and that the cause be set down for hearing *pro confesso*.—*Fitzgerald v. Quinlan*, 12 I. E. R. 393. (E.E.)

6. When a suit has been instituted, and subsequently a cause petition is presented for the same object, the petition should state the existence of the suit. It is no objection to a motion to discharge the Court's order, that the respondent did not appear in the Master's office.—*McConkey v. Gwynne*, 4 I. Jur. 146. (C.)

7. The 20th Rule of April 1861 does not apply to cases of persons lodging *caveats* "in the goods," who are not by interest entitled to do so. In such cases, an appearance entered, accompanied by a notice in the terms of that Rule, and the *caveat*, will be set aside, with costs.—*Russell v. R.*, 8 I. Jur. N. S. 40. (P.)

##### V. 2. *When substituted: its Incidents.*

8. Ptf. neglected to enter for deft. an appearance, within the period which the G. R. allows for that purpose. The Court, without compelling him to enter an appearance, discharged him from custody.—*Creagh v. Mahony*, 2 Jones, 342. (E.E.)

9. A parliamentary appearance may be entered against a member of parliament, under G. O. 13.

A second parliamentary appearance having been entered irregularly, the first was allowed to stand.

A deft., applying to set aside the parliamentary appearance, need not appear, or adopt the appearance.

*Semble*—Service of a subpoena is not such a proceeding within G. O. 58 as is waived by an amendment of the bill.—*Denny v. O'Connell*, S. & Sc. 116. (R.)

10. When husband and wife, defts., are separately served with subpoena within the jurisdiction, and the husband alone appears, ptf. cannot enter a parliamentary appearance for the wife, and proceed to take the bill *pro confesso* against her separately; nor will the Court award an attachment against the husband for not having entered an appearance for his wife. The proper course, since the new G. Os. is for ptf. to move to set aside the appearance which the husband had entered for himself alone.—*Fitzpatrick v. Hackett*, S. & Sc. 128. (R.)

11. Practice as to entering an appearance for a deft. served out of the jurisdiction, pursuant to the 4 & 5 W. 4, c. 82.—*Atkinson v. Caldwell*, 3 I. E. R. 190. (E.E.)

12. When service of subpoena upon a deft. who has gone abroad has been substituted, and no appearance was entered for him—*Held*, the 2nd G. O. of February 1839 applied, and

that a parliamentary appearance might be entered for him.—*Wise v. The Bishop of Cork, Flan. & K. 390.* (R.)

1. Service of process under 4 & 5 W. 4, c. 82, allowed, and appearance entered, when the affidavit of service was sworn before a J. P. of the county of M., in America; and deft. was not personally known to the person who served the process.—*Atkinson v. Watson, Long. & T. 108.* (E.E.)

2. When a deft. is served with subpoena in Ireland, the Court has no jurisdiction to make an order that a parliamentary appearance be entered for an adult deft., or that the Clerk in Court should be appointed to appear and answer for a minor deft. after the fourteen days specified in the 33rd Rule have expired; the side-bar order not having been entered within such fourteen days.—*Anonymous, 11 I. E. R. 584.* (R.)

3. Parliamentary appearances having been entered for minors within the fourteen days specified by the 33rd Rule, the Court amended the side-bar rules and appearances after the fourteen days had elapsed.—*Egan v. Nolan, 11 I. E. R. 585.* (R.)

4. A cause is not out of Court as against a deft., for whom the parliamentary appearance has been entered, though more than a year has elapsed since such appearance.

But the Court will exercise a discretion in granting or withholding an order *pro confesso* in such a case, and will not be bound to act on an old parliamentary appearance.

In this case the parliamentary appearance was entered in Nov. 1846, and an order *pro confesso* was granted in April 1848.—*Blakeney v. B., 13 I. E. R. 84.* (R.)

#### V. 3. Undertaking to Appear.

#### V. 4. Gratis.

#### V. 5. Conditional.

[See *Eyre v. Kingston, Ir. L. T., vol. 2, pp. 104, 119.*]

ARGUMENT. See PRACTICE, ANSWER—PRACTICE, DEMURRER—PRACTICE, PLEA—PRACTICE, COURT, PRACTICE IN.

VI. ATTACHMENT. See PRACTICE, PROCESS. For Attachment of Money, Stock, Shares, or Debts, see CHARGING ORDER, ante.

[4 & 5 W. 4, c. 78. See 5 & 6 W. 4, c. 16. Small Debts Act, 11 & 12 Vic., c. 28. See General Orders 1843, 43, 104, 105. See also Gam. Ch. Orders, p. 219, 240, 278, and Gen. Orders 1867, 63, 65, 127, 128, 129.]

1. Its Effect.
2. When issued, and in what cases: Cause against it.
3. Affidavits in support of.
4. Discharge from.

5. Against Prisoners.

6. Service of.

7. Entry of.

8. Execution of: Return to.

9. For want of Answer.

10. For Costs.

11. With Proclamations.

#### VI. 1. Its Effect.

5. A receiver having neglected to lodge his balance, pursuant to the Master's order, an attachment was issued against him, directed to the sheriffs, who made a return of *non est inventus*. It was afterwards renewed, and a similar return made. It was then directed to the coroner who made an improper return. An attachment was issued against the coroner which also was renewed from time to time. On taxation, the Master refused to allow the ptf. the costs of those proceedings which he had taken against the receiver and against the coroner. The Court refused in the first instance to allow those costs out of the estate, as it did not appear that the receiver or his sureties were insolvent, but directed the recognizance to be put in suit and the motion to stand over.

Payment of the amount for which the attachment was issued against the receiver would not discharge the contempt. He would still be liable to the costs of the proceedings against him; and, if he could be identified with the coroner, perhaps also for the costs of the proceedings against the coroner.—*Erskine v. Baker, 7 I. Jur. 25.* (R.)

#### VI. 2. When and in what Cases an Attachment will be granted: Cause against it.

6. An attachment will not be directed to the coroner until legal grounds for doing so have been laid.—*Malcomson v. Gregory, H. & Jon. 152.* (E.E.)

7. A deft. being in custody under a *ne exeat*, a final decree to pay a sum was made against him. Held, that, within a limited time, the Court would discharge him therefrom, but would give ptf. liberty meanwhile to attach deft. for non-payment.—*Robinson v. Harris, H. & Jon. 588.* (E.E.)

8. A sheriff, refusing to try to execute an attachment issued to compel an appearance in an equity suit, will be attached.—*Morgan v. Copeland, 1 Jones, 248.* (E.E.)

9. When husband and wife are separately served with a subpoena, and the husband enters an appearance for himself alone, ptf. cannot enter a parliamentary appearance for the wife, and proceed to take the bill *pro confesso* against her separately. The Court will not award an attachment against the husband for not having entered an appearance for his wife.—*Fitzpatrick v. Hackett, S. & Sc. 128.* (R.)

10. When a party has been arrested under an attachment, and mistakenly discharged by the sheriff, any application to renew the

attachment must be made upon notice to the party.

*Quære*—Can such an application be sustained under any circumstances?—*Cunningham v. M'Cambie*, S. & Sc. 427. (R.)

1. It is not cause against an attachment for not taking out leases under the Court, that the tenant was unable to procure sufficient sureties; did not get into possession; and was informed by the receiver's solicitor, that, if he did not procure securities within the next eight days, the next bidder would get the lands.—*Humble v. H.*, S. & Sc. 670. (R.)

2. The letting of land in con-acre is but a mode of farming it.

Therefore the Court will not attach the inheritor for receiving rent from his con-acre tenants, though they have been served with the order to pay their rents to the receiver.—*Close v. Brady*, Jon. & Car. 186. (E.E.)

3. Solvent parties rescued a distress made by a receiver. The Court granted against them a conditional order for an attachment, and intimated that the receiver should proceed also at Quarter Sessions.—*Mahon v. M.*, Fl. & K. 18. (R.)

4. When a respondent interferes with rents over which a receiver has been appointed, the Court will, upon notice to the party, grant in the first instance an absolute order for an attachment.—*Thomas v. T.*, Fl. & K. 621. (R.)

5. To ground an attachment for non-performance of a decree to pay money, it is not sufficient merely to produce and tender to deft. ptf.'s receipt for the money when the demand is made. The money must be demanded under power of attorney from ptf., and that fact must appear by the affidavit supporting the attachment motion.—*Gregory v. Hand*, 2 I. E. R. 93. (E.E.)

6. To warrant a party in issuing a writ of replevin, he should have been in clear and unequivocal possession of the thing replevied, when it was taken. If he issues the writ under improper circumstances, he will be attached for contempt; the writ will be quashed; and the goods ordered to be restored.—*Comerford v. Blake*, 2 I. E. R. 176. (C.)

7. When a decree for a sale contains the usual direction, that all proper and necessary parties shall join in conveying to the purchaser; if one of such parties, being bound by the decree and within the jurisdiction, afterwards refuses to execute the conveyance, he will be attached in the first instance. The Court will not order the Master to execute it in his name, under the statute, until it appears that an attachment cannot induce him to execute it *propria manu*.—*Usher v. Scanlan*, 3 I. E. R. 474. (R.)

8. A purchaser cannot be attached for not

completing his purchase until after a report of good title has been obtained.—*Vincent v. Goig*, 3 I. E. R. 480. (R.)

9. On the 14th of March 1838, the purchaser of lands sold under the decree, and over which a receiver had been appointed, went into possession of them. The receiver died; and in May 1842, the inheritor, who was beneficially entitled to the arrears of rent due on the 1st Nov. 1837, applied for attachments for non-payment thereof, against the under-tenants. The Court refused the aid of its process after such a lapse of time.—*D'Arcy v. Sherry*, 4 I. E. R. 690. (E.E.)

10. A minor, being ordered to execute a conveyance to a purchaser, at her mother's instigation, refused. The Court granted a conditional order to attach the minor for refusing; and against her mother for interfering to prevent the deed's execution.—*M'Cartney v. Simonton*, 5 I. E. R. 594. (E.E.)

11. Tenants of lands sold under decree refused to give copies of their leases. The Court ordered them to produce their leases to ptf.'s attorney to enable him to take compared copies. Some tenants disobeyed that order. Upon an undertaking from the purchaser and the parties in the cause to confirm the leases—*Held*, that an attachment should issue against those tenants, unless they produced their leases, and allowed copies to be taken.—*Scott v. Miller*, 6 I. E. R. 120. (E.E.)

12. Before an attachment can issue for the non-performance of a decree or order of the Court, personal service of such decree or order must be effected.—*Whistler v. Aylward*, *In re Fitton*, Dr. Rep. temp. Sugden, 1. (C.)

13. An application for an attachment against a party for not executing the purchase deed pursuant to the decree, should be on motion, and the order will be absolute in the first instance.—*Brennan v. Carroll*, 7 I. E. R. 196. (R.)

14. Every decree and order must be served on the party to obey it, pursuant to the 104th G. O., before any attachment can issue for disobedience thereof. When a solicitor issued an attachment without having served the order on the party, the Court set aside the attachment, with costs against the solicitor.

An order to perform an act "forthwith" means within a reasonable time.—*Mackinnon v. Palmer*, 7 I. E. R. 203. (R.)

15. Practice under the 105th G. O. in issuing a sequestration, when there has been no attachment.—*In re Powell*, 7 I. E. R. 452. (C.)

16. When an action at law has been commenced against a party for irregularly issuing an attachment, and arresting the deft. under it, it is in the discretion of the Court to restrain the action.

The Court will not restrain the action when serious or substantial damage has been sus-

tained.—*M'Kinnon v. Palmer*, 7 I. E. R. 496 (R.)

1. A counsel for a defendant published in a newspaper what purported to be a report of the proceedings in this Court. This report was exaggerated, incorrect, and injurious, and contained unjustifiable imputations upon the plaintiff. A motion was made to attach the counsel for a contempt of Court. *Held*, that though the publication might be libellous, yet, the Court, not being satisfied that it was calculated to obstruct the free course of justice, ought not to commit him for contempt.

The several classes of cases in which Courts of Justice have power to commit for contempts fully considered. In all the cases in which Courts have committed for constructive contempts (except *Cann v. C.*) the publication was either calculated to produce false evidence or attributed perjury to the witnesses pending the suit.

Whatever may be the privilege of counsel, addressing a Court or jury, to comment upon the character of parties or witnesses, such privilege does not justify counsel in publishing such speech, if it contain defamatory matter.—*Birch v. Walsh*, 10 I. E. R. 93. (R.)

2. The interest in the lease of lands, over which a receiver had been appointed, was evicted by the head landlord for non-payment of rent. Afterwards the lands were redeemed by a mortgagee, and the receiver restored. The Court refused to grant an attachment against sub-tenants for non-payment of rent during the period of the broken gales; one before the eviction, the other after.—*Barrett v. Connellan*, 1 I. Jur. 66. (R.)

3. When a receiver has been appointed, an attachment will be granted against a party who, having had notice of that appointment, interferes with the rents before the order has been served upon the tenants.—*M'Alpine v. St. George*, 1 I. Jur. 129. (R.)

4. When the order to pay rent has been served on all tenants of the lands, and A. succeeds one of them in possession, it is not necessary to serve A. with the order to pay, for the purpose of obtaining an attachment for non-payment of rent.—*Roche v. Collins*, 1 I. Jur. 282. (R.)

5. It is an open question whether this Court will grant an attachment for the rescue of a distress. The question has not been concluded by *Ford v. Head*, 8 I. E. R. 371, and *Mahon v. M.*, Fl. & K. 18.—*Thompson v. Irwin*, 2 I. Jur. 53. (R.)

6. An attachment does not lie against a sheriff for not taking a replevin bond.—*Donnelan v. Blossie*, 2 I. Jur. 304. (C.)

7. If a sheriff is charged with being in collusion with a party against whom an attachment has issued, the practice is to apply that the sheriff should amend his return, and not for an attachment against him.—*M'Culloch v. Legg*, 5 I. Jur. 23. (R.)

8. A rentcharge of £100 was granted out of lands, part of which was let to two tenants, whose rents amounted to £155, and who, by the same deed, attorned to the grantee. A receiver having been appointed over the rentcharge, on petition under the Judgment Acts, the grantor distrained the tenants for £55, the balance of their rents over the rentcharge. *Held*, that the Court had, by appointing a receiver, attached the whole rent payable by the tenants; and an attachment was awarded in the petition matter.—*Hayden v. Shearman*, 2 I. C. R. 137. (R.)

9. An affidavit showing cause against a conditional order for an attachment was filed without presenting a petition. The Court, on motion, directed that the notice to show cause should be struck out of the list, and that the conditional order should be made absolute in the office.—*In re Dillon*, 4 I. C. R. 35. (R.)

10. The appointment in a suit in the Court of Ch. in England, of a receiver over lands in Ireland, operates only as against the parties in that suit; but does not affect the jurisdiction of the Court of Ch. in Ireland to appoint a receiver over the same lands, and to punish by attachment any interference with him in the exercise of his duties. An attachment was accordingly awarded against the bailiff of a receiver appointed by the Court of Ch. in England over lands in the county Cork, for interfering with the collection of rent by a receiver subsequently appointed by the Court of Ch. in Ireland.—*Ferguson v. Coote*, 7 I. Jur. 175. (M.O.)

11. When parties signed an undertaking to endorse bills to secure a composition after bankruptcy, but afterwards refused to do so, on the ground that they did not understand what they were called upon to sign, and that the bankrupt led them astray as to his circumstances—*Held*, that they were not at liberty to withdraw the undertaking which they had signed; and that an attachment should issue against them within a week, if they did not sign the bills.—*Re Fahy*, 6 I. Jur. N. S. 322. (B.)

#### VI. 3. Affidavits in Support of. See PRACTICE, AFFIDAVITS.

#### VI. 4. Discharge from Attachment.

12. An order was made under the Contempt Act (5 & 6 W. 4, c. 16), to discharge a debt, from custody under an attachment for non-payment of costs, and the costs were directed to be a charge upon funds reported in the cause as due to the debt.

The Court is bound to exercise its power to discharge a party in custody for a contempt, in all cases in which the purposes of justice will not be answered by detaining him in custody.—*Joyce v. J.*, S. & Sc. 703. (R.)

13. An order was made under the Contempt Act (5 & 6 W. 4, c. 16), to discharge a debt.



from custody under an attachment for the non-production of a deed, upon payment of the costs of the attachment proceedings; the deft. and his solicitor having sworn that they could not procure the deed, and that the reference thereto in the deft.'s answer, as being in his possession, had being made through inadvertence and mistake.—*Nugent v. N.*, S. & Sc. 704. (R.)

1. A tenant, who had been attached for non-payment of rent, was discharged from the contempt under the 5 & 6 W. 4, c. 16; but committed for the rent and costs, so as to give the Insolvent Court jurisdiction.—*Smith v. S.*, S. & Sc. 709. (R.)

2. A deft. having been imprisoned eight months, for breach of an injunction against breaking up ancient pasture lands, was discharged from custody, upon undertaking to lay them down again.—*Scully v. Skehane*, S. & Sc. 710. (R.)

3. The deft., while attending the Court of Q. Sessions, pursuant to his recognizance to prosecute, was arrested under a commission of rebellion for not answering the ptf.'s bill. The Court discharged him from custody.—*Graves v. M'Carthy*, 2 Jon. 626. (E.E.)

4. A tenant, arrested under an attachment for non-payment of rent, is entitled to his discharge on payment of the sum and costs marked on the writ; and is not to be kept in custody until after payment of the costs of making absolute the conditional order.—*Grattan v. Donegal*, 2 I. Jur. 98. (R.)

5. A respondent is not entitled to his discharge from custody under a *ne exeat regno*, upon the ground that he was made amenable to that writ by an arrest under a warrant issued on informations sworn by the petitioner, in respect of the same matters which were in question in the suit; even though the prosecution instituted in pursuance of those informations be eventually abandoned, if the petitioner appear to have had a *bona fide* intention of prosecuting the criminal proceedings at the time of procuring the arrest.—*Kelly v. Birch*, 3 I. C. R. 466; 7 I. Jur. 73. (C.)

#### VI. 5. Against Prisoners.

6. *Semble*—To fix the Marshal with the amount of a writ, the writ must be delivered to him or to one of his officers. Mere delivery to a person who opened the Marshalsea door is insufficient.

The Marshal of the F.-c. Marshalsea cannot detain a prisoner upon a writ directed to the Sheriffs of the city of Dublin.—*Napier v. Molyneux*, S. & Sc., 435. (R.)

#### VI. 6. Service of.

7. Before an attachment for non-performance of a decree or order of the Court can issue, personal service of such decree or order

must be effected.—*Whistler v. Aythward*, *In re Fitton*, Dr. Rep. temp. Sugden 1. (C.)

#### VI. 7. Entry of.

#### VI. 8. Execution of Attachment: Return to.

8. A writ of assistance will not be granted to aid the sheriff in executing an attachment directed to him, which issued against a tenant under the Court for non-payment of his rent.—*Bleagher v. M.*, 1 Jon. & L. 31. (C.)

#### VI. 9. For want of Answer.

[See Gen. Order of 1843, 43; Ch. Ireland Act 1867.]

9. When no material discovery from a defendant is necessary, the plaintiff's proper course is to proceed to take the bill as confessed for want of an answer. In such case the plaintiff should not issue an attachment against the defendant for want of an answer, under the 38th G. O.—*Johnson v. M'Auley*, S. & Sc. 707. (R.)

10. Except in the case of a bill for discovery, an attachment for want of an answer should not be issued. If issued, it will be set aside, since the suit's object may be fully attained by taking the bill *pro confesso*.—*O'Brien v. Manders*, 2 I. E. R. 39. (R.)

11. A bill charged that deeds were "in the possession of said defts., or some or one of them." Two defts. allowed the bill to be taken as confessed against them. All the others answered by positively denying possession of the deeds. The Court refused to act upon the argumentative conclusion, as an admission by the defts. against whom the bill had been taken as confessed, that the deeds were in their possession, though ptf.'s solicitor offered to make an affidavit of the fact that those defts.' solicitor had distinctly admitted to him that they had possession of the deeds. In such a case, ptf.'s course is to proceed by attachment for want of an answer, and not to take the bill *pro confesso*.—*Purcell v. Langston*, 4 I. E. R. 443. (R.)

12. When an attachment issued for want of answer a few days after the time for answering had expired, without any notice, and there appeared not to be any intention on the part of the deft. to make away with the property, an account of which was sought, the Court discharged the deft., without requiring him to pay any costs, on his undertaking to answer.

Although it is the strict right of a plaintiff to issue an attachment when the time for answering has expired, the Court will not allow the practice to be used oppressively.—*Sharpe v. S.*, 2 I. Jur. 114. (R.)

VI. 10. *Attachment for Costs.*

[See also Costs.]

1. The Remembrancer having been appointed guardian to a minor defendant, upon process of contempt for want of an appearance, the Court, upon motion of the minor by her mother and testamentary guardian, allowed her to answer by her testamentary guardian, "paying the costs as offered by the defendant's notice of the 30th Jan.; the costs to be paid within one week after taxation, and the answer to be filed within one week after payment of such costs."

The notice of the 30th January, served by the minor's mother, informed the plaintiff that she had appeared, and was about to answer for the minor. It contained an offer to pay the costs occasioned by the Remembrancer's appointment as guardian. The minor's answer was afterwards filed, and accepted by the plaintiff. The costs not having been paid, the Court granted an attachment against the guardian for non-payment of them.—*Brady v. Finnegan*, Jo. & Car. 426. (E.E.)

2. After service of a subpoena for costs, the party liable is allowed by the practice of the Court eight days to pay the costs. An attachment sued out before that time has expired is irregular, and will be set aside. But when the party was in custody under an execution when the attachment issued, it was set aside without costs, the party undertaking not to bring an action in respect of the arrest or detention.

An attachment sued out irregularly may be withdrawn, though executed, and another attachment may be sued out on the same subpoena.—*Brennan v. Kenny*, 2 I. C. R. 94; 4 I. Jur. 112. (R.)

3. Money in the sheriff's hands, levied under an attachment for costs, awarded by a decree, remains in *custodia legis*, and is not, without further order, the property of the party who has issued the attachment.

An attachment for costs was issued by A. and B. (A.'s solicitor) against C., who paid the amount to the sheriff, and lodged with him a sequestration for a larger amount against A. *Held*, that the sheriff was not justified in paying the amount received on the attachment to the sequestrators, without the order of the Court.

Costs are decreed to be paid by C. to A., or B. his solicitor. An attachment is delivered to the sheriff. C., who has a demand against A., issues a sequestration for it; pays the costs to the sheriff; and lodges the sequestration with the sheriff.

*Semble*—If the money be paid into Court, B.'s lien for costs will prevail over C.'s sequestration.—*Williams v. Reeves*, 12 I. C. R. 173. (R.)

4. An attachment for non-payment of costs, ordered to be paid within six days after service of order, will not be granted until after a personal demand for costs has been made.—*In re Crean's Goods*, 10 I. Jur. N. S. 181. (P.)

VI. 11. *With Proclamations.*VII. *Attachment against Property.*

5. In a foreclosure suit, there being a surplus fund after payment of reported incumbrances, and the mortgagor being dead, a *puise* judgment creditor obtained an order under 23rd sec. of 3 & 4 Vic., c. 105, to charge with the amount of the judgment the surplus fund, the residue of the purchase-money of real estate sold under the decree. *Held*, that the fund was to be considered either as real estate belonging to the heir-at-law of the deceased judgment debtor, or as personality belonging to his personal representative; and that the 3 & 4 Vic., c. 105, does not give jurisdiction to attach by a charging order the property of a deceased debtor in the hands of his representative.

*Semble*—It is very questionable whether the 23rd sec. of 3 & 4 Vic., c. 105, extends to money.—*Wallace v. M'Conn*, 4 I. E. R. 522; *Flan. & K.* 510. (R.)

6. The 23rd and 24th secs. of the 3 & 4 Vic., c. 105, are to be read in connection; and therefore the charging order under that statute is first a conditional order *ex parte*, to be made absolute; which last is the order contemplated by the statute.—*In re Dunscombe*, 9 I. E. R. 4. (R.)

7. To obtain a charging order under the 3 & 4 Vic., c. 105, s. 23, it is not necessary that the judgment should be revived. The Court granted the order on the petition of husband and wife, on a judgment obtained by the wife *dum sola*, without its having been revived.—*Irwin v. Nesbit*, 13 I. E. R. 125. (R.)

8. A rentcharge of £100 was granted out of lands, part of which were let to two tenants whose rents amounted to £155, and who by the same deed attorned to the grantee. A receiver having been appointed over the rentcharge on petition under the Judgment Acts, the grantor distrained the tenants for £55, the balance of their rent over the rentcharge. *Held*, that the Court, by appointing the receiver, had attached the whole rent payable by the tenants; and an attachment was awarded in the petition matter.—*Hayden v. Shearman*, 2 I. C. R. 187. (R.)

9. Funds in Court in an administration suit were decreed to be paid to A., "as administrator of his late wife," but the Master's report had not been made up showing the amount payable, or whether A. was entitled to any sum in his own right. B., a judgment creditor of A., sought a charging order under the 23rd and 24th sections of the 3 & 4 Vic., c. 105, upon the funds in Court to the credit of the suit, or whatever portion thereof A. should be entitled to. *Held*, that A.'s interest in the funds did not justify the Court in charging them by an order under that Act.

The funds were directed to be impounded for fourteen days, to give B. an opportunity

of filing a cause petition to establish his right.—*Burns v. Owen*, 6 L. Jur. 192. (R.)

1. An attachment for £6. 17s. 7d., payable under an order of the Court of Ch., was issued in 1837, and was renewed in 1848, but not afterwards, as it could not now be executed in consequence of the 11 & 12 Vic., c. 28. The Court gave liberty to issue a *fi. fa.* for the amount.—*Fenton v. F.*, 7 L. Jur. 26. (R.)

2. The order made by a Court of Law, under ss. 132, 133, 134, and 135 of the C. L. P. Act 1853, to attach stock standing to the credit of a debtor in a cause in the Court of Ch., does not *per se* operate as a seizure of, or a charge on the stock.

*Semble*—The lodging of such an order with the Accountant-General, without obtaining an order of the Court of Ch., does not charge the stock.

*Semble*—A conditional order does not attach the fund, under the C. L. P. Act.

A conditional order to charge funds in Ch. was obtained in a Law Court, under the C. L. P. Act, on the 30th of June; made absolute on the 8th of August; and lodged with the Accountant-General on the 14th of Nov. A conditional order to charge the same fund was obtained in Ch. by another creditor, under the 3 & 4 Vic., c. 105, on the 1st of August; lodged with the Accountant-General on the 7th of August; and made absolute on the 18th of Nov. *Held*, that the creditor who had obtained the order in Ch. was entitled to the fund in priority to the other.—*French v. Balfre*, 6 I. C. R. 63; 2 I. Jur. N. S. 299. (R.)

#### VIII. BILL. See PRINCIPAL AND SURETY.

##### BILL CONCERNING CHARITY. See CHARITY—PRACTICE, EVIDENCE.

IX. BILL OR PETITION. See PRACTICE IN-JUNCTION, Ct. of Ch. Reg. (Ir.) Act 1850, 13 & 14 Vic., c. 89; 30 & 31 Vic., c. 44, ss. 53–78, 89, 98, 106, 157, 158, G. O. (1867), 1–40.

FRAME OF, STATEMENTS IN, &c. See PLEADING BILL.

1. *Verifying*. [See 30 & 31 Vic., c. 44, s. 89, G. O. (1868) under the Companies Act (1862), 4.]

2. *Summary Order*.

3. *Amendment*. See 30 & 31 Vic. c. 44, ss. 60, 157, 158; G. O. (1867), 11–24.

#### IX. 1. *Verifying*.

[As to Practice under Ct. of Ch. Reg. (Ir.) Act 1850, see 13 & 14 Vic., s. 89; 30 & 31 Vic., c. 44, s. 89; G. O. (1868) under the Companies Act (1862), 4.]

3. Order made, extending a receiver under the Judgment Acts, on a petition verified by the petitioner's solicitor, under certain circumstances.—*Casement v. Rorke*, 4 I. C. R. 36. (R.)

4. *Quære*—Whether the description of the relator, in a cause petition, by way of information and bill, as a ratepayer, in the title of the petition and affidavit verifying the petition, are sufficient?—*Attorney-General v. Le Hunt*, 8 I. C. R. 437. (R.)

#### IX. 2. *Summary Order*.

[See PLEADING BILL, II, 18. Petition under the Ct. of Ch. (Ir.) Reg. Act 1850.]

#### IX. 3. *Bill, Amended*.

[See PLEADING, BILL, II, 8.]

5. A widow filed a bill to raise arrears of her jointure charged on lands by settlement. Deft.'s answer denied the husband's power to jointure, since he had, at the settlement's date, only an estate tail, which was not barred afterwards. An amended bill, praying for dower, if ptf. was not entitled to jointure, was then filed. Deft. neither answered the amended bill, nor appeared at the hearing. Ptf. was decreed entitled to dower, and to an account of the arrears. *Held*, that the amended bill was a continuation of the original suit; and that deft. could not, when taking the account, set up in the office the 3 & 4 W. 4, c. 27, s. 40, which limits to six years the recovery of arrears of dower, though the amended bill was not filed until after that Act came into operation, and although the original bill had been filed before that date.—*Smith v. Walsh*, 1 I. E. R. 167. (E.E.)

6. The amended bill is *the* bill. Therefore, though the original bill may have been answered, it is improper to apply that the amendments may be taken as confessed. The application should be, that the bill may be taken as confessed.—*O'Grady v. Barry*, 1 I. E. R. 296. (R.)

7. Under G. O. 59 (Nov. 1834), when the bill is amended after answer, the deft. having notice that his answer to the amendments is required, is not entitled to a notice to press for his answer.—*Knox v. K.*, 2 I. E. R. 212. (R.)

8. As a general rule, it is improper to introduce into counsel's briefs both the original and amended bills.—*Higgins v. Bateman*, 2 Dr. & War. 70. (C.)

9. If, the amendments be too long for interlineation, a bill is amended by new engrossment; ptf. is not obliged to furnish a copy of the re-engrossed bill: it suffices to furnish a copy of the amendments, or to call on deft. to send his copy to be amended.—*Fulton v. D'Orsay*, 7 I. E. R. 482. (R.)

10. A ptf. may rely on a title, acquired in point of form after the bill has been filed, if it is not inconsistent with his original claim, and is capable of relating back. Therefore, when the devisee of an insolvent debtor filed a bill for renewal, and, the objection having been raised, afterwards procured himself to be

appointed assignee, and amended the bill by inserting a statement of that fact.—*Held*, that he could sustain the bill.—*Doyle v. Callow*, 12 I. E. R. 241. (C.)

#### X. BILL OR PETITION, AMENDMENT OF.

[The cases in the I. C. R. refer chiefly to amendments of cause petitions under the Ct. of Ch. (Ir.) Reg. Act 1850, 18 & 14 Vic., c. 89. See 30 & 31 Vic., c. 44, ss. 60, 157, 158: G. O. (1867) 1-40.]

1. *Generally: when necessary: when granted: in what cases allowed.*
2. *Effect of Amendment, and of Motion for leave to Amend.*
3. *Within what Time: order to Amend in a given Time.*
4. *When, of Course: when, by Special Application only.*
5. *Motion to Amend; necessary steps on.*
6. *Motion to Amend without prejudice; when granted.*
7. *Other Cases.*

#### X. 1. Amendment of Bill generally: when necessary: when granted: in what cases allowed.

[See also PLEADING II, 8—AMENDED BILL.]

1. Liberty given on motion, after hearing and re-hearing, to amend the prayer, by praying the benefit of proceedings stated in it; a satisfactory reason being given why leave was not asked at the hearing, and the deft. being allowed to answer anew.—*Blake v. Foster*, Beat. Rep. 464. (C.)

2. In a suit to appoint new trustees, the Court permitted the replication and rejoinder to be withdrawn, and the bill amended by making the infant child of the ptfs., born after issue joined, a deft.—*Gavagan v. Brophy*, 2 Jon. 629. (E.E.)

3. The ptf. and her younger children filed their original bill to raise jointure and portions out of the lands of T. The deft., by answer, insisted that the ptf.'s husband had been tenant in tail of those lands, and that he had not done any act to bar the entail; and claimed the lands as issue in tail. The ptf. then filed what she called an amended bill, making her younger children defts., and claiming dower or jointure out of the same lands.

*Quære*—Was the latter an original, or an amended bill?—*Walsh v. W.*, Jo. & Car. 52. (E.E.)

4. In a suit for the separate estate of a wife, the husband (an insolvent) and C. were named co-ptfs. On motion to dismiss the bill for want of prosecution, and a cross motion to amend it, liberty was given to amend it by striking out those two co-ptfs.' names, by adding the husband's assignee as deft., and naming S. as the wife's next friend; upon the terms of ptf.'s giving all the defts. security for past costs, making the amendments, and filing a replication within short specified periods, or, in default, the bill to be

dismissed, with costs, as against the defendant who made the application.—*Sweeney v. Hall*, 1 I. E. R. 22; S. & Sc. 662. (R.)

5. A bill may be amended, without an order, once after answer, and after notice to dismiss it for want of prosecution. Such an amendment, made after service of a notice to dismiss, is not cause against the motion to dismiss.—*Dycers v. Goulding*, 2 I. E. R. 57. (R.)

6. A suit was instituted by husband and wife, in relation to the separate estate of the wife. The husband subsequently became insolvent. The Court allowed the bill to be amended, by making the husband and his assignee defts., and by substituting a person to sue as next friend of the wife, upon the terms of such person giving security by recognizance for bygone, but not for future costs.—*Ring v. Nettles*, Fl. & K. 51; 3 I. E. R. 53. (R.)

7. When the ptf. assigns his interest in the subject matter of the suit, the Court will not permit his assignee to be made a party by amendment, but will leave him to file a supplemental bill.—*McGrath v. Heeran*, Fl. & K. 237; 3 I. E. R. 476. (R.)

8. An order to amend without prejudice to process is a side-bar rule which the ptf. takes at his peril.

A deft. who has answered cannot be struck out of the bill by amendment. — *v. Zwickerman*, 5 I. E. R. 22. (E.E.)

9. An amendment of a married woman's bill, by adding a next friend, allowed.—*Johnstone v. Kirkwood*, 2 Con. & L. 484. (C.)

10. *Semble*—If one ptf. desires it, and the defts. assent, the Court will allow the bill to be amended by striking out that ptf.'s name. The other ptfs. can then make him a deft.—*Brangan v. Gorges*, 7 I. E. R. 221. (R.)

11. When a state of facts has recently arisen that renders it necessary to amend the bill, the Court will allow a second amendment after answer, though the last of the answers was filed more than twelve months before the notice of motion.—*Smith v. Gould*, 7 I. E. R. 271. (R.)

12. When a bill has been amended by new engrossment, the matter being too long for interlineation, the ptf. need not furnish a new copy of the re-engrossed bill. It is sufficient to furnish a copy of the amendments, or call upon the deft. to send his copy to be amended.—*Fulton v. D'Orsay*, 7 I. E. R. 482. (R.)

13. A suit having abated by the death of one deft., the ptf., to revive the suit, filed a bill, setting forth, by way of recital, the matters in the original bill; and, as amendments, stated matters that occurred, some before, and others after the filing of the original bill. *Held*, this was not an amended bill within the 55th G. O., so as to require a re-statement of the original bill; but that the statement by way of recital was sufficient.

The object of the rule is, to oblige the ptf. to state the whole of his case in one bill, and to prevent the expense of taking out copies of several and successive amended bills, so that the amended bill becomes the only bill, and states the case in full without reference to an original bill. Where this substitution becomes impossible the rule does not apply.

The rule applies to cases in which matters remain as they were when the bill was filed, and not to cases in which subsequent events make it necessary to continue the suit as originally on the record.—*Harnett v. Harrington*, 7 I. E. R. 502. (R.)

1. In a suit by married women in relation to their separate estates, in which their husbands were made co-ptfs., leave given, after answer, to amend, by striking the names of the latter out of the bill as ptf.s., and making the assignee of one who had become bankrupt, and the others, defts. The amendment does not come within the 50th G. O., so as to make it necessary for the ptf. to join in the affidavit with the solicitor.—*Greer v. G.*, 8 I. E. R. 32. (R.)

2. When one deft. dies after answer, the Court will not permit his devisee to be made a party by amendment.—*Listowel v. Callaghan*, 8 I. E. R. 472. (R.)

3. Application to amend a petition, verified by affidavit, refused. — *v. Steele*, 8 I. E. R. 511. (E.E.)

4. Liberty to amend the bill at the hearing, by including all the creditors, refused.—*Connolly v. M'Dermot*, 3 Jon. & L. 260. (C.)

5. Plaintiff will not be allowed to amend the bill by putting in issue *puisse* incumbrances and making the incumbrancers parties, without prejudice to an order to take the bill *pro confesso* obtained against the principal defendant.—*O'Callaghan v. Blake*, 9 I. E. R. 220. (R.)

6. Leave given to amend the bill, without prejudice to the time for answering, under the 52nd Rule, in a matter varying the relief prayed, no copy of the bill having been taken out, and the motion being unopposed.

*Quere*—Whether it would have been given if opposed?—*Law v. Moore*, 10 I. E. R. 205. (R.)

7. In Ireland, since the New Rules, leave will be given to amend the bill, although the subject-matter of the amendment occurred after the filing of the bill.—*Birch v. Walsh*, 10 I. E. R. 221. (R.)

8. A bill, filed in 1844, to raise a sum secured on a term created by a settlement of 1773, stated the proceedings in a suit of A. v. B., by a prior judgment creditor, and prayed the benefit of the decrees and accounts therein; that the decrees might be carried into execution, so far as necessary for the plaintiff's relief; and a sale of the term. The

cause stood over at the hearing, to make two minors parties by supplemental bill. One, X., by his answer, impeached the decrees in the suit of A. v. B.; both claimed as purchasers for value under a settlement of 1842, made by W. At the hearing of the supplemental cause in June 1847, plaintiff's counsel contended that X. could not impeach the decrees, as he claimed under W., who had acquiesced in them; and an order was made that the further hearing of the cause should stand over, with liberty to the plaintiff in the meantime to bring before the Court the parties beneficially interested in the decrees in A. v. B. The plaintiff filed a supplemental bill, setting out the whole of the proceedings in A. v. B., and the suit of 1844; certain assignments of the judgment and sum decreed in A. v. B. for the benefit of W.; charging that W. and X., and the parties claiming under the assignment in A.'s right, could not object to have the decrees carried into execution, and praying that they might be carried into execution against them, and that the plaintiff might have the benefit thereof; or if the Court should be of opinion that they could not be carried into execution, according to the terms thereof, with such modification as to the Court should seem meet; and that plaintiff's claim, and all prior and contemporaneous charges might be raised by a sale of the term of 1773. The Court refused to take the bill off the file as irregular. *Held*, on demurrer, that the order of June 1847, though it authorised the filing of a supplemental bill to bring new parties before the Court, did not warrant the making of a new case; and that the case of estoppel, and the prayer that the decrees might be modified and altered, was a new case and not warranted by the order.

*Semble*—The frame of the suit and relief prayed being altered, all the necessary parties to the suit of 1844 should be parties, particularly the party representing the term of 1773.—*M'Namara v. Blake*, 11 I. E. R. 527. (R.)—*[Affd.: 12 I. E. R. 362. (C.)]*

9. Orders to amend, without prejudice to an order *pro confesso*, should be made only when the amendment cannot prejudice that defendant.—*Baker v. M'Dermot*, 1 I. Jur. 162. (C.)

10. After issue joined and witnesses examined by the defendant, the plaintiff will not be permitted to amend the bill by introducing new matter which will alter the frame of the suit, and to which an answer is required.—*O'Keefe v. Lanigan*, 1 I. Jur. 328. (R.)

11. The bill having been dismissed against a defendant by the 64th Rule, a motion for leave to amend generally was refused with costs. An amendment under the 49th Rule, by which the same defendant was made a party, was *held* regular, and an order to take the bill *pro confesso* against him was made.—*Hornibrooke v. Ware*, 12 I. E. R. 440. (R.)

12. Liberty to amend the bill was given after replication filed, by striking out a party, and

showing that he was not a necessary party, without prejudice to the replication or depositions; the amendment being such as the Lord Chancellor could make at the hearing.—*Hammond v. Molloy*, 2 I. Jur. 69. (R.)

1. The death of a defendant, and the pendency of proceedings to raise a personal representative, are special circumstances such as will induce the Court to relax the 50th G. O. 1843, and permit a second amendment more than six weeks after the last answer has been filed.—*Clelland v. Kerr*, 2 I. Jur. 99. (R.)

2. An annuitant, defendant in an annuity bill, died before the other defendant answered, but after appearance. The Court permitted the bill to be amended by stating the death of this defendant, and of the payment of the arrears of the annuity to the time of the death.—*Owens v. O.*, 2 I. Jur. 167. (R.)

3. Amendments of cause petitions are to be made without alteration, erasure, or interlineation, by stating the matter of the amendment at the foot of the affidavit to verify, or by endorsement thereon.

Form of order on amendments of cause petitions.

In general the petitioner must abide the costs of the motion for leave to amend, and of the amendment.—*Graves v. Holland*, 1 I. C. R. 123. (R.)

4. Leave to amend the bill, without prejudice to an injunction, will not be granted as of course. The motion must be made without delay, and be supported by an affidavit stating the proposed amendments, and when the matter of them came to the ptf.'s knowledge.

When the answer had been filed in April, an application made in August for leave to amend by introducing charges and an interrogatory founded thereon, in avoidance of a defence set up by the answer, was refused.

The practice in Ireland in this respect is correctly stated in *Donegal v. Berry* (1 Hog. 46), and differs from the practice in England as stated in *Ferrand v. Hamer* (4 M. & Cr. 113).—*O'Beirne v. O'B.*, 1 I. C. R. 152; 3 I. Jur. 65. (R.)

5. When an injunction obtained on filing the bill has upon the coming in of the deft.'s answer been continued until the hearing, and the ptf. for the first time seeks to amend his bill without prejudice to the injunction, the Court will grant a motion to that effect if the proposed amendments be not inconsistent with the case previously made by the bill for the injunction. To sustain such a motion there is not any necessity for an affidavit stating when the matter of the proposed amendments came to the knowledge of the plaintiff.

*Donegal v. Berry* (1 Hog. 46), and *Hamilton v. Patten* (1 Cr. & Dix, Ab. Cases, 203), observed upon.—*O'Beirne v. O'B.*, 1 I. C. R. 158; 3 I. Jur. 106. (C.)

6. The Court will allow a petition to be taken off the file, for the purpose of amendment, before answer, and be re-sworn.—*Johnson v. Molloy*, 3 I. Jur. 190. (C.)

7. A bill was filed in the name of a minor ptf., by next friend. An amendment was sought to be made after the expiration of the time limited by the 50th G. O. (1843). The Court allowed the amendment to be made, on the ground that, as the ptf. was a minor, no decree could be made until his rights were properly stated, which could be done by amendment at the hearing, or by a second bill.—*Hamilton v. Wilson*, 3 I. Jur. 377. (C.)

8. An answering affidavit to a cause petition having been filed, the petitioner set down the cause for hearing, and subsequently applied for leave to amend. The Court made the usual order for amendment, but made the petitioner pay the respondent his costs of appearing on the motion.

The practice in amending cause petitions stated.

Observations on the practice of filing affidavits in cause petition matters, up to the time of hearing.—*Power v. Barron*, 2 I. C. R. 112. (R.)

9. Husband and wife were joined as co-ptfs.; the husband's rights being those of a specialty creditor; the wife's, those of a legatee. *Held*, that she was improperly joined as ptf. The Court allowed the husband to amend by making his wife a deft., to be sued by her next friend.—*Evans v. Holton*, 4 I. Jur. 13. (C.)

10. When a party has by mistake been made a respondent to a petition, amendment is not necessary; the petition may be dismissed as against him.

The prayer of a petition, when verified, cannot be altered, but must be amended; if necessary, by adding a prayer at foot.—*Massy v. Burgess*, 4 I. Jur. 75. (R.)

11. Cause petition to administer assets. Referred to the Master, and a discharge filed by the executor, the sole respondent and principal devisee. He alleged that the assets were deficient, and that the other devisee should be brought before the Court. Motion of course to amend the petition's prayer by praying that a competent part of the specifically devised estates might be sold to pay debts; that the proportion to be contributed by each devisee should be ascertained; and that the specific devisee might be bound. *Held*, that notice of the motion should be served.—*Geraghty v. G.*, 4 I. Jur. 135. (R.)

12. When the petition stated the lease upon which the rent was reserved to be "for lives renewable," it being, in fact, a grant in f.f., the Court dismissed the petition, there being no power in the Court to amend.—*Yelverton v. Avonmore*, 4 I. Jur. 237. (C.)

13. After answering affidavits had been filed by the respondent, and the cause had come to

be heard, counsel for the ptf. applied to let it stand over to amend the petition in particulars pointed out by the def't.'s answer. The Court allowed it to stand over for that purpose, without prejudice to the question of costs. The motion having come on, and the amendment sought by the petitioner being to add the name of a new petitioner, and to make a new case—*Held*, that such an amendment could not be permitted at that stage of the proceedings.

*Semle*—The manner of the amendment should be as stated in the notice of this motion.—*Browne v. O'Donnell*, 6 I. Jur. 158. (C.)

1. Before a cause petition was set down for hearing, the respondent's solicitor informed petitioner's solicitor that respondent was ill, and could not file affidavits. Petitioner's solicitor misunderstood him, and set down the cause for hearing. The Court granted liberty to the respondent to file his affidavit notwithstanding.

When a party wishes to amend a cause petition he must serve notice, and must set out the amendments in full.—*Boyle v. Guinness*, 6 I. Jur. 161. (R.)

2. A cause petition was allowed to be amended by stating that one of the respondents was in insolvent circumstances, and had taken possession of a part of the assets which were necessary to pay the petitioner's demand.

Leave was also given to enter a side-bar order to strike a respondent out of the petition, on payment to him of his costs up to the time of the notice, but without prejudice to the petitioner having his costs at the hearing, if the Court should think fit.

Form of side-bar order entered in the office without motion.—*Taaffe v. French*, 7 I. Jur. 234. (R.)

3. In future, no order to amend a cause petition will be made except on production of the Rolls certificate or the Lord Chancellor's order, referring the matter to the Master under the Ch. Reg. Act, s. 15.—*Porter v. Archbold*, 4 I. C. R. 651; 1 I. Jur. N. S. 116. (R.)

4. The Court has not jurisdiction on motion, without a petition, to pay out funds lodged under the Trustee Relief Act.—*Ex parte Stock*, 5 I. C. R. 341. (R.)

5. When a petitioner prays relief on a particular agreement, and a different agreement is produced, the proper course to be taken is for the party to amend his petition, abandoning the relief originally prayed, and praying relief on the agreement produced. If he continues to rely on the original agreement, and seeks relief in the alternative, the petition must be dismissed.—*Daly v. Coghlan*, 3 I. Jur. N. S. 150. (R.)

6. A petition was dismissed at the hearing, because there was not sufficient notice to postpone a registered deed under which the respondent claimed. A supplemental petition in the nature of a bill of review was filed, putting in

issue new matter to prove actual notice; and was set down to be heard before the Court of Appeal along with the re-hearing of the original decree. Their Lordships being of opinion that actual notice was proved, but that the title of the petitioner to the property was not sufficiently clear, remitted the cause petition and supplemental cause to the Court of Ch., and allowed the petitioner to amend, by adding parties, and otherwise as he might be advised, in reference to his title.—*Barton v. Sampson*, 3 I. Jur. N. S. 401. (C.A.)

7. In 1828, a bill to raise a charge out of lands was filed in the Exch.; a decree to account was made in 1830. *Held*, that a petition praying a benefit of the former proceedings could not be referred under the Ch. Reg. Act, s. 15. Leave was given to amend the petition; the petition to be referred on production of the certificate of amendment.—*Neary v. Callan*, 10 I. C. R. 285. (C.)

8. H., tenant for life, with remainder to his children as he should appoint, in default of appointment to them equally, appointed to his eldest son, subject to charges for his adult younger children.

The tenant for life and the appointees joined in executing to the appellant a mortgage, to secure a debt of the tenant for life.

The eldest son afterwards filed a petition, alleging the appointment to have been made in pursuance of an agreement between the tenant for life and the appellant; and that the mortgage was a fraud on the power.

The petition also contained charges of actual fraud by the appellant upon the appointees.

The petition prayed that the mortgage might be set aside, as fraudulent, and as a fraud on the power. *Held*, that, at the hearing, the petition might be amended, by praying that the deed of appointment might be set aside.—*Skilton v. Flanagan*, 14 I. C. R. 484. (C.A.)—[See s. c., 15 I. C. R. 303; 9 I. Jur. N. S. 341. (C.A.)]

9. In a suit to establish the contents of a lost will, the contents must be set out in an affidavit, or a copy lodged in the registry, and referred to in the declaration. A record made up in the ordinary form, applicable to an existing will, was, at the hearing, ordered to be amended accordingly.—*Connor v. McGettigan*, 8 I. Jur. N. S. 338. (P.)

10. A possessory petition cannot be amended.—*O'Neill v. McErlaine*, 16 I. C. R. 280. (R.)

11. A petition in the nature of a bill of review must be, and must state that it is filed with the Court's leave; otherwise it will be dismissed at the hearing.

*Quære*—Would the Court, at the hearing, allow this amendment; that the petition had been filed with the Court's leave?—*Connor v. Reeves*, 16 I. C. R. 398. (R.)

**X. 2. Effect of Amendment: and of Motion for Liberty to Amend.**

1. A formal amendment of the bill is not a proceeding which will keep alive a cause, which is out of Court, until service of a subpoena to elect.—*Townsend v. Newenham*, S. & Sc. 700. (R.)

2. An amendment of the bill under G. R. 54, with notice to deft. to answer the amendments and exceptions which had been allowed by the Master, is a waiver of the exceptions, as ptf. ought to have proceeded under G. R. 56.—*O'Grady v. Barry*, S. & Sc. 371. (R.)

3. In general, amending a bill is a waiver of exceptions to the answer; but under the Order of 13th June 1780—(see G. O. 54, 27th March 1848)—deft. is, in such a case, bound to answer not only the amendments, but also the exceptions.—*Burroughs v. M'Intosh*, 3 Dr. & War. 150; 2 Con. & L. 95. (C.)

4. At the hearing the cause was allowed to stand for parties, who then were brought before the Court by supplemental bill, which contained new matter affecting the parties to the original bill. *Held*, that they should be also parties to the amended bill.—*M'Namara v. Blake*, 1 I. Jur. 317. (C.)

5. A material amendment of the bill is a waiver of a parliamentary appearance.—*O'Brien v. Clancy*, 12 I. E. R. 312. (R.)

6. The G. O. are not so absolutely binding on the Court that they cannot be in any instance relaxed. The general merits of the case and the like are no grounds for departing from them, but only the conduct of the parties, or events in the course of the suit; and, if in the case there appear the ordinary grounds of equitable relief, such as fraud, surprise, or accident, the Court may give relief against the strict construction of the Orders.

A., a deft., answered in Feb.; other defts. answered in April, on whose answer it was necessary to move for documents, which were not produced pursuant to the order made, until August. In Oct. A. served notice to dismiss the bill under the 82nd Order; and the plaintiff served a notice for liberty to make amendments rendered necessary by the answer and deeds. The Court refused to dismiss the bill.—*Downing v. Hodder*, 12 I. E. R. 371. (C.)

7. Striking out a deft. is not an amendment which entitles a deft. to further time to answer under the 52nd G. O.—*Gouldsberry v. G.*, 2 I. Jur. 52. (R.)

**X. 3. Within what Time; Order to Amend in a given Time.**

8. When ptf. amends his bill under G. O. 52, and gives deft. notice, deft. should send his copy to be amended within two days; ptf. should return it amended two days after, re-

quiring, if necessary, an answer. The month will run from the date of the return of the bill and notice, and exclusive of it.

If deft. neglects to send his copy for amendment in two days after requisition, and ptf. returns it in two days after he gets it, the month will commence to run on and from the sixth day after that on which deft. was served with notice to furnish his copy.—*Greer v. G.*, 7 I. E. R. 72. (R.)

9. When ptf. amended his bill *bona fide* after the deft. was entitled to move to dismiss it, the Court refused to dismiss the bill, but made the plaintiff pay the costs of the motion.—*Moore v. Lalor*, 9 I. E. R. 148. (R.)

10. An order gave leave to amend a cause petition before the following day, and to file an affidavit verifying the amendment, the respondent to have liberty, within fourteen days, to file affidavits in reply. The amendments were not filed for several days. An affidavit, verifying the amendments in detail, but filed prior to the motion for leave to amend, was relied on as sufficiently complying with the order to amend and verify. The Court, on motion, refused to take the amendment off the file for irregularity; but allowed the respondent fourteen additional days (running from the date of the latter motion), to file affidavits in reply. Costs to be costs in the cause.—*Guinness v. Phelps*, 6 I. Jur. 889. (R.)

**X. 4. When of Course: when by Special Application only.**

11. After issue joined, the bill cannot be amended except upon affidavit showing the necessity of the amendments sought.—*Malony v. Lowry*, H. & Jon. 220. (E.E.)

12. An amendment in the prayer was made after publication passed, and after the cause had been set down for hearing.—*Smithwick v. S.*, H. & Jon. 397. (E.E.)

13. When a bill has been amended once after a demurrer allowed, otherwise than "for the purpose of rectifying any clerical error, or an error in names, dates or sums," it cannot be amended a second time in matter of substance, without the leave of the Court upon special motion.

Three demurrers had been put in to the bill, each by a different deft. The demurrers were allowed and the bill was amended after each demurrer in matter of substance. *Held*, upon the construction of the 49th, 50th, and 64th G. O., that the amendments (except the first) were irregular, same having been made without the leave of the Court upon special motion, and an amendment having been made after the first demurrer was allowed, which amendment was not for the purpose of rectifying a clerical error or an error in names, dates, or sums.—*Fitzpatrick v. Lidwell*, 10 I. E. R. 31. (R.)

14. When a bill is demurred to on several grounds, one of which is that there is no affi-



davit annexed corroborating the statement in the bill of the loss of a deed; and this defect is supplied within the ten days limited by the 64th G. O. (1848)—*Held*, that the filing of this affidavit was an amendment; and that after the ten days no second amendment could be permitted without leave of the Court.—*Lord Cork v. Blennerhassett*, 1 I. Jur. 164. (R.)

#### X. 5. Motion to Amend; necessary steps on.

1. Where a state of facts has recently arisen that renders it necessary to amend the bill, the Court will allow a second amendment after answer, though the last of the answers was filed more than twelve months previous to the notice of motion.—*Smith v. Gould*, 7 I. E. R. 271. (R.)

2. After the original bill had been answered, the ptfs. amended the bill by a new engrossment, and subsequently made further amendments without obtaining an order under the 50th G. O. *Held*, that those amendments were irregular.

The answer mentioned in the 49th and 50th G. O. means an answer to the original bill.—*Nolan v. Ball*, 8 I. E. R. 573. (R.)

3. The Court will allow a petition to be taken off the file for the purpose of amendment before answer, and be re-sworn.—*Johnson v. Molloy*, 8 I. Jur. 190. (C.)

4. A cause petition under the Ch. Reg. Act cannot be amended (unless in very plain cases), without notice to those respondents who have entered appearances.—*O'Brien v. Tredennick*, 4 I. Jur. 135. (R.)

5. After answering affidavits had been filed by the respondent and the cause had come on to be heard, counsel for the ptf. applied to let it stand to amend the petition in particulars pointed out by the deft.'s answer. The Court allowed it to stand for that purpose, without prejudice to the question of costs. The motion having come on, and the amendment sought by the petitioner being to add the name of a new petitioner, and to make a new case—*Held*, that such an amendment could not be permitted at that stage of the proceedings.

*Semble*—The manner of the amendment should be as stated in the notice of this motion.—*Browne v. O'Donnell*, 6 I. Jur. 158. (C.)

#### X. 6. Motion to Amend without Prejudice: when granted.

6. When process to a sequestration for want of answer had issued, leave to amend the bill, without prejudice to the process, refused, the alteration proposed being such as to materially vary the record.—*Foster v. Fox*, 8 I. E. R. 514. (E.E.)

7. A formal amendment having been made after the bill had been taken *pro confesso*, and

without having applied under G. O. 51, the Court allowed the amendment to stand, without prejudice to the order to take the bill *pro confesso*.—*Martley v. French*, 9 I. E. R. 4. (R.)

8. Ptf. will not be permitted to amend the bill, putting in issue *puisne* incumbrances, and making the incumbrancers parties, without prejudice to an order, to take the bill *pro confesso*, obtained against the principal deft. —*O'Callaghan v. Blake*, 9 I. E. R. 220. (R.)

9. Leave to amend the bill, without prejudice to an injunction, will not be granted as of course. The motion must be made without delay, and be supported by an affidavit stating the proposed amendments, and when the matter of them came to the ptf.'s knowledge.—*O'Beirne v. O'B.*, 1 I. C. R. 152; 3 I. Jur. 65. (R.)—[*Rev'd.*: 1 I. C. R. 158; 3 I. Jur. 106. (C.)]

#### X. 7. Other Cases of Amendment.

10. A., who was deft. as an acting executor, died. The Court gave leave to the ptf. to amend by making the other executors parties in the place of A., without paying A.'s costs. —*Pye v. Coppinger*, 12 I. E. R. 314. (R.)

11. One of several co-ptfs. was of imbecile understanding at the time when the bill was filed. His name was used without authority. The Court would not order the bill to be taken off the file. *Aliter* if he were the sole ptf.

*Quere*—Could the Court, under such circumstances, order the imbecile ptf.'s name to be struck out of the bill?—*Brangan v. Gorges*, 7 I. E. R. 225. (R.)

12. When there are several defts., one of whom only has been required to answer the amendments, the proper course is to move to have the bill taken as confessed, and not to set down the cause for a decree *pro confesso*.

Notice of the amendment of a bill requiring an answer was served on the 31st of Dec. On the 1st of Feb. (the 31st of Jan. being Sunday), notice was served to move to have the bill taken as confessed. The motion was refused as premature.—*Walker v. Daly*, 10 I. E. R. 232. (R.)

13. A private Act of Parliament provided that a suit on behalf of an Insurance Company, in the name of the secretary, should not abate by the death of the nominal ptf., but might be continued in the name of the secretary for the time being. *Held*, that the substitution of the name of the new secretary was not such an amendment as would entitle the deft. to further time to answer.

If, under an order to make such an amendment, the ptf. inserts other matter, the deft. will be entitled to further time to answer, although the further amendment may not be material.—*Le Capellain v. The Earl of Kingston*, 2 I. Jur. 91. (R.)

**XI. BILL PRO CONFESSO.** See PRACTICE, DECREE—PRACTICE, EVIDENCE—STATUTES, CONSTRUCTION OF, II. 8.

[See General Orders (1867), 65, 110–126.]

1. One of several defendants was arrested for not answering a bill for tithe composition. Having been two months in custody, the bill was ordered to be taken *pro confesso* against him. Practice in taking a bill *pro confesso* pursuant to the 5 & 6 W. 4, c. 16, rule 10.—*Savage v. Carboy*, 2 Jcn. 315. (E.E.)

2. In moving to have a bill taken *pro confesso* under G. O. 46, it is not necessary to include in the same application all the defts. who have neglected to answer. Ptf. may, if he pleases, move against each deft. separately.—*M'Loughlin v. M'L.*, S. & Sc. 113. (R.)

3. G. O. 46, to take a bill *pro confesso*, does not apply to the case of a deft. out of the jurisdiction who has adopted a parliamentary appearance entered by ptf. after service of subpoena, &c., under the 2 W. 4, c. 33, and 4 & 5 W. 4, c. 82.—*Malone v. Tuile*, S. & Sc. 200. (R.)

4. G. O. 46, to take a bill *pro confesso*, does not apply to the case of a deft. out of the jurisdiction, who has entered an appearance after service of the subpoena, &c., under the 2 W. 4, c. 33, and 4 & 5 W. 4, c. 82.—*Williams v. Shaw*, S. & Sc. 204. (R.)

5. An answer filed by a ptf. for an infant deft. is an answer within G. O. 46, and entitles ptf. to move to have the bill taken *pro confesso* against the other defts. who have not answered. A notice that ptf. "would proceed to issue process to enforce deft.'s answer, or proceed to have the bill taken as confessed," is a sufficient monthly notice within G. O. 25.

The Court will encourage a suit to get out of litigation as soon as possible.—*Keogh v. Murphy*, S. & Sc. 330. (R.)

6. When no deft. has answered, the proceeding to take the bill *pro confesso* must be under G. O. 45.—*Warningham v. Watts*, S. & Sc. 492. (R.)

7. Notice of motion to take a bill as confessed against some defts. under the 46th G. O. need not be given to another deft. for whom a parliamentary appearance has been entered.—*Tarrant v. Allen*, S. & Sc. 676. (R.)

8. Service of the month's notice to answer under G. O. 25 is irregular, when no proceeding in the cause has been taken for more than twelve months.

A formal amendment of the bill is not a proceeding such as will keep alive the cause, which is out of Court until a subpoena to elect is served.

When a ptf. seeks a decree under G. O. 45, he must be prepared to show that all his previous proceedings were perfectly regular.—*Townshend v. Newenham*, S. & Sc. 700. (R.)

9. When no material discovery from a deft. is necessary, the ptf.'s proper course is to proceed to take the bill as confessed for want of an answer.—*Johnson v. M'Auley*, S. & Sc. 707. (R.)

10. On motion to take a bill *pro confesso* against the guardian *ad litem* of a lunatic, the order was made on the terms of serving notice on the lunatic's nearest relations, and on his guardian.—*Crawford v. Kernaghan*, 1 Dr. & Wal. 195. (C.)

11. The amended bill is *the* bill. Therefore, though the original bill may have been answered, it is improper to apply that the amendments may be taken as confessed. The application should be—that the bill may be taken as confessed.—*O'Grady v. Barry*, 1 I. E. R. 206. (R.)

12. A sole deft.'s answer, filed within two days after a decree *pro confesso* had been obtained, was allowed to stand, and the decree was set aside, upon terms, although the affidavit grounding the application did not particularly show any grounds of defence upon the merits.—*Daly v. Duggan*, 1 I. E. R. 315. (R.)

13. Some of the defendants having answered, the original bill was afterwards amended. None of the defendants answered the amended bill. *Held*, upon motion to take the bill as confessed against such of the defendants as had not answered the original bill, that the proper course was to set down the cause to be heard against all the defendants.—*Cahill v. Lambert*, Fl. & K. 89. (R.)

14. After an order to have the bill taken as confessed against a defendant, the Court will not permit him to answer without an affidavit of merits.—*Delamy v. Doolan*, Flan. & K. 182. (R.)

15. When no proceedings have been taken against a defendant within a year, the cause is out of Court as to him, though proceedings have, within that time, been taken against other defendants.—*Bartley v. Davis*, Fl. & K. 620. (R.)

16. Notwithstanding the 34th G. O. of March 1843, leave given to defendant to file his answer after an order to take the bill as confessed against him, although more than three years had elapsed after the order to take the bill as confessed was pronounced, and the cause was in the Lord Chancellor's term list of causes for hearing; the plaintiff having been himself guilty of delay, there being a full affidavit of merits, and the defendant being put under terms, so as not to postpone the hearing of the cause.—*Cruise v. Sheil*, 6 I. E. R. 132. (R.)

17. When a cause is set down to be heard *pro confesso*, formal amendments having been made in the bill, the Court at the hearing will

require the matter of the amendments to be stated.—*Burrough v. Williamson*, 6 I. E. R. 374. (R.)

1. Ptf. is not entitled, as of course, to a decree against a party against whom the bill has been taken *pro confesso*. The case must be made out against him.—*Lloyd v. L.*, 4 Dr. & W. 354; 2 Con. & L. 592. (C.)

2. When no deft. has answered, ptf.'s proper course is to have the cause set down to be heard *pro confesso*. He cannot move to take the bill as confessed against one deft. The cause cannot be set down to be heard *pro confesso* against some of the defts.—*Blosse v. Lynch*, 7 I. E. R. 335. (E.E.)

3. When the sole deft. died after answer, and a bill of revivor and supplement was filed against his executor and devisees, and the latter did not answer, the proper course is to take the bill *pro confesso* against them, and not to set down the cause to be heard *pro confesso* against all the defts.—*Burnside v. Mayne*, 8 I. E. R. 97. (R.)

4. By suffering the bill to be taken as confessed against him, deft. admits the facts stated in it; but ptf. must show that those facts, so admitted, entitle him to relief.—*Simmonds v. Palles*, 8 I. E. R. 335; 2 Jon. & L. 489. (C.)

5. A formal amendment having been made after the bill had been taken *pro confesso*, without having applied under the 51st G. O., the Court permitted the amendment to stand, without prejudice to the order to take the bill *pro confesso*.—*Martley v. French*, 9 I. E. R. 4. (R.)

6. Ptf. will not be allowed to amend the bill by putting in issue pious incumbrances, and making the incumbrancers parties without prejudice to an order to take the bill *pro confesso* obtained against the principal deft.—*O'Callaghan v. Blake*, 9 I. E. R. 220. (R.)

7. When a sequestration for contempt in not answering has been issued against a deft., and the sequestrators are in possession, the Court will not permit the bill to be taken *pro confesso*, if ptf. elects to continue the sequestrators.—*Cormick v. C.*, 9 I. E. R. 474. (R.)

8. Form of order on motion to take bill as confessed against a person alleged to be of unsound mind.—*Swift v. S.*, 11 I. E. R. 557. (R.)

9. An order to take a bill *pro confesso* may be made, if there be an answer filed when the motion is moved, though none had been filed when notice of motion was served.—*Hilhouse v. Tyndal*, 12 I. E. R. 316. (R.)

10. When a bill has been amended after answer, and notice given that no answer is required to the amended bill, the plaintiff cannot set down the cause *pro confesso*, although the defendant has served notice that

he will answer the amendments.—*Hamilton v. West*, 12 I. E. R. 422. (R.)

11. Appearance on the 26th April; order on the 8th of May, staying proceedings until security for costs should be given. Security given on the 4th of Dec.; cause set down *pro confesso* on the 24th of Jan., the 23rd being Sunday. Held, irregularly, the deft. having the whole of the 24th to answer.—*White v. W.*, 12 I. E. R. 425. (R.)

12. The bill having been dismissed against a deft. by G. R. 64, a motion for leave to amend generally was refused with costs, but an amendment under G. R. 69, whereby the same deft. was made a party, was held regular; and an order to take the bill *pro confesso* against him was made.—*Hornibrooke v. Ware*, 12 I. E. R. 440. (R.)

## XII. BILL OF DISCOVERY.

[See also PLEADING II, 10, 11.]

13. A deft. in a cross cause to discover evidence, cannot resist a discovery of matter touching which he might have enforced a discovery in the original suit.

A discovery of evidence is not confined to a disclosure of such facts only as will tend to establish affirmatively the case of a ptf. in possession.

A person in possession is not to be called upon by a claimant to discover his title deeds, unless it be shown that there is a common title, or that they will affirmatively establish the claim.—*O'Connor v. Malone*, S. & Sc. 516. (R.)—[See Amendment of demurrer: *ibid*, 551. (R.)]

14. When, on a bill for discovery merely, an injunction is granted to restrain action at law, ptf. will not be required to give judgment in that action.—*Wilder v. Farrell*, 8 I. E. R. 101. (R.)

15. A., by his bill, stated that having a charge affecting the lands of M. held by deft. X., under a lease, an agreement was entered into between them that X. should, in lieu of A.'s charge, grant him an annuity for the lives of himself and his sister, charged on the lands of B., and other properties, including M. A. afterwards discovered that there were charges outstanding affecting B., when X. further agreed that a judgment affecting B. should be assigned to A. as a security, which X. was unable to do; and having broken penal covenants in the lease of M., his interest was evicted by the landlord, C., between whom and X. an agreement was then entered into to give X. a new lease. The bill charged and stated various acts to show that X. evaded performing his agreement, and in order to extinguish A.'s claims on the lands, aided C. to evict the interest in them on a previous promise of a new lease; and prayed a specific performance of the agreements; that the new lease might be decreed liable to A.'s demand and charged with the annuity; that if X. could not fully perform the agreements, by reason of

the incumbrances on B., then, that he might do so as far as possible, and indemnify A. against incumbrances; a reference or issue to ascertain A.'s loss by the inability of X. to perform his agreement fully; and that X. should pay the amount. X. demurred to the relief and discovery, assigning as causes that part of the discovery sought was immaterial, being in relation to the new lease, as to which A. had no title to relief; and that as the bill prayed specific performance, A. could not seek part performance with indemnity and compensation. *Held*, that the demurrer in relation to the relief, seeking that the new lease might be liable, could not be sustained; and that the interrogatories being in part material, A. was entitled to the discovery; that the demurrer, so far as related to the relief of part performance, with indemnity and compensation, would, if so confined, be good; but the demurrer being bad as to the former part, was bad altogether. —*Southwell v. Daly*, 9 I. E. R. 7. (R.)

1. A bill of discovery in aid of a defence at law will not lie against one who is not a party to the record at law.

If a bill prays relief and discovery, the ptf. cannot waive the relief, and insist on the discovery.

A bill by the directors of an Insurance Co. stated matters which amounted to a legal defence; and prayed a discovery of them; that a policy of assurance might be delivered up to be cancelled; and an injunction to stay an action at law brought on it. The bill was against A. (administratrix of the assured) and B. (assignee of the policy), in concert with whom, and by whose directions the bill charged the policy to have been effected; but who was not a party to the action. The Court refused the injunction on the bill as a bill of relief, because it stated facts amounting to a defence at law; or as a bill of discovery, because it prayed relief which the ptf. could not waive. —*Anderson v. Dowling*, 11 I. E. R. 590. (R.)

### XIII. BILL OR PETITION, DISMISSAL OF.

[See PRACTICE, COSTS. See 25 G. 3, c. 51 (Ir.), s. 3; 30 & 31 Vic., c. 44, s. 86; G. O. (1867), 102, 136–140.]

1. General Orders respecting.
2. Generally: in what Cases: Ground for.
3. By Plaintiff.
4. By Consent.
5. General Effect of.
6. For want of Prosecution.
7. On behalf of Infants.
8. Motion for.

#### XIII. 1. General Orders respecting.

[The cases in the Irish Ch. Rep. refer chiefly to the practice under the Ct. of Ch. Reg. (Ir.) Act 1850, repealed in part by the 30 & 31 Vic., c. 44.]

2. The 81st G. O. of 1843 does not apply to a case in which a receiver has been actually in receipt of the rent, and orders have from time to time been made.

A bill was filed in 1823. The cause was not

yet heard. The Court refused to dismiss the bill, as a receiver was in receipt of the rents, and orders had been made in the cause. —*Mara v. Tibeaud*, 7 I. E. R. 556. (R.)

8 The G. O. of the Court are to be regarded as part of the statute under the authority of which they were made, and not to be departed from on special considerations, but bind the Court, unless there is something in the conduct of the party insisting on them which disentitles him from relying on them.

*Semble*—The clause in the 82nd G. O. of 1843, "if the ptf. shall not proceed with the cause," would authorise the Court to refuse an application to dismiss a bill for want of prosecution, though none of the courses pointed out by the order were pursued by the ptf., if he was prevented from proceeding by the act of the deft. —A delay in amending the bill, consequent on waiting for judgment in an action brought by the deft.—*Held*, not such an excuse, especially as it was not brought before the M. R. on the original motion. —*Davies v. D.*, 10 I. E. R. 614. (C.)

4. When the ptf. has been discharged as an insolvent after the filing of the bill, the proper order under the 82nd or 83rd Rule is, that the bill be dismissed against him without costs, if his assignee do not file a supplemental bill within a specified time. —*Darling v. Marsh*, 11 I. E. R. 261. (R.)

5 The G. O. are not so absolutely binding on the Court that they cannot be in any instance relaxed. The general merits of the case and the like are no grounds for departing from them; but only the conduct of the parties, or events in the course of the suit. If in the case there appear the ordinary grounds of equitable relief, such as fraud, surprise, or accident, the Court may give relief, against the strict construction of the Orders.

A., a deft., answered in Feb. Other defts. answered in April, on whose answer it was necessary to move for documents, which were not produced, pursuant to the order made, until Aug. In Oct., A. served notice to dismiss the bill under the 82nd Order; and the ptf. served a notice for liberty to make amendments rendered necessary by the answer and deeds. The Court refused to dismiss the bill. —*Downing v. Hodder*, 12 I. E. R. 371. (C.)

6. The Court will not, on the consent of parties, reinstate cause petitions dismissed for want of prosecution under the 20th or 27th G. O. of July 1851, unless there are sufficient grounds, irrespectively of the consent, for reinstating them.

When a cause petition under the Ct. of Ch. Reg. (Ir.) Act, is dismissed under the 20th G. O., the Court will not, on motion, give costs to a respondent who did not appear when the cause was called on. —*Porter v. Archbold*, 4 I. C. R. 651; 1 I. Jur. N. S. 116. (R.)

7. When a petitioner becomes bankrupt before the petition stands dismissed by the 27th G. O. of 1851, the suit is not affected by that order.

In such a case the proper course is, to move that the petition do stand dismissed unless the assignee file a supplemental bill within a time to be limited by the Court.

But when, *pendente lite*, a petitioner voluntarily assigns his property, the suit is not thereby abated, and is therefore within the operation of the 27th G. O.

In the latter case leave to reinstate the petition may be given on payment of the costs of the motion. — *Maxwell v. Read*, 15 I. C. R. 133. (R.)

1. The appointment of a receiver in a mortgage cause does not take the case out of the operation of the 81st G. O. 1843. — *Woodroffe v. Greene*, 15 I. C. R. 176. (C.A.)

2. An I. E. Court order for the sale of lands, the subject of a suit in the Court of Chancery, did not, without an order of the latter Court, stay the suit, so as to prevent its being dismissed by the 81st G. O. of 1843.

An order appointing a receiver in a suit praying a sale for the payment of incumbrances did not prevent the suit being dismissed by the 81st G. O. of 1843. — *Foss v. F.*, 15 I. C. R. 215. (R.)

3. Under the 51st G. O. of the 19th May 1857, if the final order in a cause petition be not obtained within the time limited by the Master, the petition is not dismissed, without an order to that effect. — [*Moore v. Keogh*, 10 I. C. R. 501, not followed.] — *Corker v. C.*, 15 I. C. R. 304. (C.A.)

### III. 2. Generally: in what Cases: what is a Ground for.

4. A bill was dismissed with costs, under the 93rd G. O., upon the motion of a deft. who had become bankrupt after filing his answer. — *Walcott v. Bristow*, S. & Sc. 552. (R.)

5. An order was made on a ptf. residing abroad to stay proceedings until he gave security for costs. He allowed a long time to pass without giving security. Thereupon a further order directed that he should give security before a day named, or that his bill should stand dismissed without costs. — *Hardwicke v. Warren*, 2 I. E. R. 156; S. & Sc. 645. (R.)

6. A bill to restrain waste, the damage proved being £7. 16s., is beneath the dignity of the Court, and will be dismissed with costs at the hearing. — *Lambert v. L.*, 2 I. E. R. 210. (C.)

7. The proceedings of a ptf. residing abroad were ordered to be stayed until he gave security for costs. Having allowed a long time to elapse without giving it, he was further ordered to give it before a certain day; and that, in default, his bill should stand dismissed, with costs. — *Knight v. Lord de Blaquiere*, S. & Sc. 648, 649; 1 I. E. R. 345. (R.) — [See *Powell v. Smith*, S. & Sc. 654. (R.)]

8. A petition by a solvent surety of an insolvent tenant, to surrender, or to reduce

the rents of premises of which the value had greatly diminished since the lease was made, was dismissed, with costs. — *In re O'Neill's Minors*, S. & Sc. 686. (R.)

9. A conditional decree for a dismiss set aside, it having been obtained in an abated cause. — *Kidd v. Farran*, H. & J. 798. (E.E.)

10. Petition presented on behalf of the committee, after the lunatic's death, which did not contain a statement of that fact, dismissed for irregularity. — *In re Briscoe*, 2 Dr. & War. 501. (C.)

11. *Semble*—On a proper application, the Court may order to be taken off the file a bill filed as an illusory proceeding to evade the Statute of Limitations. — *Boyd v. Higginson*, 5 I. E. R. 97. (R.)

12. Bill to set aside a purchase by the deft., or to have it declared a trust for the ptf. The decree established the ptf.'s right to have the purchase declared a trust; and directed accounts, upon the taking of which a large sum was ascertained to be due to the deft. The final decree ordered the ptf. to pay that sum within six months, and directed that thereupon the estate should be reconveyed to the ptf. Payment was not made within the appointed time. *Semble*—That the dismissal of the bill was the deft.'s proper remedy.

Upon consent, however, the time for payment was enlarged for four months, and a sale was directed if default in paying within that period was made. — *Austin v. Chambers*, Dr. Rep. temp. Sugden, 85. (C.) — [See s. c., 3 Dr. & War. 178; 6 Cl. & F. 1.]

13. Bill to reform a marriage settlement, on the ground that it was not in conformity with the settlor's contract. The settlement was inconsistent with his instructions, so far as they appeared in evidence. His previous and subsequent acts and declarations consisted with the instructions, but not with the settlement. What the final contract between the parties was did not appear. Fraud, though charged, was not proved. *Held*, that relief could not be granted on the ground of mistake, since it was possible, though not probable, that the settlor had agreed to make a settlement, such as had been in fact executed.

The bill was dismissed, but without costs. — *Bunbury v. Lloyd*, 1 Jon. & L. 638. (C.)

14. If a bill cannot be dismissed against all the ptf.s, it cannot be dismissed against any of them. — *Brangan v. Gorges*, 7 I. E. R. 221. (R.)

15. A solicitor may not deal with his client for a security for a debt due to him by a third person, without giving his client all his own information touching the debt, and the nature of the security.

The Court dismissed, with costs, a bill to enforce a security taken by a solicitor from his client on a sum charged upon the principal debtor's estate, and to recover which the client was then prosecuting a suit in Equity; the solicitor having omitted to disclose the

circumstances connected with the estate, and particularly that he had other demands affecting it.—*Higgins v. Joyce*, 2 Jon. & L. 282. (C.)

1. A petition to grant a renewal to a tenant under a lease, with a covenant of renewal, presented by the receiver in a lunacy matter without the concurrence of the committee of the estate, will be dismissed with costs.—*In re The Earl of Kilkenny*, 7 I. E. R. 594. (C.)

2. When one of two co-ptfs. has no title, the bill must be dismissed generally, though the claim of the other is valid, and relates to an independent subject.—*Richardson v. Nixon*, 7 I. E. R. 620; 2 Jon. & L. 250. (C.)

3. The H. L. will not give relief to an appellant against an order of which he complains by petition, unless he has taken the proper course to obtain relief in the Court below.—*Tomney v. White*, 6 Cl. & F. 786.—[See s. c., 6 I. E. R. 303. (R.); 1 H. L. Cas. 160; 5 I. Jur. 321. (H.L.)]

4. A very voluminous suit against several defts. failed on the three main branches of the relief sought; but the ptf. succeeded in establishing a right to a limited account against one deft., which, though comparatively unimportant, was mixed up with the other matters of the suit, and was *bona fide* sought by the bill. *Held*, that the bill could not be dismissed generally.—*Flattery v. Anderson*, 12 I. E. R. 218. (C.)

5. Chattels real were mortgaged, and judgments were recovered by the mortgagee against the mortgagor, as collateral securities for the sums advanced on mortgage. The mortgagor having died, a bill was filed against his personal representative, praying an account of the sums due in respect of the mortgages; a foreclosure and sale; and an account of the personal estate of the mortgagor. The personal representative in her answer stated her belief that the chattels real were adequate to discharge the sums due. A decree was then taken for an account of those sums, and of the incumbrances prior or contemporaneous therewith, but not directing any account of the personal estate of the mortgagor. A report pursuant to that decree having been made, a decree for sale of the chattels real was pronounced. The proceeds of the sale were insufficient to pay the sums due on the mortgages. *Held*, that a supplemental bill afterwards filed by the mortgagee against the personal representative of the mortgagor, praying an account of the personal estate of the mortgagor, could not be maintained, and was accordingly dismissed, with costs.—*Joly v. Leyden*, 13 I. E. R. 444. (C.)

6. Though a bill has been filed on the authority of a reported case, which is afterwards reversed, the Court has not jurisdiction on a motion under the 82nd Rule, to order that the bill shall be dismissed without costs.—*Cronin v. Murphy*, 1 I. C. R. 233. (R.)

7. When, by mistake, a party has been made a respondent to a petition, amendment is not necessary; the petition may be dismissed as against him.—*Massy v. Burgess*, 4 I. Jur. 75. (R.)

8. A., being possessed of land, presented a petition under the 5 G. 2, c. 9, to ascertain the boundaries of an adjoining bog to which his title was disputed by the respondent. The Court would not dismiss the petition, but retained it till the petitioner established his right at law.

*Semble*—Though no jurisdiction be given the Court, by the statute under which the proceedings are taken, to direct an issue, or an enquiry as to the facts, yet the Court, to satisfy itself, will exercise its inherent powers by either of those methods.—*Lahiffe v. Gregory*, 4 I. Jur. 97. (C.)

9. V., seized in tail of the V. estate, including the lands of B. and G., with remainder to E. in tail, levied fines and suffered recoveries of the V. estate (except the lands of B. and G.) in 1814. In 1844, after the death of V., the Master made a report in the matter of E., and others, minors, finding that V. had by fines and recoveries barred all estates tail in the V. estate. In 1837, E. had attained his full age. In 1845, an answer (without oath or signature) was filed in the cause of *W. v. V.*, by the ptf.'s solicitor, on behalf of E., admitting that V., by fines and recoveries, had legally barred all estates tail in the V. estate. A similar admission was made in an answer filed by E., in 1848, in a creditor's suit of *O'B. v. V.* A decree to account having been made in *W. v. V.*, the ptf. stated that V., being seized of the V. estate (enumerating *inter alia* B. and G.), made his will, &c.; and the discharge filed for E. admitted that statement. The Master's report in *W. v. V.* found that V. had levied fines and recoveries of all the V. estate, and acquired a fee-simple therein; but no evidence was given before the Master to support that finding. The cause of *W. v. V.*, having been set down for final hearing in 1848, was directed to stand over until the return of the report in *O'B. v. V.*; and a petition having been presented in the I. E. C., it was discovered, after one of those denominations had been sold, that B. and G. were not included in the fines and recoveries. *Held*, that a cause petition filed by E., praying relief from the effect of the erroneous admissions, could not be maintained, and should be dismissed, with costs; but without prejudice to any other proceeding which he might adopt for the same purpose.—*Villiers v. White*, 2 I. C. R. 416; 4 I. Jur. 86. (C.)

10. The owner of a judgment affecting only a life estate presented a cause petition to sell it, brought before the Court the creditors on the estate who had charges created before 1840, and prayed to redeem them. They declined to be redeemed. *Held*, that the petition should be dismissed, with costs, against the

creditors on the inheritance.—*Elliot v. Osborne*, 4 I. Jur. 189. (C.)

1. When the petition stated the lease, upon which the rent was reserved, to be "for lives renewable," it being, in fact, a grant in f. f., the Court, not having power to amend, dismissed the petition.—*Yelverton v. Avonmore*, 4 I. Jur. 237. (C.)

2. A respondent, who has had a petition dismissed with costs as against him, cannot, upon a subsequent change of circumstances, have the cause re-heard.—*Folliott v. Evanson*, 6 I. Jur. 51. (C.)

3. A defendant struck out of a bill for tithe rentcharge under 1 & 2 Vic., c. 109, s. 28, is liable, not only to the costs of subpoena and appearance, but to his portion of the general costs. When a suit is instituted for the recovery of a very small amount it should be dismissed, as being beneath the dignity of the Court.—*Chaine v. Dungannon*, 6 I. Jur. 174. (R.)

4. Civil-bill decrees for poor-rate, obtained after the 15th of July 1850, though registered under the Judgment Registry Acts, will not by virtue of the 12 & 13 Vic., c. 105, ss. 17 & 18, affect lands.

A petition was filed to raise by the sale of lands the amount of civil-bill decrees for poor-rate, obtained since the 15th July 1850, and duly filed pursuant to the 12 & 13 Vic., c. 105, s. 17. An affidavit having been made by the clerk of the union, and duly registered pursuant to the 13 & 14 Vic., c. 29, s. 6, but not registered till after the filing of the petition, the petition was dismissed with costs.—*Ballinasloe Guardians v. Lynch*, 1 I. Jur. N. S. 92. (R.)

5. By R.'s marriage settlement, in 1767, £1500 were secured as portions for the younger children; that sum to be apportioned as R. might think fit. In 1806, R.'s daughter (a younger child) married G., when R. executed two bonds to secure two sums (£1000 and £500), payable on his death; the former not to bear interest till then; the latter to bear it from the date of the bonds, which were accompanied by warrants of attorney. However, judgments were never entered up. A marriage settlement, of even date with the bonds, vested them in B. (son and heir-at-law of R.) and J., as trustees (they being so described in the bonds), on trust to pay the interest to G. and his wife during their lives; afterwards, in trust for their children, in such shares as G. should appoint; otherwise, equally. No appointment was ever made. In 1807, B. married. A settlement, then executed, conveyed R.'s estates to trustees for 300 years, on trusts, whereof one was to raise £5000, and apply it, in the first instance, in paying the £1500, the portions for R.'s younger children; to apply the balance in paying such specialty debts as "are now due and owing" by R.; and to pay the residue, if any, to R. Subject to this term, the estates were conveyed to R. for life; to B. for life; to B.'s first and other sons in t. m. In 1816, R. died, and B. entered into

possession of the estates. R.'s widow took out probate of his will, and received general assets to the amount of £7500. In 1836, B. died. Interest on the money secured to G. was, during B.'s life, paid by his agent, and also during the life of C., B.'s son, who had succeeded, under the settlement of 1807, to the estates. In 1844, part of the £5000 was raised, and the £1500 secured by the settlement of 1767 were paid, but the £1500 secured by the bonds of 1806 were not raised. In 1846, G. died. There was not any evidence that interest had been paid after his death. In 1848, G.'s children filed their bill against C., F. (one of their brothers who for the purposes of the suit had taken out administration *de bonis non* to R.), and against the possessor of the term. The bill prayed that the money secured by the bonds might be paid out of the term, &c. An enquiry and accounts were directed, and a report made, which was confirmed on further directions. On appeal against the original decree, and against that on further directions—*Held*, that, under the special circumstances, the suit was maintainable: that, though B.'s personal representative was primarily liable, yet, since the trustees of the bond debt could only sue the actual possessor of the term, since he must then sue C., as holder of the estate subject thereto, and since C., besides being the holder of that estate, was also representative of B., the surviving trustee of the bond debt under the settlement of 1806, a Court of Equity, seeing that all the parties really interested were before it, would not, especially after an enquiry and report, dismiss the bill for matter of form, and thus create a necessity for such a multiplicity of needless suits.—*Burrowes v. Gore*, 6 H. L. Cas. 907.—[Affg. decrees of the Court of Ch. in Ir.]

6. A bill was filed by the assignee of an insolvent mortgagor, for an account and redemption of a mortgage. Two cause petitions for the same purpose were afterwards filed, but dismissed with costs. A new assignee having been appointed, he moved under the B. and I. Act to be substituted by suggestion as ptf. The Court, on a cross notice by the deft., ordered the costs of the dismissed petitions to be paid before the suggestion was entered.—*M'Conkey v. Gwynn*, 8 I. C. R. 33. (R.)—[Affd. 10 I. C. R. 261. (C.A.)]

7. *Semble*—A petition by way of peremptory exception in an interest suit is irregular. Having an erroneous title, the petition was dismissed with costs.—*Flood v. Bradley*, 8 I. Jur. N. S. 114. (P.)

8. By will, bequeathing legacies, and directing payment of debts and legacies, H., a minor, was made residuary legatee, and was also appointed executor with E.

The testator died in 1833, and E. obtained probate, saving the right of H.; took the accounts of the personal estate; and in 1834 invested the ascertained residue in the purchase of real estate, which was then conveyed to E. in trust for H., by a deed showing on the face of it that the lands were purchased with

the residuary personal estate. The deed reserved to E. a lien on the lands in case the residue should not amount to the then estimated sum.

H. came of age in 1837, obtained grant of probate, and entered into possession of the purchased lands, and so continued until 1858, when he took a conveyance of the legal estate from E. by a deed reciting the conveyance of 1834; and that the residue amounted to more than the estimated sum.

H. dealt with the lands as absolute owner; and as such, after 1858, granted mortgages of them by deeds reciting that he was seized in fee, free from incumbrances. The mortgagees had no notice, save that appearing on the deeds, that the lands were purchased with assets, or that any legacies remained unpaid. It subsequently appearing that H. had, after he came of age, received and wasted the personal estate, the legatees filed a cause petition to raise their legacies out of the lands in priority to the mortgagees. *Held*, that the mortgagees were not bound to enquire whether the legacies had been paid; and the petition was dismissed as against them.—*Williams v. Massy*, 15 I. C. R. 47. (C.)

1. To support an interpleader suit there must be conflicting claims. Therefore, where a reversion subject to a lease for years was devised, and the testator, heir-at-law, did not claim the rent, a petition of interpleader by the tenant against the heir-at-law was dismissed with costs, although there was a question whether the devise was not void for remoteness.

A., and a married woman and her husband, were entitled to the reversion upon, and the rent reserved by a lease. A. was entitled to one moiety, but between the husband and wife arose the question on a settlement, whether she was entitled to the other moiety to her separate use? All three brought ejectment for non-payment of rent, and the lessee filed a petition of interpleader. *Held*, that the petition as against A. should be dismissed.

*Semble*—If several are entitled to rent, and all concur in demanding it, though there be conflicting claims between them, the tenant cannot maintain an interpleader suit.—*Elliott v. Kempston*, 15 I. C. R. 120. (R.)

2. Charges of fabrication and fraud, made in a petition, failed. It was dismissed with costs.—*Stubber v. S.*, 10 I. Jur. N. S. 153. (P.)

3. A petition in the nature of a bill of review must be, and must state that it is filed with the Court's leave: otherwise it will be dismissed at the hearing.

*Quare*—Would the Court, at the hearing, allow this amendment—that the petition had been filed with the Court's leave?—*Connor v. Reeves*, 16 I. C. R. 398. (R.)

### XIII. 3. By Plaintiff.

4. The 25 G. 3 (*Ir.*), c. 51, s. 3, applies to cases in which the ptf. dismisses his bill by rule in

the office, not to cases in which it is dismissed by the act of the Court.

In dismissing the bill without costs, the Court deals with the deft.'s acts, not with the ptf.'s.

When the subject-matter of the suit was, by the ptf.'s act, transferred to the Crown pursuant to statute, the Court would not dismiss the bill without costs. The ptf.'s demand having been satisfied by the Crown, and the deft. being justly liable to pay it to the Crown, the Court would not permit him to dismiss the bill with costs, for want of prosecution.—*Bunbury v. O'Brien*, H. & J. 803. (E.E.)

5. In a tithe suit, several defts. appeared, and put in answers denying their liability, by the same attorney. The answers were almost copies of one another. At ptf.'s desire, the bill was dismissed as against them; and the Court ordered their costs to be taxed, and that the Taxing Officer should disallow the costs of any answer appearing to have been improperly or unnecessarily filed—regard being paid to the suit's nature, and the manner in which it and the defence had been conducted; the costs so ascertained to be paid by ptf.—*St. George v. Brazier*, 2 Jon. 359. (E.E.)

6. A. was made a deft. solely in relation to certain deeds which the bill alleged to be in his possession, claiming a lien upon them. A. put in a full answer, going through all the statements relating to the other defts., and concluding with a denial that he had the deeds in his possession, &c., or that he claimed any lien thereon. *Held*, that ptf. might dismiss the bill as against A., upon paying A. his costs properly incurred, regard being paid to the right in which A. was made deft. It was referred to the Master to tax those costs.—*Plumptre v. Walsh*, 1 I. E. R. 142. (R.)

7. Under the 1 & 2 Vic., c. 109 (Tithe Composition Abolition Act), s. 1, ptf. is entitled to dismiss his bill without paying costs, though it was filed to recover not only the tithe composition due for 1834, 1835, and 1836, but also the arrears recoverable therewith under the Million Act. He may dismiss it against one of several defts., and retain it against the rest.—*Burgh v. Kenny*, 1 I. E. R. 264. (E.E.)

8. Ptf. in a suit, commenced before the 16th July 1838, for tithe composition, may dismiss his bill without paying costs, notwithstanding that the usual rule for a replication, or bill to stand dismissed, has been entered by deft. before the entry of ptf.'s rule to dismiss under the 1 & 2 Vic., c. 109, s. 1; and notwithstanding that ptf. has applied for relief under its 41st sec.

A bill does not stand dismissed under the usual rule for a replication until after taxation of the costs.—*Synge v. Frost*, 1 I. E. R. 389. (E.E.)

9. Deft., having been discharged as an insolvent, filed his answer, and entered the



usual rule to dismiss ptf.'s bill with costs. The Court set aside the rule to dismiss, and retained the bill, notwithstanding ptf.'s acceptance of the costs of process after answer filed; but refused ptf.'s application for liberty to dismiss his bill without costs.—*Kane v. Russell*, 2 I. E. R. 95. (E.E.)

1. A demurrer to the whole bill, for want of a personal representative, as a party, was allowed by notice. The Court, on ptf.'s application stating that a personal representative could not be raised within the ten days allowed by G. R. 64, of 1843, gave him time to amend.—*Atkinson v. Ball*, 3 Jon. & L. 374. (C.)

#### XIII. 4. Dismissal by Consent.

2. A bill, which cannot be dismissed against all the defts., cannot be dismissed against any of them.—*Brangan v. Gorges*, 7 I. E. R. 221. (R.)

3. A cause petition under the Ch. Reg. Act, s. 15, was filed to raise the amount of a charge on lands. The order of reference was made, and a receiver appointed. The petitioner alone proved a charge; the respondent paid off the petitioner's charge and costs, and moved to make a consent to dismiss the petition and discharge the receiver a rule of Court. An order was made to stay the proceedings on the petition, and to make the consent a rule of Court.—*Dwyer v. Baker*, 6 I. Jur. 341. (R.)

#### XIII. 5. General Effect of.

4. A dismissed petition cannot, even by consent, be reinstated; a new petition must be filed.—*Balfie's Estate*, 6 I. Jur. N. S. 47. (L.E.C.)

5. A decree dismissing a bill for want of ptf.'s appearance at the hearing does not bar another suit for the same demand.—*Phibbs v. O'Donel*, 8 I. Jur. N. S. 226. (C.)

6. A judgment creditor, on behalf of himself and the other judgment creditors on the life estate of X., instituted a suit to which a trustee for all the judgment creditors was a party. At the hearing, it was dismissed on the merits. Another judgment creditor, who (save so far as the trustee represented him) had not been a party to it, subsequently instituted for a like purpose a suit, which relied upon different equities, and put forward additional facts, supported by new evidence. *Held*, that the dismissal of the first suit was not an absolute bar to the prosecution of the second.—*Dolphin v. Aylward*, 15 I. C. R. 583. (C.A.)

7. When an insolvent dies before adjudication, and his petition is dismissed, the Court will, though the order of dismissal is of record, re-instate the petition, so as to have the insolvent's estate administered as if no dismissal

had taken place.—*Re Young*, 11 I. Jur. N. S. 322. (B.)

#### XIII. 6. Bill: dismissal of for Want of Prosecution.

[Under the Court of Ch. Reg. Ir. Act 1850, see 13 & 14 Vic., c. 89: Gen. Orders of 1851, No. 27; of June 1856, No. 3. The cases in the Ir. Ch. Rep. chiefly refer to the practice under this Act, which is now repealed in part by 30 & 31 Vic., c. 44.]

8. When the subject-matter of the suit was, by the ptf.'s act, transferred to the Crown pursuant to statute, the Court would not dismiss the bill without costs. The ptf.'s demand having been satisfied by the Crown, and the deft. being justly liable to pay it to the Crown, the Court would not permit him to dismiss the bill without costs, for want of prosecution.—*Bunbury v. O'Brien*, H. & J. 803. (E.E.)

9. A bill, for a commission to examine witnesses abroad in aid of an action at law, cannot be dismissed under G. O. 93.—*Parr v. Howlin*, S. & Sc. 124. (R.)

10. When, during more than a year, no proceeding has been taken in a cause, the notice of a motion to dismiss the bill under the 93rd G. O. must be served upon the ptf. personally.—*Nolan v. Adamson*, S. & Sc. 701. (R.)

11. A motion to dismiss a bill for want of prosecution cannot be made until four months after answer filed.—*Kelly v. Bolger*, S. & Sc. 440. (R.)

12. A *feme sole* married after filing her answer. Ptf. having taken no step in the cause for more than two months, husband and wife moved the Rolls to dismiss the bill under G. R. 93. The M. R. allowed the ptf. to amend their bill by making the husband a party, within one week; in default, the bill to stand dismissed *without* costs. On appeal—*Held*, that ptf. should within eight days enter the rule to proceed; in default the bill to be dismissed *with* costs.—*Church v. Nugent*, 1 Dr. & Wal. 259. (C.)—[Varying Rolls order, S. & Sc. 554.]

13. A bill dismissed for want of prosecution, without costs, ptf. being insolvent.—*Nugent v. Palmer*, 2 I. E. R. 220. (R.)

14. When the cause is out of Court, the notice of a motion to dismiss the bill for want of prosecution should be served on the ptf. personally, and deft. should come prepared with an affidavit of such service. The ptf., if he appears on the motion, thereby waives the objection that he was not personally served with such notice.

On a motion to dismiss the bill under G. R. 93, and a cross-motion to dismiss it without costs, the Court would not enter into the merits of the cause. *Held*, that the bill should be dismissed with costs, unless the cause was shown to be within the exceptions specified in the rule.

Though ptf. showed, by affidavit, facts which might, at the hearing, disentitle deft. to costs, and would have sustained an application that ptf. should have liberty to dismiss his bill upon paying deft. the costs of a disclaimer, the Court would not consider that upon this motion; and ordered the bill to be dismissed with costs.—*Grier v. Leahy*, 2 I. E. R. 227. (R.)

1. Upon a motion to dismiss a bill with costs for want of prosecution, the Court will not allow ptf. to go into the merits, for the purpose of showing that it ought to be dismissed without costs.—*Carroll v. Donoghoe*, Fl. & K. 18. (R.)

2. When the same solicitor is engaged for several defts., some of whom withhold their answers, the Court will not allow the others to dismiss the bill for want of prosecution.—*Moriarty v. Kirwan*, Fl. & K. 140. (R.)

3. When a suit has abated by the marriage of a sole female ptf., the Court will order that the suit be revived within a certain time, or in default thereof that the bill be dismissed without costs.—*Westropp v. Henley*, Fl. & K. 141. (R.)

4. When no proceedings against a deft. have been taken within one year, the cause is, as to him, out of Court, although within that time proceedings have been taken against other defts.—*Bartley v. Davis*, Fl. & K. 620. (R.)

5. An irregular replication affecting to join issue with, amongst others, a deft. who had appeared, but not answered, though he was only a formal party, is not a proceeding in the cause, to save the ptf.'s bill from being dismissed for want of prosecution.—*M'Loughlin v. Reilly*, 4 I. E. R. 175. (R.)

6. When there is a *bona fide* prosecution of a suit, although five months may have elapsed since a deft. who applies to dismiss the bill, has answered, the application to dismiss, will be refused with costs.—*Kelinge v. Audley*, 4 I. E. R. 630. (C.)

7. A cause abated by sole ptf.'s death. His executor filed a bill of revivor, not seeking an answer, and served subpoenas, but did not (though defts. had appeared) enter the rule to revive. Motion to dismiss, with costs, the bill of revivor for want of prosecution, under G. O. 82, refused with costs; that G. O. not authorising such an application. Deft. having afterwards moved that ptf. might enter the rule to revive within a limited time—in default, the bill to be dismissed with costs,—the Court granted that motion.—*Power v. Davies*, 5 I. E. R. 446. (R.)

8. When a suit, to the prosecution of which no obstacle existed, was dormant and apparently abandoned for several years; and it appeared that but for the *lis pendens* the demand should long ago have been barred by the Statute of Limitations; the Court refused an application (although made on behalf of

minors) for further time to prosecute it—the case being within the 81st G. O. of 27th March 1843.—*Callanan v. Blake*, 6 I. E. R. 100. (R.)—[Affd.: 6 I. E. R. 353. (C)]

9. Statement of the objects and policy of the 81st G. O. of 27th March 1843, and of the considerations by which the discretion of the Court to grant or refuse applications for further time to proceed is governed.—*Mills v. M.*, 6 I. E. R. 106. (R.)

10. When a ptf. and the person whom he represented, had allowed a suit, instituted in 1818, to foreclose a mortgage upon which there had been no payment of interest since 1811, to sleep since 1825—*Held* (affirming an order of the M. R.), that further time ought not to be given for the prosecution of the suit under the 81st G. O.—*Callanan v. Blake*, 6 I. E. R. 353. (C.)

11. A deft. is at liberty, under the 83rd G. O., to dismiss the ptf.'s bill for want of prosecution after the rule for publication has been served.—*Madden v. Kirwan*, 6 I. E. R. 374. (R.)

12. When no proceeding has been taken by the ptf., nor by a deft. within the year, the cause is out of Court as relates to that deft., though another deft. may have taken a proceeding within the year.—*Hodges v. Barton*, 8 I. E. R. 38. (R.)

13. When a cause was set down for hearing, but, being defective for want of parties, stood over generally, and no further proceedings were taken; upon motion of the defts., more than a year afterwards, the bill was dismissed for want of prosecution.—*Hughes v. Maitland*, 8 I. E. R. 98. (R.)

14. The 82nd G. O. will not be relaxed. When the ptf. cannot show due diligence, and is disabled from filing a replication in consequence of requiring to amend his bill, the bill will be dismissed.—*M'Loughlin v. M'L.*, 8 I. E. R. 109. (R.)

15. Deft. having served a notice under the 76th G. Rule, and being served by the ptf., in reply, with notice that upon obtaining an order for which he had applied, to take the bill as confessed against other defts., he would file a replication, is entitled to costs up to the day of service of ptf.'s notice.—*Jones v. Hewett*, 8 I. E. R. 517. (E.E.)

16. Application under 77th New General Rule, by a deft., who was a mere trustee, to dismiss ptf.'s bill, refused.—*Bryan v. Cambie*, 8 I. E. R. 522. (E.E.)

17. Under the 83rd G. O. the deft. is entitled to dismiss the bill for want of prosecution, though the ptf. has entered and served the rule for publication, unless he also set down the cause within the time prescribed.—*Hamilton v. M'Cormick*, 8 I. E. R. 582. (R.)

1. When ptf. amended his bill *bona fide* after the deft. was entitled to move to dismiss it, the Court refused to dismiss the bill, but made ptf. pay the costs of the motion.—*Moore v. Lalor*, 9 I. E. R. 148. (R.)

2. It is no answer to a motion to dismiss the bill for want of prosecution by one deft., that another deft. has obtained an order staying the ptf. until he give security for costs.—*Kelly v. Magee*, 9 I. E. R. 216. (R.)

3. When the ptf.'s bill has been dismissed, with costs, for want of prosecution, the deft. is entitled to stay him in another suit for the same object, until the costs of the first suit are paid.

The merits of the case cannot be discussed on the motion.—*Montgomery v. Johnson*, 9 I. E. R. 221. (R.)

4. Amendments of the bill had been prepared by counsel before, but were not made until after notice to dismiss the bill for want of prosecution. *Held*, no answer to the motion.—*Mark v. Willington*, 11 I. E. R. 269. (R.)

5. When there are several creditor's suits, and a decree has been made in one, and an order has been made staying the proceedings in the others on the usual terms, the defts. in the stayed suits may move to dismiss the bill for want of prosecution, for the purpose of being paid their costs; and are not bound to wait until the funds are allocated or realised in the suit which proceeds.—*Milward v. Fagan*, 12 I. E. R. 313. (R.)

6. A deft. may move to dismiss a bill under the 83rd G. Rule, after publication passed.—*Harrison v. Mason*, 13 I. E. R. 83. (R.)

7. If a cause is out of Court, it is, in the Exchequer, sufficient to serve the notice, to have the bill dismissed for want of prosecution, upon the solicitor. *Secus* at the Rolls.

On motion to dismiss a bill for want of prosecution, the Court will not enter into the merits of the case.—*Dogherty v. D.*, 2 I. Jur. 110. (E.E.)

8. After an absolute order for sale has been made in the I. E. Court, this Court may order a bill to be dismissed for want of prosecution.—*Donovan v. Bissett*, 2 I. Jur. 244. (R.)

9. Bill to foreclose a mortgage: answer, admitting the debt.

Absolute order for sale in the I. E. Court upon the petition of another creditor.

Motion by deft. to dismiss the bill for want of prosecution.

Cross motion to stay the proceedings in this Court.

Original motion refused with costs: proceedings stayed, the Commissioners of the I. E. Court not considering it desirable that the proceedings in this Court should be continued.—*Fawcett v. Minchin*, 2 I. Jur. 245. (R.)

10. After the institution of a foreclosure suit, and the filing of the answer of certain defts. in that suit, who were incumbrancers prior to the ptf., a near relative of theirs presented to the I. E. Court a petition, whereon was made an order to sell the mortgaged premises. A subsequent motion on their behalf, under the 82nd G. O., to dismiss the bill for want of prosecution, was refused, with costs; but the Court, *proprio motu*, stayed the suit.—*Bernard v. Bond*, 1 I. C. R. 198; 2 I. Jur. 311. (C.)

11. Bill to restrain an action involving a question of forgery. The Court allowed the action to proceed; the ptf. obtained a verdict; but a bill of exceptions taken remained undisposed of at the time of the motion below mentioned.

An answer to this bill had been filed; more than two months had elapsed; and no replication had been filed.

Motion to dismiss the bill for want of prosecution.

No rule: ptf. undertaking to file a replication within two days.—*Clements v. Heenan*, 3 I. Jur. 130. (R.)

12. A motion to restore a cause petition, dismissed for want of prosecution, should not be granted as a matter of course. There must be special circumstances, and it must appear that substantially justice would be defeated if the Court were to refuse the application.—*Cassan v. Carr*, 2 I. C. R. 577; 5 I. Jur. 178. (R.)

13. A cause petition was filed on the 25th Feb. 1853, and the time for the respondent filing an affidavit was extended to the 14th of April. The petitioner applied to set down the petition for hearing on the 25th Nov. The Registrar refused to set it down, being of opinion that the two whole terms had expired, under the 27th G. O. The Court, on motion, allowed the petition to be reinstated.

*Quære*.—Whether the two whole terms were to be counted from the twenty-one days after filing the petition, or from the end of fourteen days after the 16th of April, the day to which the time for respondents filing affidavits was extended.—*M'Donnell v. M. G. W. Railway Company*, 6 I. Jur. 129. (R.)

14. Some special ground must be shown in order to support an application to reinstate a cause petition dismissed by the operation of the 27th G. O. of 1851.—*Carey v. Browne*, 4 I. C. R. 210; 6 I. Jur. 349. (C.)

15. Notice of a cause petition was sent to a solicitor, supposed to be the general solicitor of respondents, on the 18th of March. He on the 22nd acknowledged its receipt, and undertook to appear on receiving a copy of the petition. Same having been sent as required on the 23rd, the solicitor entered an appearance for the defts. on the 25th of March, and the Registrar refused to set down the petition in M. Term, on the ground that two whole terms had elapsed under the 27th G. O., from the time when it might have been set down for

hearing, and that therefore the petition stood dismissed. *Held*, that the Registrar was right, as the service was to be deemed as effected on the 18th; but the Court directed the petition to be reinstated, under the special circumstances.—*Saunders v. S.*, 7 I. Jur. 63. (R.)

1. An order for liberty to file interrogatories does not imply an extension of the time for setting down the cause; and, unless such order for the extension of the time is obtained, the petition will stand dismissed pursuant to the 27th G. O., as if there had not been any such order.

The Court may in such case allow the petition to be reinstated.—*Montgomery v. Maine*, 7 I. Jur. 284. (R.)

2. The rule in *Huthwaite's Case* (2 I. Ch. Rep. 54), that an undocketed judgment is not only null and void as against a subsequent mortgage, but also null and void against an intervening redocketed judgment, is not applicable when the mortgagee makes no claim to the fund to be distributed. A mortgage cause to which a receiver has been extended, who continued in receipt of the rents. *Held*, not within the operation of the 81st G. O. of 1843.—*Woodroffe v. Greene*, 14 I. C. R. 224. (R.)—[*Affid.*: 15 I. C. R. 176. (C.A.)]

### XIII. 7. On behalf of Infants

3. Amendments to the bill prepared before, but not made till after notice to dismiss for want of prosecution—*Held*, no answer to the motion.—*Mark v. Willington*, 11 I. E. R. 269. (R.)

### XIII. 8. Motion for.

4. An order to dismiss a bill made in a suit abated by a ptf.'s death—that circumstance not being properly before the Court when it made the order—is not a nullity. There should be an order to set it aside.—*Hayes v. Woodley*, 2 I. Jur. 42. (R.)

5. A petitioner did not comply with an order to give security for costs. *Held*, that the respondent's proper application then was: not to at once dismiss the petition, with costs; but for an order that the security be given within a limited time, and that, in default, the petition do stand dismissed, with costs.—*Martin v. Bunbury*, 7 I. Jur. N. S. 274. (R.)

6. The ptf. propounded a will, and got an order that either party be at liberty to set the cause down for hearing; but did not pay the duty, and declined to act on the order. Thereupon the deft. moved to dismiss the suit, and condemn the will. *Held*, that the motion was irregular. The proper course is, for the deft. to pay the duty, take out a copy of the order, and set down the cause.—*Goslin v. G.*, 7 I. Jur. N. S. 306. (P.)

BILL OF EXCEPTIONS. See PRACTICE, EXCEPTIONS, BILL OF.

### XIV. BILL OF INTERPLEADER. See PLEADING, II, 12—PRACTICE, COSTS—PRACTICE, EVIDENCE—PRACTICE, PAYMENT INTO COURT.

7. It is not an objection to an interpleader bill by a tenant that it appears by his bill that the rent was adversely demanded by two persons, one of whom had *prima facie* a legal right to receive it, as the lessor's devisee and executrix, and the other a mere equitable claim as heir-at-law, when the adverse claimants were litigating, and the tenant was threatened with distress. The tenant, though not a party in the principal cause, may, on notice in the cause, apply for an injunction, without putting the estate to the expense of an interpleader suit.—*Doran v. Everitt*; *Byrne v. Everitt*, 2 I. E. R. 28. (R.)

8. A., the heir-at-law, and his ancestor's devisees, both claimed the reversion. A. served notice on the tenants to pay him the accruing rents. The devisees recovered by distress the first and second gales that fell due. Before the third gale became due, a tenant filed an interpleader bill. *Held*, that he was entitled to do so, and to pay the rent into Court, though A. insisted that the tenant's lease was void as against him.—*Rickard v. Hyde*, 2 I. E. R. 299. (C.)

9. It is not an objection to an interpleader bill that one party's right is legal, and the other's equitable; but both must claim the same subject adversely, not under each other.

Ptf. in an interpleader suit may be deprived of his costs, and decreed to pay the costs of those defts. who acted properly. Defts. who, by persisting in an unfounded claim, have caused the suit to be proceeded with, may be decreed to pay the costs of their co-defts. and of the ptf., so far as the suit was properly instituted.—*Glynn v. Locke*, 5 I. E. R. 61; 3 Dr. & War. 11; 2 Con. & L. 21. (C.)

10. Ptf. filed an interpleader bill, and brought in the money, but dismissed the bill before any deft. answered. *Held*, not entitled to draw the money.

*Quare*—Are the defts. entitled to their costs thereof?—*M'Kiernan v. Kernan*, 8 I. E. R. 145. (R.)

11. A. lodged money of B.'s at a bank; took a deposit receipt in the name of B.; afterwards lodged a small sum additional, and took a deposit receipt for the whole by B.'s authority, in the name of B.'s daughter, X., stating it was a provision for her. After B.'s death, A. refused to give the deposit receipt to X., and set up a claim to the money as B.'s administrator. The bank refusing to pay X. without the receipt, X. and A. brought actions against them. *Held*, that the effect of the dealing was conclusively to constitute the bank the debtor of X. only, and that they could not sustain an interpleader suit.

A bill of interpleader cannot be sustained if the claim of one defendant is not at least colourable.

A defendant against whom a bill is dismissed cannot be made to pay costs, though the suit is caused solely by his misconduct.—*Cochrane v. O'Brien*, 8 I. E. R. 241; 2 Jon. & L. 380. (C.)—[See s. c., 6 I. E. R. 312. (R.)]

1. An interpleader bill having been filed against husband and wife, separate subpoenas and notices were served under an order to substitute service which required them to appear and answer at different times. The husband appeared, and filed a separate demurrer, which ptf. set down for argument, and afterwards moved to set aside for irregularity. The Court refused the motion, and made an order, *n. p. t.*, that the husband and wife should defend separately.—*Doyle v. Dumoncel*, 11 I. E. R. 342. (R.)

2. Observations on the circumstances under which a tenant may file an interpleader petition against his landlord, and a party claiming adversely to the landlord.—*Brennan v. Shearman*, 6 I. Jur. N. S. 838. (R.)

#### XV. BILL TO PERPETUATE. See PRACTICE, EVIDENCE. See PLEADING, II, 14.

[See 30 & 31 Vic., c. 44, s. 98.]

3. A bill for a commission to examine witnesses abroad in aid of an action at law cannot be dismissed under G. O. 93.

An order for a commission to examine witnesses should state the time within which it is to be executed. When no time is specified, the proper application is, that ptf. do proceed within a given time, or pay deft. his costs; or,

*Semble*—Deft. might apply to discharge the order on the ground of unreasonable delay in proceeding upon it.—*Parr v. Howlin*, S. & Sc. 124. (R.)

4. In a suit to perpetuate testimony, liberty was given ptf., under the 13 G. 3, c. 9, to pass publication of depositions of witnesses examined *de bene esse* in the suit.—*Scanlan v. McCoy*, Fl. & K. 366. (R.)

5. After replication filed in a suit to perpetuate testimony, it is not necessary to obtain an order to examine witnesses.—*Allen v. Hacket*, 11 I. E. R. 355. (R.)

6. Bill to perpetuate testimony of witnesses touching the execution and attestation of a will of 1845, whereby a will of 1838, under which the deft. claimed, was stated to be revoked. Plea, that the ptf. put the deft. by force out of a part of the lands, and that the remainder was in the occupation of tenants under leases, or from year to year, who had not acknowledged the ptf.'s title, or paid him rent due; and that the ptf. would, by action at law against the tenants, forthwith try his title. *Held*, on the authority of *Drew v. Clarke* (1 Sim. & Stu. 108), a good plea.—*Lindesay v. L.*, 12 I. E. R. 508. (R.)

7. *Semble*—In a suit to perpetuate testimony it may be more prudent to proceed by bill

than by cause petition.—*Kiernan v. K.*, 6 I. Jur. N. S. 149. (R.)

8. A petition to perpetuate testimony of the contents of a lost deed was filed by one claiming a reversionary interest thereunder. *Held*, that, under a commission issued pursuant to its prayer, the respondents could not examine witnesses on their own behalf; and that the defence of purchase for value, without notice, is no answer to a suit to perpetuate testimony.—*Talbot v. Kennedy*, 7 I. Jur. N. S. 50. (C.)

#### XVI. BILL OF REVIEW: PROCEEDINGS AND EVIDENCE ON. See PLEADING, II, 8—PRACTICE, COSTS.

9. Liberty to file a supplemental bill in the nature of a bill of review refused to a defendant; because the defence sought to be introduced was originally within his means of knowledge, and was inconsistent with the defence before relied on.—*Blake v. Foster*, Beat. Rep. 461. (C.)

10. Where a decree is not a personal one, it is not within the 26th of Sir Richard Bolton's Rules, requiring performance of the decree before the filing of a bill of review and reversal.—*Kelly v. Lennon*, Fl. & K. 90. (R.)

11. Difference between a bill of review, and a bill in the nature of a bill of review; doctrine of the Court respecting them. The time for filing a bill of review is regulated by analogy to the time limited by 6 G. 1, c. 6, for bringing a writ of error—i. e., twenty years after the judgment, and five years after the disability, if any, of the ptf. in error has been removed.—*Kelly v. Lennon*, 1 Jon. & L. 305; 7 I. E. R. 98. (C.)

12. To sustain a bill of review, proceeding on facts discovered after the decree complained of has been pronounced, it must be shown that leave of the Court to file it was regularly obtained.

To sustain a bill of review, for error apparent on the decree complained of, it is not enough that the bill contains allegations that the decree is erroneous; but error, on the face of the decree, must be shown.—*Tomney v. White*, 1 H. L. Cas. 160.—[See 6 I. E. R. 303. (R.); 6 Cl. & F. 786; 3 H. L. Cas. 1; 5 I. Jur. 321. (H.L.)]

13. A commission of review is granted only in cases of a clear, distinct, and manifest error in law or fact.—*Kelly v. Thewles*, 2 I. C. R. 510. (C.)

14. A petition in the nature of a bill of review must be, and must state that it is filed with the Court's leave; otherwise it will be dismissed at the hearing.

*Quere*—Would the Court, at the hearing, allow this amendment; that the petition had been filed with the Court's leave?—*Connor v. Reeves*, 16 I. C. R. 898. (R.)

**XVII. BILL OR PETITION OF REVIVOR.—See**  
G. O. (1867), 141-143.

[See also PLEADING, II, 7.]

[The cases in the I. C. R. refer chiefly to revivor under the Court of Ch. Reg. Ir. Act 1850, 13 & 14 Vic., c. 89.]

1. It is necessary to obtain the Court's leave to file a bill of revivor and supplement before issue joined, when the suit has not wholly abated.—*Conyers v. Crosbie*, 1 Jones, 579. (E. E.)

2. When a cause abates by the sole ptf.'s death, and it becomes necessary to file a bill of revivor and supplement, that may be done without obtaining the Court's order.

But when the cause abates by the death of one of several defts., and it becomes necessary to file a bill of revivor and supplement, the leave of the Court must first be obtained. *Brown v. Allen*, 3 I. E. R. 503. (E. E.)

3. After a decree to account, the bar to the right of reviving the suit, which arises from delay in the proceedings, depends altogether upon the discretion of the Court.

After a decree to account, the Court will entertain a bill of revivor at any time within twenty years, unless there has been such a variation of the rights of parties as to occasion danger of working positive injury and injustice to other persons.

After a decree to account, either party might have forced on the suit, and, therefore, one cannot object *laches* to the other.—*Higgins v. Shaw*, 2 Dr. & War. 356; 1 Con. & L. 400. (C.)

4. Form of decree on bill of revivor and supplement in a suit for partition, when, after the former decree, some of the parties interested in the estate die, having devised that interest; and when, after proceedings taken under the former commission, but before its return, some of the commissioners of perambulation die.—*Herbert v. Beerhaven*, 5 I. E. R. 23. (E. E.)

5. In 1794 there had been a decree in the Court of Ch. for the sale of a term in settled estates, to pay incumbrances. At the sale, in 1808, the purchaser procured, by fraud and contrivance, a conveyance of the fee and inheritance instead of the term, and went into possession thereof. The first tenant in tail, being no party to this conveyance, in 1822 filed a bill to set aside the sale as void against him; to have the purchaser declared a trustee for him; and for an account of mesne rates. In 1823 the purchaser answered, and no further proceedings were had until 1839, when a bill of revivor and supplement was filed against the personal representative and devisees of the purchaser. *Held*, that the length of time permitted to elapse was no bar to the principal relief sought, but the account of mesne rates was directed only from the filing of the bill of revivor and supplement in 1839, from which period also

interest was to be allowed on sums for which the defendants were entitled to credit. By reason of the great delay, plaintiff was not entitled to costs.—*Thornhill v. Glover*, 3 Dr. & War. 195. (C.)

6. An executor filed a bill before probate, and died without having proved his testator's will. Subsequently the present plaintiff obtained letters of administration, *c. t. a.*, and filed a simple bill of revivor to continue the suit. *Held*, that such a bill could not be maintained.

Though it is generally true that an objection to a bill of revivor ought to be taken by plea or demurrer, yet, when the plaintiff in his bill of revivor misrepresents the character which he fills, the objection may be taken at the hearing.—*Stuart v. Burrowes*, Dr. Rep. temp. Sugden, 265. (C.)

7. The sole defendant died after answer. A bill of revivor and supplement was filed against his executor and devisees. The latter did not answer. The proper course is, to take the bill *pro confesso* against the devisees, and not to set down the cause to be heard *pro confesso* against all the defts.—*Burnside v. Mayne*, 8 I. E. R. 97. (R.)

8. A cause abated by ptf.'s death in 1829. In 1836 a bill of review was filed. In 1841 an order to revive was made. *Held*, that it could not be successfully objected that the cause had not been effectually continued.

*Semble*—There is not a rule requiring a bill of revivor for any purpose to be filed within six years after the abatement.—*Foster v. M'Mahon*, 11 I. E. R. 287. (C.)

9. When a personal representative sues or is sued, and dies, the administrator *de bonis non* may proceed, or be proceeded against by bill of revivor, or by bill of revivor and supplement. He is not bound so to frame his bill; he may at his election file an original bill.

An administrator obtained a decree declaring a judgment to be held on trusts. The judgment was fraudulently assigned, and the administrator *de bonis non* filed a bill stating the proceedings in the original suit; making the assignee a party; praying that he might be declared entitled to the benefit of the decree, and accounts and enquiries thereby directed, and to an assignment of the judgment; or original relief, if he was not entitled to the benefit of the suit and decree. *Held*, on demurrer, that the bill, being an original bill as to the assignee, the ptf. could not have proceeded by bill of revivor; and although the bill might have been framed as a bill of revivor and supplement, as against the representative of the deft. in the original suit, it was sustainable as against him either as an original bill, or as an original bill in the nature of a supplemental bill.

The 57th G. Rule does not apply to an original bill in the nature of a supplemental bill. *Banfield v. O'Shaughnessy*, 12 I. E. R. 63. (R.)

1. Practice on reviving a cause petition matter abated by the death of a sole petitioner.—*Nason v. Peard*, 2 I. C. R. 553; 5 I. Jur. 347. (R.)

2. Order on motion for leave to file a petition of revivor and supplement.—*Johnson v. Madden*, 2 I. C. R. 659; 6 I. Jur. 161. (R.)

3. The Court has not power to order service out of the jurisdiction of the notice of a suggestion to revive a suit.—*Rosborough v. Boyse*, 3 I. C. R. 489. (C.)

4. Liberty to file a petition of revivor merely may be obtained by motion of course; notice ought to be served when it is sought to file a petition of revivor and supplement.—*Williamson v. Tuckey*, 7 I. Jur. N. S. 276. (R.)

5. A. had against B. a claim for an apportionment of a gale of rent allocated and paid to B. by the receiver in the cause. In another cause A. and B. were entitled to portions of the interest on a mortgage. Pending the latter suit B. assigned his claim to C. In it sums were allocated to A. and C. in respect of their claims. On motion by A. the Court refused to pay the claim for apportionment out of the sum allocated to C.—*Russell v. Barrington*; *Barrington v. Grady*; *Barrington v. B.*, 16 I. C. R. 175. (R.)

6. An order to file a bill of revivor and supplement will not be made on a motion *ex parte*.—*Connor v. Reeves*, 16 I. C. R. 398. (R.)

#### XVII.\* Bill, Supplemental.

[See also PLEADING, II. 3, 4, 5].

7. Liberty to file a supplemental bill, in the nature of a bill of review, refused to a deft., because the defence sought to be introduced was originally within his means of knowledge, and was inconsistent with the defence before relied on.—*Blake v. Foster*, Beat. Rep. 461. (C.)

8. A supplemental bill was filed merely to bring before the Court a tenant in tail who had come into being since the pronouncing of the decree in the original cause. All the defts. in that cause appeared at the hearing of the supplemental suit. *Held*, that, since they appeared in consequence of a notice by the ptf., they were entitled to their costs of the hearing against ptf., who should not have those costs [over].—*Wallace v. Blake*, 1 Dr. & Wal. 378. (C.)

9. Ptf. charged B., named a deft., to be out of the jurisdiction, but omitted to pray process against him on his coming within it. *Held*, that ptf. was; nevertheless, entitled to the costs of a supplemental suit instituted to compel him to join as a conveying party in the deed to the purchaser under the decree.—*Oldham v. Wilkins*, 1 Dr. & Wal. 717. (C.)

10. The 3 & 4 Vic., c. 107, s. 41, applies to ptf.s only. When the assignee of an insolvent deft. dies, a supplemental bill is necessary to bring the new assignee before the Court.—*Meagher v. O'Mara*, Fl. & K. 269. (R.)

11. After the original cause was set down in the Chancellor's list for hearing, one deft. became insolvent. Ptf. filed a supplemental bill, bringing the insolvent's assignee before the Court. The time for answering having expired, the supplemental cause was set down in the Rolls list, to be heard on bill *pro confesso* against the assignee, the original cause being still unheard. *Held*, that there could not be in the supplemental cause a decree before the original cause was heard, since otherwise there would be two decrees; and that, therefore, the supplemental cause must be set down to be heard along with the original cause.—*Smith v. Chichester*, 2 I. E. R. 32. (R.)

12. It is improper to move for leave to file a supplemental bill, either before or after issue joined, since no order is necessary for that purpose.—*Knox v. K.*, 2 I. E. R. 33. (R.)

13. Whenever an old interest is transmitted to, or a new interest vested in a new party, after the suit's institution, that, strictly speaking, is supplemental matter, though it occurs before issue joined. In some cases, however, the new party has been brought before the Court by amendment.—*Carnegie v. Johnson*, 3 I. E. R. 197. (E.E.)

14. *Semble*—When a ptf. has not any right to file his original bill, a subsequently accruing right cannot be made a ground for bringing the matter before the Court by way of revivor and supplement.—*Byrne v. B.*, 4 I. E. R. 621; 2 Dr. & War. 71; 1 Con. & L. 189. (C.)—[Affg.: Fl. & K. 435. (R.)]

15. When, after decree, the principal deft.'s interest was assigned, the assignee was not permitted to intervene, without being made a party by supplemental bill.—*Crofts v. Mitchell*, 6 I. E. R. 373. (R.)

16. When a deft. becomes insolvent pending the suit, the provisional assignee is properly made a party to the suit by supplemental bill.—*Roddy v. Molloy*, 13 I. E. R. 90. (R.)

17. The principles on which the Court acts in allowing supplemental and amended bills are applicable to cause petitions under the Ch. Reg. Act. The Court therefore refused leave to file a supplemental petition, by which an entirely new case was made, after a decretal order had been pronounced on the original petition, and an issue had been tried at law under it.—*Urquhart v. Deey*, 2 I. C. R. 97; 4 I. Jur. 184. (R.)

18. The Master, on a cause petition under the 15th sec., appointed a receiver over lands to pay a judgment debt. A third person claimed to be entitled to the rents under a

lease made after the judgment. The Court gave leave to file a supplemental petition to set aside the lease, but offered no opinion whether that was the proper course.—*Woodhouse v. Molony*, 7 I. Jur. 38. (R.)

1. The Lord Chancellor has not jurisdiction to entertain an application for liberty to use new evidence upon a re-hearing of a cause before the Court of Appeal. Such evidence must be put in issue by a supplemental petition in the nature of a bill of review. The application for liberty to file it must be made at the Rolls Court.—*Barton v. Sampson*, 3 I. Jur. N. S. 71. (C.)

2. When a supplemental petition, in the nature of a bill of review, has been filed, this Court has jurisdiction, under the 19 & 20 Vic., c. 92, to hear the supplemental petition along with the re-hearing of the decree in the original cause; and the proper practice is, to set down such petition for hearing before the Court of Appeal, along with the re-hearing of the decree appealed from.—*Barton v. Sampson*, 3 I. Jur. N. S. 71. (C.A.)

3. A supplemental petition, in the nature of a bill of review founded on newly discovered facts, cannot be maintained when the newly discovered facts, if previously known, would not have influenced the decree of which complaint is made, but would have merely induced the party complaining of the decree to take a different course in the original suit.—*Nason v. Peard*, 10 I. C. R. 233; 5 I. Jur. N. S. 137. (C.)

4. When a supplemental petition, in the nature of a petition of review on newly discovered matter, has been filed, the original cause must be re-heard before the Court of C. A., simultaneously with the supplemental petition.

For this purpose, the original petition should be set down in the Chancellor's list of causes, and the order for re-hearing should direct that the supplemental petition be heard together with it.—*Barton v. Sampson*, 3 I. Jur. N. S. 71, followed.—*Radcliff v. Orme*, 5 I. Jur. N. S. 245. (C.A.)

5. A principal made to his agent two leases, which the Court set aside. The agent sub-leased part of the lands to two tenants. One sub-lease was made before, and the other after the filing of the cause petition impeaching the original leases, which was not registered as a *lis pendens*, nor was any notice of it served on the sub-tenants. The Court refused an injunction to dispossess them, and put the petitioner's representative into possession; but directed the motion to stand over to let a supplemental petition be filed against the sub-tenants.—*Geoghegan v. Blackstock*, 6 I. Jur. N. S. 28. (R.)

6. If the decree in the original suit merely directs a common account against an agent, a decree, charging him with what he might without wilful default have received, cannot be

made in a supplemental suit.—*Connor v. Reeves*, 16 I. C. R. 398. (R.)

**XVIII. CAUSE GENERALLY: ADJOURNING, ADVANCING, CONSOLIDATING, RESTORING, RETAINING, AND SPEEDING.**

[See 30 & 31 Vic., c. 44: G. O. 1867.]

1. *Generally.*
2. *Adjourning.*
3. *Advancing.*
4. *Consolidating.*
5. *Restoring.*
6. *Retaining.*
7. *Speeding.*

RESPECTING COSTS OF A CAUSE STANDING OVER, OR BEING STRUCK OUT OF THE LIST. See PRACTICE, COSTS.

See PRACTICE, HEARING AND SETTING DOWN CAUSES. PRACTICE, BILL DISMISSAL OF. PLEADING, BILL, DISMISSAL OF.

**XVIII. 1. Cause generally.**

7. If a female deft., against whom process has issued, marries pending the suit, the process will be continued against her and her husband.—*M'Namara v. Lysaght*, H. & J. 623. (E.E.)

8. An order allowing a plea of the Statute of Limitations does not put the cause out of Court.—*Howlett v. Lambert*, Flan. & K. 593. (R.)

9. When no proceedings have been taken against a deft. within a year, the cause is out of Court as to him, although proceedings have been taken within that time against other defts.—*Bartley v. Davis*, Flan. & K. 620. (R.)

10. The ptf. entered a rule to confirm the report, and the order that the cause be set down to be heard on report unexcepted to, and merits, on the same day. The deft. afterwards excepted to the report. *Held*, that the cause was irregularly set down, that it should, therefore, be struck out of the list, and that the ptf. should pay the costs of the day.—*Scully v. S.*, 3 I. E. R. 384. (E.E.)

11. Upon a hearing upon a special finding by the Master, the Court is confined to the alternatives thereby put.—*Montgomery v. Southwell*, 2 Con. & L. 263; 3 Dr. & War. 171. (C.)

12. Order of hearing counsel:—First, leading counsel for ptf.: then the junior upon the evidence; then the deft.'s three counsel: and the second counsel for the ptf. to reply.—*Taylor v. T.*, 2 Con. & L. 422. (C.)

13. When no proceeding has been taken by the ptf. in the cause, nor by a deft. within the year, the cause is out of Court as relates to that deft., though another deft. may have taken a proceeding within the year.—*Hodges v. Barton*, 8 I. E. R. 38. (R.)

14. A cause was set down for hearing, but, being defective for want of parties, stood over



generally. No further proceedings were taken in the cause. Upon motion of the defts., more than a year afterwards, the bill was dismissed for want of prosecution.—*Hughes v. Maitland*, 8 I. E. R. 98. (R.)

1. Ptf.'s solicitor is entitled to give out briefs and fees to counsel upon the day on which he sets down the cause to be heard *pro confesso*.—*Ivie v. Gahan*, 9 I. E. R. 223. (R.)

2. After the report and final decree in the cause, the Court will permit, at the instance of the party having the carriage of the cause, judgment creditors concurring in the sale to come in and prove their demands, with liberty to surcharge and falsify the accounts already taken in the cause; it being for the advantage of all parties, and to save the expense and delay of a supplemental suit.—*Clarke v. Jessop*, 10 I. E. R. 40. (R.)

3. The defts appeared by the same solicitor on the 7th of Oct. 1845, and on the 19th of Jan. 1846 several joined in filing an insufficient answer. A further answer was filed, which was also excepted to, and reported insufficient, and thus ptf. did not obtain a full answer from any deft. until the 2nd of Dec. 1846. He served notice in that month, to take the bill as confessed against the defts. who had not answered at all, and also against those who had not answered fully. *Held*, that the cause was not out of Court as to the defts. who had not answered, or those who had not answered fully, and the motion was granted.—*Birch v. Walsh*, 10 I. E. R. 203. (R.)

4. Although a suit be totally abated by a sole ptf. assigning away his interest or becoming insolvent, it is yet capable of being continued so as to allow the benefit of it, under this doctrine, to creditors proving charges under a decree made in a suit seeking the continuance and benefit of the abated suit. When the original ptf. made an assignment by deed for the benefit of creditors, one trust of which was to continue the abated suit, and original bills in the nature of bills of revivor and supplement were filed by the trustee, and a *c. g. t.* of this deed, stating it, and praying the benefit of the abated suit, the receiver appointed in which was continued, a decree made and entitled in the new suits only, without referring to the abated one, but reciting among the evidence the proceedings in it, was *Held*, to be such a decree as entitled creditors proving charges under it to the benefits of the abated suit for this purpose.

The practical application of Lord Redesdale's classification of bills observed on.—*Bennett v. Bernard*, 10 I. E. R. 584. (C.)

5. The Court has authority to permit the assignee of a judgment creditor to continue proceedings in his own name. But when the original proceedings have been taken by a trustee, and an assignment has thus been rendered necessary, the Court will not give the costs of the motion to continue.—*Weir v. Ormsby*, 1 I. Jur. 283. (R.)

6. A cause is not out of Court as against a deft. for whom a parliamentary appearance has been entered, though more than a year has elapsed since such appearance,

But the Court will exercise a discretion in granting or withholding an order *pro confesso* in such a case, and will not be bound to act on an old parliamentary appearance.

In this case the parliamentary appearance was entered in Nov. 1846; an order *pro confesso* was granted in April 1849.—*Blakeney v. B.*, 13 I. E. R. 84. (R.)

7. At the hearing of cause petitions, of which notice has been served, junior counsel should be retained to open the petition, as in causes.—*Russell v. Bevan*, 1 I. C. R. 62, note. (C.)

#### XVIII. 2. *Adjourning a Cause.*

8. It appeared at the hearing that D., a deft charged only in his individual capacity, was also a necessary party as representative of M., deceased. On that ground, the Court refused to order the cause to stand over, or to oblige ptf. to amend, but directed an account of M.'s assets, though not prayed by the bill; with liberty for D. to rely in the office on any defence which he might have made at the hearing, if he had been charged by the bill in his representative capacity.—*Phillips v. P.*, 1 I. E. R. 179. (C.)

9. *Semble*—When, on the construction of a deed, there is a reasonable doubt whether the party, who is charged as entitled to the first estate of inheritance, has that estate, the Court will allow the cause to stand over to be amended by bringing before the Court the person who, if the party charged as tenant in tail takes only a life estate, would indisputably represent the inheritance.—*Whaley v. Morgan*, 2 Dr. & Wal. 330. (C.)

10. When a deft., by his answer, insists that he is a purchaser for value, and without notice, proof of payment of the purchase money is an essential part of the defence. If, at the hearing, deft. fails to prove this, the Court will not allow the cause to stand over to enable deft. to supply that defect.—*Molony v. Kernan*, 2 Dr. & War. 81. (C.)

11. On showing cause against an injunction obtained on a possessory bill, the Court cannot order the cause to stand over, with liberty to amend the bill by putting in issue matter not stated in, or exactly consistent with it: such a motion is analogous to the final hearing of an ordinary cause.—*Congleton v. Mitchell*, 12 I. E. R. 34. (C.)

12. The Court refused to stay a mortgagee's suit after a decree in another creditor's suit, in which the ptf. was a puisne judgment creditor, who filed his bill within a year of the entry of his judgment, and whose right to a sale of the estate depended on setting aside a settlement puisne to the mortgage under which no tenant in tail was *in esse*.

If a prior mortgagee does not insist on being

redeemed at the first hearing, he cannot do so at the final hearing.—*Foster v. Ker*, 12 I. E. R. 51. (C.)

1. When affidavits are filed so recently that they cannot be answered before the hearing, the Court will, if the filing parties insist on using the affidavits, allow the petition to stand; and make those who cause the delay pay the costs thereby occasioned.—*Figgis v. F.*, 4 I. Jur. 273. (C.) *Anderson v. O'Connor*, *ibid.*

#### XVIII. 3. *Advancing a Cause.*

2. In a creditor's suit the ptf. obtained a decree to account. Afterwards, and before the decree was made up, the ptf. was paid his demand.

The ptf. having neglected to prosecute the suit, the Court gave the carriage thereof to a third person, who alleged himself to be a creditor of the deceased.—*Hines v. O'Keefe*, 2 Jon. 624. (E.E.)

3. A cause ought not to be transferred from the long to the short cause list, when it involves the decision of any point requiring argument.—*Kane v. Johnson*, 1 I. E. R. 279. (E.E.)

4. Some of the defts. had been served, out of the jurisdiction, with subpoenas, but did not appear. None of them had answered the bill, although the time allowed had expired as to all. *Held*, that the case came within the 25th G. O.; that parliamentary appearances should be entered for the defts. who had been served out of the jurisdiction; and that the cause be set down for hearing *pro confesso*.—*FitzGerald v. Quinlan*, 12 I. E. R. 393. (E.E.)

#### XVIII. 4. *Consolidating Causes.*

5. The Court will not, under the 13 & 14 Vic., c. 89, s. 28, consolidate petitions, unless it clearly appears that no injustice can be done thereby.—*Lysaght v. L.*, 3 I. Jur. 162. (C.)

6. The Court will not, on the application of a ptf., consolidate a suit in which a decree to account has been made, with one which has not reached that stage of proceeding.—*Goold v. G.*, 4 I. Jur. 85. (C.)

#### XVIII. 5. *Restoring a Cause; Reinstating.*

[The cases in the Ir. Ch. Rep. refer to the dismissal of petitions for want of prosecution, reinstating, &c.]

7. A motion to restore a cause petition, dismissed for want of prosecution, should not be granted as a matter of course. There must be special circumstances, and it must appear that substantially justice would be defeated if the Court were to refuse the application.—*Cassan v. Carr*, 2 I. C. R. 577; 5 I. Jur. 178. (R.)

8. Order to revive a cause petition under the Ch. Reg. (Ir.) Act 1850, the suit having

abated by the death of one of the respondents.—*Ryall v. Farmer*, 5 I. Jur. 377. (R.)

9. A cause petition was filed on the 25th February. The respondent's time for filing affidavits was extended to the 14th of April. The petitioner applied to set down the petition for hearing on the 25th Nov. The Registrar refused to set it down, as he was of opinion that the two whole terms were expired under the 27th G. O. The Court, on motion, allowed the petition to be reinstated.

*Quare*—Whether two whole terms were to be counted from the twenty-one days after filing the petition, or from the end of fourteen days after the 16th of April, the day to which the time for respondents filing affidavits was extended?—*McDonnell v. M. G. W. Railway Co.*, 6 I. Jur. 129. (R.)

10. An order for liberty to file interrogatories does not imply an extension of the time for setting down the cause; and, unless such order for extension is obtained, the petition will stand dismissed, pursuant to the 27th G. O., as if there had been no such order.

The Court may, in such case, allow the petition to be reinstated.—*Montgomery v. Mayne*, 7 I. Jur. 284. (R.)

11. When a petitioner becomes bankrupt before the petition stands dismissed by the 27th G. O. of 1851, the suit is not affected by that order.

In such a case the proper course is to move that the petition do stand dismissed unless the assignee file a supplemental bill within a time to be limited by the Court.

But when, *pendente lite*, a petitioner voluntarily assigns his property, the suit is not thereby abated, and is therefore within the operation of the 27th G. O.

In the latter case leave to reinstate the petition may be given on payment of the costs of the motion.—*Maxwell v. Read*, 15 I. C. R. 133. (R.)

12. A cause petition, which stood dismissed under the 27th G. O. of 1851, was reinstated, upon the sole ground (although some proceedings had been had upon it, and there had been some delay on a respondent's part) that the petitioners were minors; but only on payment of respondents' costs of the motion within ten days after taxation. Otherwise the motion to stand refused with costs, without further order.—*Thompson v. Thomas*, 11 I. Jur. N. S. 143. (R.)

13. An order extended, *beyond* the day upon which the petition would stand dismissed under the 27th G. O. of 1851, the petitioner's time to file affidavits in reply. Upon motion for liberty to set down the cause for hearing, although two terms had elapsed since the answer was filed, and that, if necessary, the cause might be reinstated, the Court, without special ground, reinstated the petition.—*Armstrong v. A.*, 17 I. C. R. 132. (R.)

XVIII. 6. *Retaining a Cause.*

1. Retaining the bill, and giving the party liberty to bring an ejectment, is substantially the same as directing an issue.—*Blackwood v. Gregg*, H. & Jon. 310. (E.E.)

2. The bill charged that the ptf.'s ancestor's alleged will was a forgery, and prayed an issue:—Whether it was his will or not? and that the defts. might be restrained from setting up temporary bars. The cause was heard upon sequestration against the devisees named in the will. *Held*, that the Court could only decree the bill to be retained, with liberty to the ptf. to bring an ejectment, and that the defts. be restrained from setting up temporary bars.—*Nelson v. Averell*, 2 Jon. 782. (E.E.)

3. A cause petition filed in 1854 was allowed to be amended by stating the death of A., a respondent, in 1850, intestate; that B., his heir-at-law, was heir-at-law of the mortgagee, and as such claimed to be entitled to part of the fund in Court; and by naming him as a respondent. The time being about to expire within which the cause could be set down, the notice of motion asked that it should be retained for a longer time. This was refused with costs.—*Irvine v. De Ryther*, 7 I. Jur. 225. (R.)

4. The Chancery Registry Offices being open during vacation on only two days in each week, the last day for application fell on a day between those on which the office was open. A petition filed on the next office day was retained.

The proper course is to apply to extend the time.—*Wilmot v. Aylmer*, 6 I. Jur. N. S. 26. (C.A.)

XVIII. 7. *Speeding a Cause.*

5. When a bill has been amended after answer, and notice given that no answer is required to the amended bill, the ptf. cannot set down the cause *pro confesso*, although the deft. has served notice that he will answer the amendments.—*Hamilton v. West*, 12 I. E. R. 422. (R.)

6. In a suit by bill and answer, after decree, the deft.'s solicitor died. No solicitor was named in his stead. The Court, on the application of the deft. having carriage of the proceedings, allowed him to proceed in the suit before the Master: serving the other defts.—those who resided out of the jurisdiction by substitution of service or otherwise—as the Master should direct.—*De Morin v. Henry*, 5 I. Jur. N. S. 300. (R.)

7. A cause petition was not set down for hearing in proper time, because the petitioner was thrown off his guard by a pending negotiation for a settlement, and an understanding founded on an unauthorised arrangement between the solicitors as to the hearing. Motion to reinstate the petition, granted.—*Shanney v. O'Leary*, 6 I. Jur. N. S. 12. (C.)

8. A dismissed petition cannot be reinstated even by consent. A new petition must be filed.—*Balf's Estate*, 6 I. Jur. N. S. 47. (L.E.C.)

## XIX. CAUSE, CONDUCT OF.

9. In a creditor's suit ptf. obtained a decree to account, but was paid his demand before that decree was made up. Ptf. having neglected to prosecute the cause, the Court gave the carriage of the suit to a third person, alleging himself to be a creditor of the deceased.—*Hines v. O'Kerffe*, 2 Jon. 625. (E.E.)

10. A receiver's duty is to collect the rents, but not to assume the management of the cause.—*Callaghan v. Reardon*, S. & Sc. 682. (R.) [See *Callaghan v. Reardon*, 1 Cr. & Dix Notes of Cas. 231. (R.)]

11. *Semble*—The Court, having made an erroneous decree to account, is not bound to continue the error by further proceedings in the suit taken on the return of the Master's report.—*Roberts v. Hughes*, Beat. Rep. 417. (C.)

12. The Court will not re-hear a cause in which the decree is not made up, but remains in minutes.—*The Commrs. of Ch. Don. & Beg. v. Hunter*, 1 Dr. & War. 544. (C.)

13. In a question touching the carriage of a decree for a sale, in two suits, the solicitor, C., in the first, was assignee of a charge prior to the ptf.'s, and it was in that cause reported at £1800, but in the second cause at £900, because of a difference in the accounts decreed, —*Held*, that, C. having by the assignment an interest different from the ptf.s., the carriage of the decree should be given to the ptf.s. in the second suit.—*Keons v. Magawly*, 7 I. E. R. 603. (C.)

14. The 106th G. Rule does not apply when a decree to account was obtained so far back as twenty-five years ago, and the suit had since abated and been revived several times.—*Cavanagh v. Blake*, 8 I. E. R. 515. (E.E.)

15. When a property has paid the creditor having the carriage of the proceedings, and the residue is more than sufficient to pay the remaining creditors, the Court will, on application, transfer the carriage of the proceedings to the owner.—*In re Lambert*, 3 I. Jur. 235. (I.E.C.)

## CAVEAT.

—Against Enrolment of Decree or Order. See G. O. (1867), 107.

—In Court of Probate. See PRACTICE, PROBATE, 20 & 21 Vic., c. 79.

CERTIFICATE OF CLERK OF RECORDS AND WRITS. See G. O. (1867), 75, 85, 96, 270, 279.

CERTIFICATE OF CHIEF CLERK. See 30 & 31 Vic., c. 44, ss. 140–142, 146, 149; G. O. (1867), 232–241, 243; G. O. (1868), under the Companies Act (1862), 12, 28, 31, 56, 66.

**CERTIFICATE OF MASTER.** See PRACTICE, MASTER, REFERENCE TO, &c. See 30 & 31 Vic., c. 44, ss. 32, 34, 35, 36, 37.

## XX. CERTIORARI AND CERTIORARI BILL.

### (XX. a.) CHANCERY.

#### 1. *Chancery Regulation (Ir.) Act* 1850 (13 & 14 Vic., c. 89.)

- a. *Generally.*
- b. *Special Case.*

#### 2. *Summary Order.*

### (XX. a.) 1. *Chancery Regulation (Ir.) Act* 1850 (13 & 14 Vic., c. 89.)

- a. *Generally.*
- b. *Special Case.*

[See also under the several headings—PLEADING, I, 14; II, 18; V, 26—PRACTICE, ANSWER, BILL, OR PETITION, &c. &c.]

#### 1. a. *Generally.*

1. When petitions under the Ch. Reg. Act are unnecessarily prolix, the Court will direct the Master to have regard, in the taxation of costs, to the matter improperly introduced.—*Johnstone v. Linde*, 1 I. C. R. 19; 3 I. Jur. 3. (C.)

2. Cause petitions under the Ch. Reg. Act will be heard, in the first instance, on the petition, and affidavits filed in opposition to or support of the same, and on the answers to any interrogatories filed.—*Glacock v. Ross*, 1 I. C. R. 50. (C.)

3. Interrogatories having been annexed without leave of the Court to a cause petition, it was ordered that they should be allowed to stand; costs occasioned by them were reserved until the hearing.—*O'Malley v. Denny*, 1 I. C. R. 118. (C.)

4. In general, cause petitions should be verified by the petitioner.

Form of order on application that the petition be received without the petitioner's affidavit.—*Montgomery v. Eyre*, 1 I. C. R. 120. (C.)

#### 1. b. *Special Case.*

5. When a petition, in the nature of a special case, is presented under the 11th sec. of the Ch. Reg. Act, it is not necessary to the maintenance of such a petition that all the parties interested in the question for adjudication should concur in the statement of facts put forward in the petition.

Nor is the sanction of the Master necessary to such a petition, where a party interested, but not a petitioner, is under any of the disabilities mentioned in that section.

Whether the rights of persons, under such disabilities, should be bound adversely, must be considered in each case.

It is indispensable in every petition under that section that the documents relied on should be fully set out in the petition, or that copies of such documents should be furnished to the Court and to the parties.

Where a petition under that section prayed a declaration of the invalidity of an appointment under a power, and of the validity of a subsequent appointment—*Held*, that the donee of the power and an appointee (a *feme covert*), whose husband was a party, were necessary parties.—*In re O'Reilly*, 1 I. C. R. 208; 3 I. Jur. 205. (C.)—[See s. c., 1 I. C. R. 497. (C.)]

6. By a petition under the 11th sec. of the Ch. Reg. Act, it appeared that A., entitled to the interest of a legacy of £3000 during her life, with a power to appoint the principal amongst her children (which power did not authorise an exclusive appointment), having three sons and a daughter, by deed in 1834 appointed that sum equally amongst her two younger sons and her daughter; and made a provision *aliunde* for her eldest son. Subsequently the daughter married; the eldest son died in non-age. The petition stated that A. having been advised that the appointment in 1834 was not a valid execution of the power, by deed in 1850 appointed £1900 to one of the surviving sons, £1000 to the other, and £50 to the daughter; and left £50 unappointed. The petition was presented by the two surviving sons, and prayed that the appointment of 1834 should be declared invalid, and that the appointment of 1850 should be declared valid. Counsel appeared at the hearing for the daughter, and supported the prayer of the petition. Her husband resisted the petition, and in his affidavit stated that his wife was, at the instigation of A., living separate from him, and that A. had executed the latter appointment in order to defeat the former, on faith of which he alleged that he had married the daughter. The affidavit also alleged that A. was in collusion with her sons for the purpose of obtaining the fund, or a large portion of it, to pay her own debts. There was not any evidence given on either side. The Court refused to make the declaration prayed for, and dismissed the petition without prejudice, and without costs.—*In re O'Reilly*, 1 I. C. R. 497. (C.)—[See s. c., 1 I. C. R. 208. (C.)]

7. A special case should be framed thus, under the Ch. Reg. Act, s. 11:—A statement of the facts, followed by a series of interrogatories, signed by a counsel on each side.—*In re Trusts of Guinness's Will*, 8 I. Jur. N. S. 24. (R.)

### (XX. a.) 2. *Summary Order in reference to the Master, under the 15th sec. of the Court of Ch. Ir. Reg. Act 1850.*

8. On a petition under the Ch. Reg. Act, for an account on foot of a legacy charged upon lands; for payment of the sum found due; the Court refused to make a summary order under the 15th sec.; being of opinion that although the case fell within the spirit, it was not within the letter of that sec.—*Kirk v. Edmondstone*, 1 I. C. R. 17. (C.)

9. When the conuzor of a judgment is alive, the Court will not pronounce a summary order under the Ch. Reg. Act, upon a petition

praying an account on foot of the judgment, and a sale of the real estate.—*Ingram v. Russell*, 1 I. C. R. 18. (C.)

1. The Court will not make a summary order of reference upon a petition under the Ch. Reg. Act, to which interrogatories are annexed.—*Ryan v. Mulligan*, 1 I. C. R. 20; 3 I. Jur. 13. (C.)

2. A petition under the Ch. Reg. Act may be verified by the solicitor of the petitioner, but not in the short form given by the Act. The solicitor's affidavit should concisely verify the details of the petition.—*Ex parte Griffith*, 1 I. C. R. 21. (C.)

3. To induce the Court to pronounce a summary order of reference, under the Ch. Reg. Act, for the administration of assets, there should be an affidavit that there is not any other proceeding pending for the same purpose.—*Triphook v. Griffin*, 1 I. C. R. 21. (C.)

4. When a petition under the Ch. Reg. Act has been verified by the solicitor and not by the petitioner in the form given by the Act, the Court will not make a summary order under the 15th sec. Notice must be served of the petition, and it must be set down for hearing as a cause petition.—*Stackpole v. Stott*, 1 I. C. R. 22, note. (C.)

5. A judgment creditor who has registered an affidavit of ownership of lands by the debtor, pursuant to the 13 & 14 Vic., c. 29, which gives to such registration the effect of a mortgage, is entitled to proceed summarily under the 15th sec. of the Ch. Reg. Act.—*Woodroffe v. Fannin*, 1 I. C. R. 23. (C.)

6. On a petition under the Ch. Reg. Act for a partnership account, it appeared that an arbitration had taken place upon the subject in dispute, and that an award was made, although not under seal.—*Held*, that the case was not one for a summary order under the 15th sec., and that notice must be served upon the respondent.—*Murphy v. Keller*, 1 I. C. R. 24. (C.)

7. When, upon a petition presented under the Ch. Reg. Act, by a creditor, on behalf of himself and all other creditors of a deceased person, for administration of his real and personal assets, the usual order of reference to the Master has been made under the 15th sec., the Court will not dismiss the petition on payment to the petitioner of his debt and costs, as the order of reference is equivalent to a decree to account in a plenary suit, and therefore confers upon the other creditors an interest in the proceedings.—*Stokes v. Coltsman*, 1 I. C. R. 44; 3 I. Jur. 63. (C.)

8. Amendments of cause petitions are to be made without alteration, erasure, or interlineation, by stating the matter of the amendment at the foot of the affidavit to verify, or by endorsement thereon.

Form of order on amendments of cause petitions.

In general the petitioner must abide the costs of the motion for leave to amend, and of the amendment.—*Graves v. Holland*, 1 I. C. R. 123. (R.)

9. When a notice that a cause petition was "set down in the list of causes for hearing before the Lord Chancellor under the Court of Chancery (Ireland) Regulation Act 1850," was served upon a respondent, and the petition was set down in the list of causes under the 15th sec., the Court being of opinion that such a notice was likely to mislead, refused to make a summary order under that sec., and transferred the petition to the general list.—*Livesay v. Maxwell*, 1 I. C. R. 254; 3 I. Jur. 250. (C.)

10. A party entitled to the interest, during his life, of money charged upon lands, may, under the 15th and 27th sec. of the Ch. Reg. Act, obtain on petition, praying merely a receiver over the lands, a summary order of reference to the Master for that purpose.—*Bennett v. Briscoe*, 1 I. C. R. 594. (C.)

11. The 8th G. O. of the 31st of July 1851 applies only to cause petitions presented with respect to the administration of real or personal estate, when a summary order is sought for under the 15th sec. of the Ch. Reg. Act.—*Holmes v. Walker*, 1 I. C. R. 596. (C.)

12. When a summary order has been made under the 15th sec. of the Ch. Reg. Act, the Master has authority to deal with all objections to the petition on the ground of multifariousness, or of the absence of proper parties.—*Taylor v. Young*, 1 I. C. R. 650; 4 I. Jur. 88. (C.)

13. The Court will make a summary order under the 15th sec. of the Ch. Reg. Act, upon a cause petition, filed by an incumbrancer and annuitant, praying—not redemption, foreclosure, or sale—but the appointment of a receiver over lands, subject to his (the petitioner's) incumbrance and annuity, although a petition for the sale of the same lands has been previously presented in the I. E. Court by the owner of the lands.—*Carter v. C.*, 1 I. C. R. 592. (C.)

14. A cause petition presented by a legatee for the administration of the real and personal estate of the testator, named no person who had proved the will as a respondent; but stated that four executors had been named in the will, one of whom alone proved it, and had since died, and the others, who were named as respondents, had acted as executors, although they had not joined in taking probate. *Held*, that the case was a proper one for a summary order under the 15th sec. of the Ch. Reg. Act.—*Agnew v. Connell*, 1 I. C. R. 716. (C.)

15. A petition for the sale of lands, in payment of the vendor's lien on those lands for unpaid purchase money, falls within the sum-

mary jurisdiction of the Court under the 15th sec. of the Ch. Reg. Act, and the 9th G. O. of July 1851.—*Enraght v. Mahony*, 2 I. C. R. 241. (C.)

1. When a petition has been referred to the Master under the Ch. Reg. Act, s. 15, he has power to direct service of notice under the 32nd G. O. of 1851, for the purpose of binding persons by the proceedings in the cause.—*Stanley v. S.*, 5 I. C. R. 416. (C.)

2. The Court's jurisdiction to make a summary order of reference upon petition under the Ch. Reg. Act, s. 15, praying the appointment of guardians, allowance of maintenance, settlement of a scheme of education, &c., in minor matters, will be exercised with great reluctance.

*Semble*—It is better to present a summary petition in the minor matter.—*Garnett v. G.*, 2 I. Jur. N. S. 314. (C.)—[See also *Charleville a Minor*, 13 I. C. R. 6. (C.)]

3. The Court's jurisdiction to make a summary order of reference upon petitions under the Ch. Reg. Act, s. 15, praying the appointment of guardians, allowance of maintenance, settlement of a scheme of education, &c., in minor matters, will be exercised with great reluctance.

*Semble*—It is better to present a summary petition in the minor matter.—*Fetherstone v. Moore*, 2 I. Jur. N. S. 315. (C.)

4. A petition to carry into execution the trusts of a will, even though it seeks to charge a trustee as for wilful default, may be referred to the Master, under the 15th sec. of the Ch. Reg. Act.—*Johnston v. J.*, 5 I. C. R. 493; 2 I. Jur. N. S. 315. (C.)

5. A., entitled to the lands of G., devised them to B. B. mortgaged G. and X. to C. A. was at his death indebted to D. On a petition filed by D., praying for an administration of A.'s assets, and that C.'s mortgage might be thrown on X. in the first instance—*Held*, that the suit came within the jurisdiction conferred by the Ch. Reg. Act, s. 15.—*Murray v. Madden*, 6 I. C. R. 228. (C.)

6. An order of reference, under the 15th sec. of the Ch. Reg. Act, in an administration suit, cannot be obtained without a personal representative being named as a party.—*Cleary v. C.*, 8 I. C. R. 264. (C.)

7. District administration having been granted, on the usual affidavit that the testator's assets did not amount to more than £200, the administrator attempted to obtain £1000, to which the intestate was entitled. Proceedings to revoke the district administration were taken. *Held*, that a summary order of reference of a suit for administration and a receiver might be made, without the three weeks' demand of account required by the G. O.—*Wales v. Grier*, 12 I. C. R. 88. (C.)

XXI. Charge and Discharge. See ACCOUNT, VIII.—PRACTICE, ACCOUNT.

[See also PRACTICE, MASTER, REFERENCE TO.]

8. *Quære*—How far the officer is authorised to decide between the parties in a cause on a pleading by way of discharge filed in the office, and relying upon the Statute of Limitations?—*Thwaites v. M'Donough*, 2 I. E. R. 97. (E.E.)

9. A creditor, coming in under a decree, cannot rely upon a will as creating a trust in his favour, unless it has been put in issue sufficiently for that purpose, either by the pleadings in the cause, or by the charge and discharge in the office.—*O'Kelly v. Bodkin*, 2 I. E. R. 361. (E.E.)

10. A creditor on foot of a paramount charge went into possession of the debtor's estate under his will, of which she was a trustee, and by which she took some benefit. The will directed payment of a puisne mortgage out of another fund. She did not pay it; but paid the rents for the benefit of the *c. q. t.*, without paying that or other puisne incumbrances. In a creditor's suit—*Held*, that she could not be charged with any money beyond the sums appropriated to her own use, as against the principal or interest of her own demand, for the benefit of a puisne creditor, especially as he had been a solicitor, and had advised her, though as a friend, and without payment, in the application of the rents.—*Boyd v. Murdock*, 7 I. E. R. 607; 2 Jon. & L. 203. (C.)

11. A suit for an account against an *elegit* creditor in possession was heard on bill and answer. The only evidence before the Master to charge deft. with the rent of certain lands, was an admission in the answer, which was accompanied by a statement that the lands were erroneously included in the *elegit*, and belonged to a third person with whom deft. had accounted. *Held*, that the Master was not bound to take the entire statement in the answer, but might on admission charge deft. with the rent received, and find that the property belonged to the debtor.—*M'Donnell v. Alcock*, 8 I. E. R. 127. (C.)

12. The Court will not permit a discharge, sworn and filed, to be amended; but will, in a proper case, permit a further discharge to be filed.—*Fenton v. F.*, 8 I. E. R. 363. (R.)

13. The Court will not suffer a party who has not relied on the Statute of Limitations by his discharge, to do so by a supplemental discharge.—*Kelly v. Rutledge*, 8 I. E. R. 378. (R.)

14. In a decree for an account of old standing against an executor, a direction was inserted allowing him to discharge himself by affidavit of items, though exceeding 40s.—*Dooner v. D.*, 12 I. E. R. 580. (C.)

15. A creditor's application for liberty to file a discharge to the charge of another creditor, to raise the question of the Statute of

Limitations, was refused, because of considerable neglect and delay on the applicant's part.—*Kelly v. Rutledge*, 2 I. Jur. 154. (C.)

1. H., a judgment creditor, made a debt., permitted a report and decree to be made in 1828, which omitted all mention of his claims. In 1855, he obtained an order permitting him to file a charge and obtain at his own expense a separate report in respect of his claims; but reserving to the persons who had proved in the cause a right to rely on the decree against his claims. The Master found that his incumbrance was subject to the rights and priorities established by the decree of 1828. *Held*, that, on the true construction of the order of 1855, the Master was right in so finding.

*Quare*—Whether the order of 1855 was right in permitting H. to file a charge in respect of a claim omitted in a decree to which he was a party?—*Knox v. Waters*, 5 I. C. R. 430. (C.)

2. In 1810, two judgments on a joint and several bond, against D. and B., to secure £2200, and in 1812 another judgment, to secure £1000, against D., were entered up by X., as trustee for the Mayo Infirmary. In 1819, a joint and several bond to secure £3200, the sum for which the judgments were obtained, was executed by D. and B. to X., who gave warrants to satisfy the judgments. In 1823, two deeds were executed by D. and B., by the first of which they conveyed lands to trustees, to sell with their consent, or the consent of the survivor, and to stand possessed of the purchase-money, on trusts declared by the second deed, viz.—to apply £8275 as D. and B. should appoint; in default of appointment, to pay the sum of £3200 due to X., the trustee of the Mayo Infirmary (a party to the deed in another character), on a judgment against D. and B., his executors, &c. No sale was had. In 1826, D. died. In 1827, X. died, without entering judgment on the bond of 1819, and before the judgments of 1810 and 1812 were satisfied. In 1832, B. and the trustees of the deed of 1821 mortgaged to the ptfs., who had notice of the deed of 1823, but not of the bond of 1819; and who, without enquiring whether the £3200 had been paid to the Mayo Infirmary, merely required the judgments of 1810 and 1812, which they supposed to be the judgment referred to by the deed of 1823, to be satisfied. Judgment was entered on the bond of 1819 in 1838, and assigned in trust for the Mayo Infirmary, to A., who, in a foreclosure suit filed by the ptfs., proved the judgment, and was, by the final decree, decreed to be paid in the priority of 1838. Y., executor of X., who was not a party to the suit, after the decree, obtained an order allowing him to prove his claim under the deed of 1823, on the usual terms of making up a report at his own expense. *Held*, on objections to the report under that order, that a trust was created by the deed of 1823 in favour of X., under which the £3200 was charged on the lands.

That the ptfs. had notice that the £3200 was due to the Mayo Infirmary under the deed of 1823; and having neglected to enquire whether it had been paid, could not ward off the claim by reason of the inaccuracy in the description of the security under which it arose.

That X. having executed the deed, though not made a party thereto, as trustee for the Mayo Infirmary, the doctrine of *Garrard v. Lord Lauderdale* (3 Sim. 1) did not apply; and that he might have enforced the trust created for him.

That Y. not having been a party to the suit, the order of 1854 was right in permitting him to come in and prove his demand, although it was in substance for the same debt which had been decreed to A.—*Gurney v. Oranmore*, 5 I. C. R. 436. (C.)

3. When an incumbrancer, made a party to a suit, permits a decree *pro confesso* negating the facts on which his claim depends, and afterwards permits a final decree to be taken, which does not provide for his rights, he cannot be permitted to come in and file a charge, and obtain a separate report respecting his claims. — *Gurney v. Oranmore*, 5 I. C. R. 447; 1 I. Jur. N. S. 442. (C.)

4. A party having lapsed the time for filing a discharge, the Master of the Court enlarged the time, and the Commissioner in Chamber made an order allowing the party to file a discharge, in which one of the defences relied on was the Statute of Limitations. The Court, on appeal, refused to set aside such order, considering the matter entirely within the discretion of the Commissioner before whom it had come. — *In re Mason*, 6 I. C. R. 592; 3 I. Jur. N. S. 53. (I.E.C.)

5. The parties entitled to a fund, for a long series of years, dealt with it in a particular way. *Held*, in the absence of any positive evidence to show what their shares in the fund were, that they must be taken to have been entitled to it, in the shares pointed out, by their mode of dealing with it.

On appeal from a Master's order, the Court considered that certain matters had not been properly put in issue before the Master, and allowed the appellant to file, and use upon the appeal motion, a supplemental charge, putting the matters in issue.—*Sneyd v. Stewart*, 3 I. Jur. N. S. 105. (R.)

CHIEF CLERK. See 30 & 31 Vic., c. 44; 30 & 31 Vic., c. 129; G. O. 1867; G. O. 1868 (under the Companies Act 1862.)

CLERKS, JUNIOR AND SENIOR. See 30 & 31 Vic., c. 44; 30 & 31 Vic., c. 129.

CLERK IN COURT. See PRACTICE, OFFICERS IN COURT: 30 & 31 Vic., c. 44, s. 164; 30 & 31 Vic., c. 129, ss. 20–23.

CLERK OF ENROLMENTS. See *ibid.*

COMMISSION TO TAKE ANSWER. See PRACTICE, ANSWER.

XXII. COMMISSION TO ASCERTAIN BOUNDARIES, AND VALUE OF LANDS. See COMMISSION OF PARTITION, PERAMBULATION, &c.; BOUNDARIES.

COMMISSION IN AID.

COMMISSION OF BANKRUPTCY. See BANKRUPTCY, VI.

COMMISSION OF LUNACY. See LUNACY, IV.

COMMISSION TO EXAMINE. See PRACTICE, EVIDENCE.

XXIII. COMMISSION OF PARTITION, PERAMBULATION, &c. See ESTATE, VII—STATUTE, II.

1. On a bill of partition, by one tenant in common against another, a receiver will not be granted unless a case of exclusion is shown.—*Spratt v. Ahearne*, 1 Jones, 50. (E.E.)

2. In a partition case the Court will not order the party objecting to the non-service of reversioner to disclose his name, &c., to the petitioner; but will not give him the costs of the day unless he undertakes to do so.

The petition will be allowed to stand over to give the petitioner time to effect such service.—*Kelly v. Skelton*, 1 Jones, 555. (E.E.)

3. A commission of perambulation for settling boundaries cannot be obtained by petition, under the 5 G. 2, c. 9, when minors are interested.—*In re O'Brien*, 3 I. E. R. 161. (C.)

4. The affidavit of service did not state that the persons served were the only persons in possession of those lands, which the Court considered a fatal defect.—*In re O'Brien*, 3 I. E. R. 161. (C.)

5. In partition suits, in future, all parties are to abide their own costs until the issue of the commission; but the costs of issuing and executing it, and of the final hearing and decree, are to be paid by the parties in proportion to their respective interests.—*M'Bride v. Malcolmson*, 2 Dr. & Wal. 700. (C.)

6. A bill stated that the lands of B., part of which contained 159 acres, and part 46 acres, had for many years before 1794 been held by the same tenants, so that the boundaries became confused; that in 1804 A. was seized in fee of the 159 acres, and held the 46 acres by lease from H. for a term; that the mearings and boundaries of the 46 acres had not since been ascertained, the entire of the lands having been since the making of the lease, as they had been for 100 years before, held by

the persons who owned the fee-simple lands; that they had been so mixed up that it was impossible to discover the boundaries, or ascertain where the 46 acres were situated. After deducing ptf.'s title, the bill stated that deft. claimed to be entitled, as H.'s assignee, to the 46 acres; that ptf.'s interest under the lease had determined; and prayed a partition, or a commission to ascertain the boundaries. On demurrer—*Held*, that the bill could not be sustained for a partition, since no title to a partition at law was shown; nor as a bill to ascertain boundaries, since the parties were independent proprietors; the inference being, that deft. was in possession of the 46 acres, and that the owner of the fee-simple lands, and not the deft., was responsible for the confusion of the boundaries.

In Equity a petition will be decreed only when ptf. would be entitled to a partition at Law.—*O'Hara v. Strange*, 11 I. E. R. 262. (R.)

7. When the boundaries have been confused, or land has been encroached on by the tenant, the question of boundary or encroachment should be determined before a f.-f. grant is executed under the Ren. Lease. Con. Act, either by ejectment, or, if there be an outstanding legal estate, by an issue.

Form of the order directing an issue.

*Semble*—The Court has no jurisdiction, on a petition under the Act, to issue a commission to ascertain the boundaries.—*Ireland v. Wilson*, 1 I. C. R. 623. (R.)

8. After decree in a partition suit, and before the return of the writ of partition and commission of perambulation, one of the commissioners, and A., one of the defts. who was entitled to a part of the lands, died. The cause having been revived by suggestion, and the Master having approved of a new commissioner, the Court, on motion, directed a renewal of the writ and commission, and directed the part allotted by the decree to A. to be allotted to his widow and children, pursuant to his will, as stated in the suggestion.—*Valentine v. Middleton*, 2 I. C. R. 93. (R.)

9. In partition suits, the costs of issuing and executing the commission and the final decree and hearing, should be borne by the parties in proportion to their respective interests.

The several parties respectively abide their own costs of all subsequent proceedings.

The costs of mutual deeds of partition, and of having them settled by the Master, are subsequent costs, and are to be borne by the parties respectively.

The fact of one of the parties being a minor does not vary the rule.

The ptf. will not be allowed the costs of a deed of disclaimer by the trustees of a deft., who, though necessary, had not been made parties to the suit; nor the costs of a case to counsel advising such deed.—*Balfe v. Redington*, 2 I. C. R. 324. (R.)

10. A cause petition was presented for the partition of a house and lands, the respondent not having appeared, an order was made for



partition, in the proportion of five-eighths to the petitioner, and three-eighths to the respondent; and to "divide" into two equal parts the dwelling-house, offices, kitchen garden, lawn, orchard and plantations;" and one part thereof to allot to the petitioner, and the other part to the respondent. The two commissioners agreed upon leaving the house quarter (including the dwelling-house, offices, kitchen garden, lawn, orchards, and plantations), equal to two-eighths of the entire, and divided the rest of the lands into six equal parts. The commissioner for the respondent insisted upon having the entire of the house quarter included in the respondent's share, but the commissioner for the petitioner insisted on having the house division, offices, kitchen garden, orchard, and plantation divided, pursuant to the order. He, in presence of the other commissioner and of the respondent, cast lots upon them and upon the other six lots; allotted them accordingly; and made a return exactly in the terms of the order of partition, which the other commissioner refused to sign. *Held*, upon a motion for an attachment against the latter commissioner for disobeying the order of the Court, that the motion should stand over, in order that the respondent should have liberty to apply for a re-hearing of the petition in Chancery, as the commissioners ought to have had power to allot the entire house to one, and a compensation in land to the other.—*Foster v. Higgins*, 6 I. Jur. 409. (R.)

#### XXIV. COMMISSION OF REBELLION.

1. *Semble*—If deft. has been arrested under a commission of rebellion, ptf. may, by entering the proper rule, compel him, in a fit case, to give security to abide the decree.—*O'Dell v. Curreen*, 1 Jones, 48. (E.E.)

2. The police must assist commissioners of rebellion in executing that writ. If they, when called on, refuse to do so, they may be attached for contempt of Court.

*Semble*—G. R. 6, for the guidance of the police, applies only to a voluntary interference by the police in the execution of a writ, decree, or civil order.—*Knox v. Gavan*, 1 Jones, 190. (E.E.)

3. The deft. being in attendance on the Court of Q. Sessions, pursuant to his recognizance to prosecute, was arrested under a commission of rebellion for not answering the ptf.'s bill. The Court discharged him from custody.—*Graves v. M'Carthy*, 2 Jon. 626. (E.E.)

#### XXV. COMMISSION OF REVIEW. See PLEADING, BILL OF REVIEW—PRACTICE, BILL OF REVIEW.

4. A commission of review, after the judgment of a Court of Delegates, should issue only when there is some doubtful and important question of law, or when there has been some clear mistake in fact, or some gross miscarriage. The circumstances that the Delegates admitted proofs refused by the Prerogative

Court, and which materially altered the case, though the new evidence removed the weight of that by which the Prerogative judge was much influenced, and would (as alleged) have altered his decision; and that the Delegates doubted, and were divided; and the Judge whose opinion turned the scale had changed it unexpectedly at the last moment; are no grounds for such a commission, especially when the opinion of the Chancellor inclines to that of the majority of the Delegates.—*Von Stentz v. Comyn*, 12 I. E. R. 622. (C.)

COMMISSIONERS TO ADMINISTER OATHS. See 30 & 31 Vic., c. 44, ss. 74–83.

XXVI. COMMITMENT. [See G. O. (1867), 63, 65, 127, 128, 129.]

CONDUCT OF SUIT. See PRACTICE, CAUSE, CONDUCT OF.

XXVII. CONSENT IN COURT. See ACQUISITION—BARRISTER—HUSBAND AND WIFE, III—PRACTICE, DECREE.

[General Order, 1848.]

5. When the object of a consent is to appoint a receiver over outstanding personal estate, the amount of the salary to be allowed should be fixed by the consent.—*Burke v. B.*, Flan. & K. 89. (R.)

6. A consent, which recites as facts, matters of legal inference, without showing the grounds for it, will not be made a rule of Court when the correctness of the inference is material.

A consent, signed by all the parties, respecting acts to be done by a receiver, will be made a rule of Court; but the receiver will thenceforth be considered only as the parties' private agent.—*Gunning v. Ryan*, 2 I. E. R. 140. (R.)

7. A consent, the object of which is the allowance of a sum of money, paid by a receiver on account of costs, will not be made a rule of Court, unless signed by the parties themselves, as well as by their attorneys.—*Coleman v. Mason*, 2 I. E. R. 322. (E.E.)

8. When a consent is in the nature of an allocating order, there must be an affidavit that it has been signed by all the creditors who have proved in the cause.—*Cooke v. Briscoe*, Flan. & K. 39; 3 I. E. R. 28. (R.)

9. A consent that one-fourth of £500, to which a married woman was entitled, be paid to her and to her husband, was made a rule of Court, without her being examined to waive her equity.—*Loughrey v. Lahiffe*, 3 I. E. R. 511. (E.E.)

10. A consent that a receiver may be appointed, and that he may not be obliged to

account before the Master, will not be made a rule of Court.—*Richey v. Gleason*, Fla. & K. 99. (R.)

1. The names of all the parties to the cause ought to be set out in the title of a consent, which it is sought to make a rule of Court.—*Scott v. Miller*, 6 I. E. R. 219. (E.E.)

2. A consent to dismiss the bill without costs was signed by one ptf. on behalf of himself and of another ptf., who was of imbecile understanding, and also by the third ptf.; but not by or with the privity of their solicitor. It was also signed by the defts. and by their solicitors. On a motion to make the consent a rule of Court—*Held*, that the signature of the solicitor was not essential to the validity of the consent, as the clients might compromise their claims without his assistance or privity; not however prejudicing any rights which the solicitor might have.

That the signature on behalf of the imbecile ptf. was a nullity, as he was not competent to authorise the act; and that the consent could not be made a rule of Court.—*Brangan v. Gorges*, 7 I. E. R. 221. (R.)

3. A consent will not be made a rule of Court unless written on paper, bookwise, and with proper margins for binding up.—*Anonymous*, 8 I. E. R. 109. (R.)

4. In a cause in which a minor is concerned, it is irregular and improper for the parties or their solicitors to enter into any consent, without disclosing, on the face of it, the fact that one of the parties is a minor. A side-bar rule entered on such a consent, when that fact did not appear—*Held*, irregular.—*Gatchell v. G.*, 8 I. E. R. 391. (E.E.)

5. Application to make a consent a rule of Court, the object being that the officer should enquire into the rights of the parties, and as to the costs, the cause not having been heard, refused.—*Lecky v. Bell*, 8 I. E. R. 506. (E.E.)

6. Consent to pay money to an attorney in the cause must be signed by the clients.—*O'Carney v. O'C.*, 8 I. E. R. 506. (E.E.)

7. The Court will not make a consent a rule of Court, unless the names of all the parties in the suit are stated in the consent.—*Minchin v. Walpole*, 9 I. E. R. 139. (R.)

8. The Court will not, on the application of the client, set aside an order made on a consent signed by his solicitor, on the allegation that he acted without authority; there being no fraud or misrepresentation.—*Connatty v. O'Reilly*, 11 I. E. R. 333. (R.)

9. When the parties before decree entered into a consent to take accounts, which was made a rule of Court, and a Master's report obtained on it, upon which the cause was set down—*Held*, the cause could not be heard.—*Hodnett v. Going*, 11 I. E. R. 421. (C.)

10. A submission to arbitration made a rule of Court by consent in a cause is within the 10 W. 3, c. 14 (*Ir.*).—[*Garde v. G.*, 4 Law Rec. N. S. 115, followed. *Dennis v. Deane*, 8 Law Rec. N. S. doubted.]—*Goggin v. Downing*, 13 I. E. R. 60. (R.)

11. A party entered into a consent, the terms of which were extremely disadvantageous to himself, and stated on affidavit that he laboured under a misapprehension of the terms of such consent when he entered into it. The Court referred it to a Commissioner in Chamber to ascertain his rights, and award such compensation as he might be entitled to, declaring that none of the parties should be bound by the consent entered into.—*In re Wilton*, 3 I. Jur. 208. (I.E.C.)

12. When one party to a cause is a lunatic, the application to make a consent to admit documents a rule of Court ought to be made to the Lord Chancellor, even though the cause is in the Rolls list.—*Litton v. Power*, 7 I. C. R. 64. (C.)

CONSOLIDATING CAUSES. See PRACTICE, CAUSE ADJOURNING, &c.

#### XXVIII. CONTEMPT. Respecting Costs of. See PRACTICE, COSTS.

1. *General Orders respecting Contempt: Contempt generally.*
2. *What constitutes it: Process and Committal for.*
8. *Its Effect.*
4. *Discharge from: Effect of Discharge.*  
[See 5 & 6 W. 4, c. 16.]

XXVIII. 1. *General Orders respecting Contempt: Contempt generally.*

XXVIII. 2. *What constitutes Contempt: Process and Committal for.*

[See 1 W. 4, c. 36; 2 & 3 W. 4, c. 33, s. 3; 5 & 6 W. 4, c. 16.]

13. A counsel engaged for the deft. published in a newspaper what purported to be a report of the proceedings in this Court. The report was in many respects exaggerated, incorrect, and injurious, containing unjustifiable imputations upon the plaintiff. A motion having been made for an attachment against him for a contempt of Court—*Held*, that though the publication might be libellous, yet the Court, not being satisfied that it was calculated to obstruct the free course of justice, ought not to commit him for contempt.

The several classes of cases in which Courts of Justice have power to commit for contempts, fully considered. In all the cases in which Courts have committed for constructive contempts (except *Cann v. Cann*) the publication was either calculated to produce false evidence or attributed perjury to the witnesses pending the suit.

Whatever may be the privilege of counsel, addressing a Court or jury, to comment upon

the character of parties or witnesses, such privilege does not justify him in publishing the speech, if it contains defamatory matter.—*Birch v. Walsh*, 10 I. E. R. 93. (R.)

1. The conditional order for the appointment of a receiver in Chancery renders every party to the cause or matter, who interferes with the rents payable to the receiver, guilty of a contempt.—*Delacherois v. —*, 2 I. Jur. 89. (C.)

### XXXVIII. 3. Effect of Contempt.

2. The affidavit of a party against whom process of sequestration has issued, will not be heard as cause against a conditional order obtained in the cause, such affidavit not stating any irregularity in the proceedings.—*Creed v. C.*, Longf. & T. 581. (E.E.)

3. A defendant in contempt to a sequestration cannot show cause by affidavit against making a conditional order for a receiver on process absolute.—*Creed v. Moore*, 4 I. E. R. 684. (E.E.)

4. When a defendant has been served out of the jurisdiction with subpoena to appear and answer, and does not appear, process entered against him without the order of the Court is irregular, and will not be allowed to stand.—*Persse v. Bayley*, 5 I. E. R. 586. (E. E.)

5. A party who is in contempt for disobedience of an order of Court, can be heard only to show irregularity in the order.—*Mad-den v. Woods*, 7 I. E. R. 637. (R.)

6. Decree *pro confesso* against a defendant, although the plaintiff was in contempt when the cause was set down, the costs having been paid before the decree was pronounced.—*Casey v. C.*, 11 I. E. R. 327. (R.)

### XXVIII. 4. Discharge from Contempt.

7. A deft., arrested under process of contempt for want of an appearance, will not be discharged from custody until he puts in his answer.

*Semble*—If a deft. has been arrested under a commission of rebellion, ptf. may, by entering the proper rule, compel him, in a fit case, to give security to abide the decree.—*O'Dell v. Curren*, 1 Jones, 48. (E.E.)

8. In a tithe suit, a deft., who had been attached for want of an answer, applied to be discharged from custody. Ptf. did not insist on his answering. *Held*, that deft. was entitled to be discharged on paying the debt, with such costs as he would have been liable to pay if he had been sole deft., and also the costs of the motion.

In a similar case a deft., who had incited the parishioners to oppose ptf.'s claim, was discharged on paying the debt; the costs of filing the bill; the costs of all the proceedings against him, and of the motion.—*Weldon v. M'Gee*, 1 Jones, 160. (E.E.)

9. An order was made under the 5 & 6 W. 4, c. 16, to discharge deft. from custody under an attachment for non-payment of costs. The costs were directed to be a charge on funds reported due to deft. in the cause.

The Court is bound to exercise its power to discharge a party in custody for a contempt in all cases in which the purposes of justice will not be answered by detaining him in custody.—*Joyce v. J.*, S. & Sc. 703. (R.)

10. An order was made, under the 5 & 6 W. 4, c. 16, to discharge a deft. from custody under an attachment for non-production of a deed, upon paying the costs of the attachment proceedings; deft. and his solicitor having sworn that they could not procure the deed, and that the reference to it in deft.'s answer, as being then in his possession, was made through inadvertence and mistake.—*Nugent v. N.*, S. & Sc. 704. (R.)

11. A tenant, who had been attached for non-payment of rent, was discharged from the contempt under the 5 & 6 W. 4, c. 16; but committed for the rent and costs, so as to give the Insolvent Court jurisdiction.—*Smith v. S.*, S. & Sc. 709. (R.)

12. A deft. had been eight months in prison for breaking an injunction against breaking up ancient pasture lands. An order to discharge him was made, upon his undertaking to lay down the lands again.—*Scully v. Skehane*, S. & Sc. 710. (R.)

13. A sequestration on a final decree abates with the suit. A deft. was arrested for contempt in not furnishing a rental to sequestrators. Under an attachment sued out pending abatement by the death of a sole ptf., he was discharged by the Court.

It is the practice in Ireland to grant attachments to receivers against tenants under the Court, notwithstanding a total or partial abatement of the suit.—*Brennan v. Kenny*, 2 I. C. R. 579; 4 I. Jur. 112. (R.)

14. The days mentioned in the 5 & 6 W. 4, c. 16, s. 12, Rule 2, which enacts that if a defendant, in custody for contempt, shall not have been sooner brought to the bar of the Court, the ptf. shall bring him by *habeas corpus* to the bar of the Court within thirty days of his being in custody, and if not, the Sheriff shall discharge him, are to be computed without reference to the orders of the Court as to the computation of time. The deft. was committed on the 10th of April, and brought up on the 13th of May. *Held*, that he was entitled to his discharge.—*Trustees of Lord Portarlington v. Scrope*, 2 I. C. R. 588. (R.)

XXIX. COPIES. See PRACTICE, EVIDENCE See 30 & 31 Vic., c. 44, ss. 58, 59, 60, 63, 92, 102, 120, 128, 152; G. O. (1867) 8, 9, 10, 20, 21, 22, 25-30, 33-40, 42-44, 57, 59, 60, 67, 80, 81, 170, 173-175, 177-190, 225, 260, 279.

**XXX. COSTS.** See 30 & 31 Vic., c. 44, ss. 70, 99, 100, 106, 109, 164-169: G. O. (1867), 51, 55, 90, 94, 121, 138, 149-151, 152, 173, 182, 189, 200, 204, 206, 246, 257.

- *Proof for.* See BANKRUPTCY, XIII.
- *On Petitions in Bankruptcy.* See BANKRUPTCY, XVII.
- *Revivor for.* See PRACTICE, ABATEMENT AND REVIVOR.
- *Of Attachment.* See PRACTICE, ATTACHMENT.
- *Of Appeal and Re-hearing.* See PRACTICE, APPEAL—PRACTICE, RE-HEARING—STATUTE, II—VENDOR AND PURCHASER, VIII.

1. Generally.
2. How Lost.
  - a. Generally.
  - b. By Fraud.
  - c. By Tender of Demand.
3. Apportionment of: Contribution for.
4. From what Fund Payable: in what Order.
4. a. Of Counsel.
5. Payment and Tender of: when Necessary: their Effect.
6. Security for.
7. Setting off.
8. When stayed by or on Appeal.
9. Taxation of. [12 & 13 Vic., c. 53.]
  - a. Generally.
    1. General Jurisdiction.
    2. Under Statutes.
  - b. Costs of Taxing Costs.
  - c. Effect of Taxation: of Costs not being Taxed, and of Appeal: Re-hearing and Revivor for.
  - d. When Party shall Pay Taxed Costs, or only Fixed Costs.
  - e. Whether Costs in Cause, or Extra Costs.
  - f. Allowances beyond Taxed Costs: respecting Costs, whether as between Party and Party, or Solicitor and Client.
10. In Cases of: on Suits for: by or to whom.
  - a. Abandonment of Motion, &c., after Motion to Appear, &c.
  - b. Account.
  - c. Administration Suits.
  - d. Amendment.
  - e. Appeal.
  - f. Attorney-General and Crown.
  - g. Bankrupt and Insolvent: their Assignees.
  - h. Bank of England.
  - i. Bill or Petition, Dismissal of.
  - j. Cause standing over, or struck out: Costs of the Day.
  - k. Charity.
  - l. Commissioners.
  - m. Contempt.
  - n. Creditors.
  - o. Cross Cause.
  - p. Decree for Administration of Assets.
  - q. Demurrer or Plea allowed: submitted to: overruled: ordered to stand over.
  - r. Discovery.

- s. Dower.
- t. Executors, Administrators, Trustees, Committees, &c.
- u. Exceptions Allowed or Overruled.
- v. Heir-at-Law: Next-of-kin.
- w. Husband and Wife.
- x. Incumbrancers: Mortgagors and Mortgagees: Equitable and Legal.
- x.\* Incumbered Estates Court. See PRACTICE, LANDED ESTATES COURT, LIV, a.
- y. Infant: Prochein Ami: Guardian.
- y.\* Injunction.
- z. Insufficient Answer.
- aa. Interpleader.
- aa.\* Intervenients.
- bb. Irregularity of Process.
- cc. Issue at Law.
- cc.\* Landed Estates Court. See PR. LIV, a.
- cc.\*\* Landlord and Tenant.
- cc.\*\*\* Legatees.
- dd. Lunacy.
- ee. Misconduct: Vexatious and Unnecessary Proceedings.
- ff. Parties improperly joined, or served with Notice of Motion, &c.
- ff.\* Partition.
- ff.\*\* Partnership.
- gg. Pauper.
- hh. Perpetuating Testimony: Commission to Examine.
- hh.\* Probate.
- ii. Proof of Debts before Master.
- ii.\* Railway Company.
- jj. Receiver.
- kk. Review.
- ll. Separate Costs.
- mm. Solicitor, personally to Pay.
- nn. Specific Performance: between Vendor and Purchaser, and other Parties generally: in Sales Judicial.
- nn.\* Trustees, see *supra*, t.
- oo. Witness.
- pp. Generally: in Cases not specified above.

Taxation of Costs in the House of Lords; 12 & 13, Vic., c. 78.

Taxation of Costs in the House of Commons; 10 & 11, Vic. c. 69.

### XXX. 1. Costs generally.

1. When the costs of making or appearing on a motion are ordered to either party, and the order names the amount, if the solicitor of the party entitled thereto produces his bill to the Registrar, and objects that that sum is inadequate, the bill is then laid before the M. R. If he deems the sum inadequate, the order is amended by expunging the specific sum and leaving the order one for costs generally

or, perhaps, in a clear case, by increasing the sum specified.—*Walker v. W.*, 1 I. E. R. 149. (R.)

1. Costs of proceedings for an injunction in the nature of a writ of estrepement, and which do not pray an account or answer, are seldom, if ever, given to the landlord.—*Chatterton v. White*, 1 I. E. R. 200. (R.)

2. As a general rule, in Courts of Equity, the costs follow the result.—*Burgh v. Kenny*, 1 I. E. R. 264. (E.E.)

3. Ptf., having charged that B., named a deft., was out of the jurisdiction, omitted to pray process against him on his coming within the jurisdiction. *Held*, that ptf. was, nevertheless, entitled to the costs of a supplemental suit instituted to compel him to join as a conveying party in the deed to the purchaser under the decree.—*Oldham v. Wilkins*, 1 Dr. & War. 717. (C.)

4. When transactions between principal and agent are in their inception impeachable from the existence of that relation, but afterwards receive validity by confirmatory acts of the principal, whose bill to impeach those transactions is dismissed on those grounds, the defendant (the agent) is not entitled to the costs of his defence.—*De Montmorency v. Devereux*, 2 Dr. & Wal. 410. (H.L.)—[See 7 Cl. & Fin. 188.]

5. The costs incurred by a ptf. in litigating and reducing considerably the demand of a creditor, whose demand is prior to that of the ptf., are not costs which the ptf. is entitled to be paid in preference to the demand of such creditor, who, at the final hearing, had a decree for payment of his demand and costs.—*Jauge v. Jackson*, Fl. & K. 45. (R.)

6. When the deft. has a good defence on the merits, but does not put his case forward distinctly by his answer, the ptf.'s bill will be dismissed, but without costs.—*Steele v. Mitchell*, 2 Dr. & Wal. 568; 3 I. E. R. 1. (C.)

7. In consequence of a controversy between the receiver and tenants under the Court, the latter came in and took a reference upon the subject at their own expense. After the proceedings had gone to a great length, it appearing that the Master would report in favour of the tenants, the parties in the cause, by consent, discharged the receiver, to prevent the report from being made up. The Court ordered the ptf. and deft. to pay the tenants all their costs of coming into Court, and of the reference, &c. Afterwards, a consent was entered into, and made a rule of Court, whereby the tenants waived the costs so ordered, upon the terms that the Master should be at liberty to continue the reference, notwithstanding the discharge of the receiver; and that the question of costs should abide the coming in of the report. Before the proceedings under the reference could be renewed, the suit abated by the death of the ptf., and

the parties refused to revive the cause. There was an application that the person entitled under the ptf.'s will to his interest in the cause, in respect of a valuable chattel real, the subject of the suit, and the deft., or either of them, should pay the tenants the costs formerly ordered, and those since incurred. *Held*, that the Court had not jurisdiction to make any order in the case.—*Hutchins v. H.*, 3 I. E. R. 217 (R.); and see note to this case, *ibid*.

8. The ptf. had a decree for a sale, &c., but were thereby ordered to pay the costs of W., who had disclaimed, and as to whom the bill was dismissed. Shortly after the decree, W. died before his costs had been taxed or furnished. The ptf. continued to proceed in the cause as if no abatement had taken place, and in two years after W.'s death obtained, out of the produce of a sale under the decree, the full amount of their demand and costs. Subsequently, W.'s administrator proceeded to have W.'s costs taxed, and the ptf.'s solicitor attended upon the taxation, but protested against the proceeding, as W. had died before taxation, and the suit had not been revived by or against his administrator. The Master, however, taxed the costs, and (after allowing the ptf. time to raise their objection by application to the Court, which they declined to make, but still insisted upon their objection) certified that he had done so in the presence of the ptf.'s solicitor, &c. Thereupon W.'s administrator issued and served upon the ptf. a subpoena for the costs. The ptf. moved to set aside the subpoena for irregularity. *Held*, that the motion should be refused; and that it would have been refused with costs but for *Averall v. Wade* (1 Moll. 571, n.), which, it was declared, ought not to bind this Court.

*Semble*—The more proper course for W.'s administrator would have been, instead of issuing a subpoena, to have applied to the Court, after the taxation, for an order upon the ptf. to pay.

*Quere*—As to the case of *Jupp v. Geering*, 5 Madd. 325?—*Barry v. Stawell*, 3 I. E. R. 18; Fl. & K. 1. (R.)

9. If, after decree, one of several defts. dies, and the cause remains in operation between the ptf. and the other defts., the right to the costs decreed to him is not affected by that deft.'s death before taxation.—*Barry v. Stawell*, 3 I. E. R. 146. (C.)

10. Defts. who, by persisting in an unfounded claim, have caused the suit to be proceeded with, may be decreed to pay the costs of their co-defts. and of ptf., so far as the suit was properly instituted.—*Glynn v. Locke*, 5 I. E. R. 61; 3 Dr. & War. 11; 2 Con. & L. 21. (C.)

11. When the case turns upon a dry question of law, the ptf. must, if it be decided against him, pay the costs.—*Ferguson v. Lomax*, 3 Dr. & War. 238. (C.)

12. When, at the time of a motion, no order is made regarding the costs of it, they follow the costs in the cause, especially in the case

of injunction bills.—*Bourne v. Farran*, 6 I. E. R. 659. (E.E.)

1. Costs of re-docketing a recent judgment not allowed in a petition matter.—*Macken v. Neocomen*, 7 I. E. R. 114; 2 Jon. & L. 17. (C.)

2. The costs of raising a family charge should be borne by the estate; but costs occasioned by dealings with the charge should be borne by the charge, not by the estate.—*Stewart v. Marquis of Donegal*, 8 I. E. R. 621; 2 Jon. & L. 636. (C.)

3. Costs given against a party who, by his want of caution in settling an estate, without giving notice that it was subject to a prior demand, necessitated a suit by the prior incumbrancer to establish his rights.—*Wise v. W.*, 2 Jon. & L. 403. (C.)

4. In a suit between claimants under a will, and an inconsistent deed executed by the testator, the costs are not paid out of the assets, on the ground that the testator created the difficulty, but are subject to the ordinary rule in adverse suits.

Costs given against a trustee under a trust deed, which was held revoked, when he had also a beneficial interest, and insisted that the deed was valid.—*Irwin v. Rogers*, 12 I. E. R. 159. (C.)

5. Costs in Equity are in the nature of a debt and not of damages.—*Archbishop of Dublin v. Lord Trimbleton*, 1 I. Jur. 49. (R.)

6. A deft. was arrested under an attachment for costs of an answer which was prolix and impertinent. The ptf. permitted him to be discharged without payment of the costs. *Held*, that the ptf. did not thereby lose his right to the costs.—*Swift v. S.*, 2 I. Jur. 65. (R.)

7. Costs of the cause do not include costs incurred before the filing of the bill—necessity for special direction.—*Cantwell v. Martin*, 2 I. Jur. 293. (C.)

8. In a motion for liberty to proceed at law, the Master of the Rolls refused to name a sum for the costs of the motion, in order to obviate the necessity of a second application.—*Ex parte Colthurst; re Barretts Minors*, 4 I. Jur. 90. (R.)

9. When an administrator has recovered a chattel interest in lands by a decree declaring his costs to be duly charged on the estate, his solicitor cannot file a petition in his own name to realise his own portion of those costs.—*In re McAlister's Estate*, 16 I. C. R. 134. (L.E.C.)

### XXX. 2. How Costs are Lost.

- a. Generally.
- b. By Fraud.
- c. By tender of Demand.

#### XXX. 2. a. How Costs are Lost generally.

10. The Court of Ch. in Ir. pronounced against P. a decree, with costs. P. paid them

to the solicitor of the opposite party. He, with his client's assent, applied the amount in paying costs due by the client to himself, and in paying the costs of an appeal which P. took to the H. L. against the decree. The H. L. reversed the decree, with costs. Thereupon P. applied for an order directing the repayment of those costs. The H. L. refused to make such an order, and left P. to apply to the Court below on the judgment now pronounced.—*Clark v. Smith*, 9 Cl. & F. 126.

[P. applied to the Court below for an order directing the solicitor to repay him the amount. *Held*, that the motion should be refused.—*Smith v. Clarke*, 5 I. E. R. 423; 3 Dr. & War. 422. (C.)]

11. When an order is moved for which might and ought to have been procured to be made as part of another order previously obtained, the applicant will not get his costs of the second motion, though successful.—*Darley v. Nicholson*, 2 Dr. & War. 86; 1 Con. & L. 207. (C.)

12. Any documents, which could be used at Law as admissions to prove an agreement pleaded, may be used in Equity for the same purpose, though not noticed in the bill; but, subject to enquiry, if deft. be taken by surprise. Such a method of proof may, however, affect the costs.—*Crosbie v. Thompson*, 11 I. E. R. 404. (C.)

13. Neither the costs of a petition to charge a fund in Court, nor of a cross motion to draw money out of Court which has been so charged under the 3 & 4 Vic., c. 105, s. 23, will be granted when the respondent does not appear.—*King v. Brownrigg*, 1 I. Jur. 81. (R.)

14. A decree directed that ptfs. resident in England should pay a deft. her costs. Before exemplifying this decree in England the deft. served a subpoena upon the ptfs. in England. *Held*, that she was not entitled to the costs, the service being unnecessary.—*Stamer v. Nesbitt*, 1 I. Jur. 298. (C.)

15. When upon consent an order had been made in Jan. 1846 staying further proceedings in a cause (in which there were two ptfs., a trustee, and c. q. t.), and directing that the costs of the ptfs. should be taxed and ascertained, the defts. undertaking to pay such costs; and those costs were not taxed until subsequently to the death of the principal ptf. (the c. q. t.), which occurred in Dec. 1848; a motion to compel the defts. to pay the costs so taxed was refused with costs, although the solicitor of the ptfs. offered an undertaking to procure for the defts., from the personal representative of the deceased ptf., a receipt for the taxed costs of the cause.—*Upton v. McGarry*, 13 I. E. R. 164. (C.)

16. A cause petition, properly falling within the Ch. Reg. Act, s. 15, was set down and heard as an ordinary cause petition. The Court refused at the final hearing (not having

been called on before to do so) to make any order as to the extra costs occasioned by the petitioner not having availed himself of the provisions of that section; the question not having been raised at the original hearing of the petition.

Form of decree, made, when pending the proceedings in this Court, an order for sale of the lands of the respondent was made in the I. E. Court.—*Eyre v. Little*, 4 I. C. R. 604; 1 I. Jur. N. S. 6. (C.)

1. The 8th G. O. of May 1857 directs that the facts deposed to in an affidavit, which are within the deponent's knowledge, shall be distinguished from those stated on belief founded on the information of others. *Semble*—That the costs of only so much of an affidavit as violates this G. O. are to be disallowed on taxation.—*Crawford v. Pilson*, 8 I. Jur. N. S. 4. (R.)

#### XXX. 2. b. By Fraud.

2. When a transaction, suspicious in its commencement, can be sustained only by subsequent confirmatory acts, the party so sustaining it must pay his own costs of investigating the circumstances.—*De Montmorency v. Devereux*, 2 Dr. & Wal. 410; 7 Cl. & F. 188. (H.L.)—[*Affg.* 1 Dr. & Wal. 119. (C.)]

3. R., occupier of premises, agreed to give them up to a company for a sum, but subsequently refused, stating that another person also had an interest in them. The company lodged the money in Court to his separate credit. Upon petition by R.; *Held*, that the lodgment was an admission by the company of his title, and that he was entitled to be paid without a reference; that the company, having made an insufficient tender, was not entitled to costs; nor was R. entitled, his proceedings being *mala fide*.—*In re Ir. S. East. R. Co.*, 1 I. Jur. 155. (E.E.)

#### XXX. 2. c. By tender of Demand.

#### XXX. 3. Apportionment of, and Contribution for Costs.

4. Upon distribution of funds in a creditor's suit, there not being any specific incumbrancer, the several debts and creditors were directed to pay ptf. their proportions of the difference of the costs between party and party, and attorney and client, in proportion to their demands, although neither the bill prayed, nor did the decree direct that they should so contribute.—*Bracken v. Drought*, 2 Jones, 114. (E.E.)

5. A specific incumbrancer filed a bill for a sale. *Held*, that judgment creditors, proving under a decree to take an account of prior incumbrances, were not bound to contribute to the payment of the plaintiff's costs, though their demands exhausted the funds, and left nothing for the plaintiff.—*The Marquis of Downshire v. Tyrrell*, 2 Jones, 804. (E.E.)

6. Pending a reference under an order whereby, *inter alia*, the Master was directed to report the costs of the reference, and of the order to pay out the funds, the Master transferred the carriage of the decree, &c., from C. to W., another creditor, and reported that the costs of the reference would be payable to W., then having the carriage of the decree. *Held*, that C. was entitled to so much of the costs of the reference as had been incurred before that transfer.—*Kelly v. K.*, 1 I. E. R. 317. (R.)

7. Costs of a partition suit must be borne by the parties according to the interests allotted to them respectively.—*M<sup>rs</sup> Bride v. Malcolmson*, 2 Dr. & Wal. 700. (C.)

8. Several children appeared, and proceeded jointly, by the same solicitor, for a sum to which they were entitled in equal shares. Having incurred costs to a considerable amount, two of the children died. There being a continuing litigation as to the persons entitled to their shares, the solicitor in the meantime allowed the surviving children to draw out their shares of the fund, without any deduction for the costs for which they were jointly and severally liable. He now applied for payment out of the sum in Court (which constituted the shares of the two deceased children) of the entire amount of the costs. *Held*, that that sum was liable, in the first instance, for that proportion only of the costs which they should have paid, if the others had contributed equally; and that it was the duty of the solicitor to have taken care that the costs should be borne equally by the several younger children.—*Crone v. O'Dell*, 3 I. E. R. 12. (R.)

9. A creditor, who has been stayed from proceeding in his suit, and compelled to come in under the decree in another suit, will not be ordered to contribute to the costs of ptf. in that suit, as between attorney and client. The rule only applies to persons coming in voluntarily under the decree.—*O'Brien v. FitzGerald*, 3 I. E. R. 159. (E.E.)

10. One of several *c. q. trusts* of a fund charged upon land, filed a bill against the owners of the estate; the other *c. q. trusts* and the trustees (who had refused to act); to raise its amount, and for payment thereof to the persons entitled. *Held*, that the suit being for the benefit of all the *c. q. trusts*, they were bound to contribute, in proportion to their shares, to the difference between the taxed costs between party and party, and the plaintiff's costs of suit, taxed as if he were the trustee of the fund.—*Bagge v. —*, 3 I. E. R. 494. (E.E.)

11. Creditors who prove under a decree obtained in an administration suit instituted by a legatee, are not bound to contribute to the difference between ptf.'s costs between attorney and client, and party and party.—*Lynch v. Skerritt*, 3 I. E. R. 504. (E.E.)

1. A moiety of an estate was devised, subject to legacies, to A. for life; remainder to his first and other sons in tail. *Held*, that the tenant for life, tenant in tail, and legatees, must bear their own costs of a partition suit; and that the tenant for life had no equity to call on the tenant in tail to contribute to the costs of the suit.—*Greer v. Mercer*, 4 I. E. R. 705. (E.E.)

2. In a suit to recover tithe composition, ptf. obtained a decree, with costs, and levied all the costs off one deft. *Held*, that that deft. was entitled to contribution from his co-defts., and that payment of that contribution would be compelled by summary order.

*Semble*—One co-deft. having died after taxation, the others were not bound to contribute in greater proportion than if he were living.—*Staples v. Smith*, 6 I. E. R. 211. (E.E.)

3. The plaintiff and others having joined in a plan for making a proposed railway, meetings were held. The names of the plaintiff and defendants, in all twenty-five, were printed in a prospectus as provisional directors, and published in different newspapers. There was not sufficient evidence to fix the remainder of the twenty-five with having acted as directors; but there was sufficient to establish the acting of the plaintiff and seven defendants. The plaintiff took no shares in the proposed company, and the defendants only a few. At one of the meetings, where the parties attended, V. was appointed engineer. The proposed plan was afterwards abandoned, and V. brought an action for his bill against the plaintiff in England (he being the only one of the directors residing there), of which the plaintiff gave the defendants notice. V. recovered, and the plaintiff paid. *Held*, that the plaintiff was entitled to contribution to V.'s bill and the costs of the action, against the defendants; and that the rate of contribution should be regulated by the number of those who had acted as directors, so as to render themselves liable to V.; and not by the number of those named as provisional directors, or by the number of the shares.

That the project having been abandoned, the bill was properly filed for contribution, and not for winding up the affairs of the company, as if it had been a partnership.

M. had been one of the twenty-five named as directors, but had taken an indemnity from the solicitors of the proposed company. The plaintiff called him as a witness on the trial of B.'s action; and his evidence having been objected to, gave him a release from all liability. By means of his evidence V.'s demand was considerably reduced. The bill sought to have M.'s share also borne ratably by the plaintiff and defendants. *Held*, that the release to M. did not discharge the other parties from their liability to contribute.

That the plaintiff would not be entitled to contribution to the loss of M.'s share, unless the examination of M. as a witness was necessary. An enquiry was directed on this point.

Principle of contribution in equity.

Distribution of costs in such a suit.—*Lefroy v. Gore*, 7 I. E. R. 228; 1 Jon. & L. 571. (C.)

4. Upon the distribution of the funds, the produce of real estate, in a suit instituted by a simple contract creditor, on behalf of himself and other creditors who should come in and contribute to the expenses of the suit, the fund being a sufficient one, the plaintiff is not entitled to make judgment creditors contribute (in proportion to their demands) to his costs between solicitor and client.—*Newby v. Drew*, 10 I. E. R. 58. (R.)

5. A decree declared that the defts. A. and B. should pay to the ptf. his costs of the cause when taxed and ascertained. *Held*, that the effect was not necessarily to establish contribution in moieties between the parties.

A decree against two, for payment of costs, is joint and several. The registration of such decree under the 3 & 4 Vic., c. 105, s. 27, does not alter its effect.—*Archbishop of Dublin v. Lord Trimleston*, 1 I. Jur. 49. (R.)

6. A decree against several, for payment of costs, is joint and several; and a receiver may be appointed over the lands of one of them, under the 3 & 4 Vic., c. 105, without making the others parties to the petition.

The costs given by a joint and several decree for payment of costs are in the nature of a debt. Therefore there must be contribution between the parties liable.—*Archbishop of Dublin v. Trimleston*, 13 I. E. R. 98. (R.)

7. The Court of Ch. will not expunge from an order of the Rolls recitals which reflect on the character of a party, unless there has been some miscarriage in the proceedings, or some injustice done. An appeal motion for this purpose dismissed with costs.

In a suit for tithe rentcharge several defts. were struck out of the bill, by side-bar rule, on payment of their proportion, and the costs of subpoena and appearance. The bill was set down against the other eight defts., who entered into a consent to pay whatever costs were taxed against them. They paid £26 on account. The general costs of the suit were taxed against them to £36. 2s. 0½d. A motion was made to the Rolls in Jan. 1854, and an order obtained directing the Taxing Master to review his taxation, and report what amount of costs would be properly charged against these eight remaining defts., if the other sixty-three defts. had been charged with the proportion of the costs of the suit to which they would have been liable under the 1 & 2 Vic., c. 109, s. 28. A report was made. In pursuance of it, his Honor directed the ptf.'s solicitor to refund to the eight defts. £17. 6s. 8d. out of the £26 paid by them for costs, and that the ptf. should pay to these eight defts. the costs of the motion of Jan. 1854, and the proceedings thereunder. *Held*, on appeal, against the payment of costs directed by the order, that this order should be affirmed, and the appeal dismissed with costs.—*Chaine v. Dungannon*, 7 I. Jur. 89. (C.)—[Rolls motion reported, 6 I. Jur. 174. (R.)]



1. The Lord Chancellor having ordered all the respondents in a cause petition matter to pay the petitioners their costs when taxed; and that all parties should be at liberty to apply to the Court as they should be advised; and the entire amount of these costs having been paid by two of the respondents; the M. R. ordered a reference to ascertain what amount a third respondent should contribute as and for his share of the costs so paid.—*M'Cauley v. Wynne*, 2 I. Jur. N. S. 193. (R.)

2. An order was made in a partition suit, in Dec. 1856, to bind persons, not parties, under the 32nd G. Order of 1851. The order was not entered in the final decree, which directed that the parties should respectively bear their own costs, up to and including the first hearing of the cause in June 1856; and that they should respectively bear and pay the costs of issuing, executing, and confirming the commission, including the costs of the final hearing, rateably, and in proportion to the value of the estates allotted to them. *Held*, that the petitioners were not entitled to a rateable proportion of the costs of the order of Dec. 1856.—*O'Gorman v. Pratt*, 9 I. C. R. 343. (R.)

**XXX. 4. From what Fund Costs are payable: in what order.**

3. After an order to pay out a deficient fund to the parties as reported, ptf. was obliged to take further proceedings in the cause. The order did not provide for the costs thereof. No application was made until all the creditors, except one, had drawn out the sums allocated to them respectively. *Held*, that ptf. was entitled to be paid out of the remaining share the costs necessarily incurred in those further proceedings.—*Birch v. Alt*, 1 I. E. R. 228. (R.)

4. A ptf. abandoned a cause in which he had obtained a decree to account. Without any restraining order having been served upon him, he came in, and proved his debt in another cause. *Held*, that a deft. (a creditor whose demand was pious to ptf.'s), in the abandoned cause, was not entitled to have the costs incurred by him in the abandoned cause paid out of ptf.'s portion of the fund brought into Court in the other cause.

*Semle*—Deft. should have applied for carriage of the decree in the abandoned cause, and had his costs added to his demand.—*Downshire v. Tyrrell*, 2 I. E. R. 66. (E.E.)

5. A supplemental bill was filed merely to bring before the Court a tenant in tail who had come into being since the decree in the original cause was pronounced. All the defts. in that cause appeared at the hearing of the supplemental suit. *Held*, that since they appeared in consequence of a notice served by ptf., they were entitled as against him to their costs of the hearing; but that ptf. should not have them over.—*Wallace v. Blake*, 1 Dr. & Wal. 378. (C.)

6. Incumbrancers on a life estate, who are

necessary parties to a suit to sell the inheritance to pay charges prior to that life estate, are only entitled to their costs against that life estate, and not against the ptf's generally.—*Ennis v. Brady*, 1 Dr. & Wal. 720. (C.)

7. Several children appeared and proceeded jointly by the same solicitor for a sum to which they were entitled in equal shares, and incurred costs to a considerable amount. Two of the children died. There being a continuing litigation as to the persons entitled to their shares, the solicitor in the meantime allowed the surviving children to draw out their shares of the fund without any deduction for the costs for which they were jointly and severally liable; and now applied for payment, out of the sum in bank (which constituted the shares of the two deceased children), of the entire amount of the costs. *Held*, that this sum was liable, in the first instance, for that proportion only of the costs which they should have paid if the others had contributed equally; and that it was the duty of the solicitor to have taken care that the costs should be borne equally by the several younger children.—*Crone v. O'Dell*, 3 I. E. R. 12. (R.)

8. The final decree directed a sale for payment of demands and costs, according to priority; and as to the deft. B. ordered, that he should have his costs out of the residue, if any. On the ptf.'s motion that B.'s solicitor should bring in the title-deeds, &c., in his hands, relating to the lands about to be sold under the decree, it appeared that B. was insolvent; that the fund would be deficient; and (it was alleged) that the costs in the cause for which the solicitor claimed a lien were incurred in proceedings by which the fund distributable under the decree had been increased to a very large extent. The solicitor was ordered to bring in the deeds, &c., but it was referred to the Master to ascertain the sum due to him for costs, and to enquire and report how far they had been incurred in proceedings by which the fund distributable had been increased. The Master reported upwards of £300 to be due to the solicitor for costs of proceedings whereby the fund distributable had been increased by upwards of £10,000. On the solicitor's motion for payment, out of the fund, of the sum reported due, and for the costs of the reference and of the motion—*Held*, that the costs in question being in the nature of salvage costs, should have been specially secured by the decree, and that the decree might be amended in that particular.

That, under such circumstances, the Court would not have been justified in taking the title deeds, &c., from the solicitor, without requiring his costs to be paid to him; and that, notwithstanding the form of the decree, and the deficiency of the fund, his motion should be granted.—*Grey v. Matthews*, 3 I. E. R. 530—[See notes, pp. 533, 534]; Fl. & K. 309. (R.)

9. The value of a settled estate being less than the sum charged thereon for younger

children's portions, the inheritor filed against the younger children a bill to sell the estate. At the final hearing he asked for his costs in priority to their demands. *Held*, that, in the absence of any agreement to that effect, he was not entitled to them.—[*Head v. Massey*, 2 Moll. 467, overruled.]—*Hughes v. Nash*, 3 I. E. R. 495. (E.E.)

1. When a suit is necessitated by any difficulty in construing a will, the costs are payable out of the estate: testator himself having created the difficulty.—*Comms. of Ch. Don. & Beq. v. Cotter*, 1 Dr. & War. 498. (C.)—[*Rev. 2 Dr. & Wal.* 615. (C.)]

2. By the settled practice, ptf. in a creditor's suit only gets costs in the same rank as his demand, except such as have been incurred for the benefit of the parties in the cause; e.g., of making out title to the estate to be sold.—*Nelson v. Brady*, 4 I. E. R. 359; 2 Dr. & War. 143; 1 Con. & L. 239. (C.)

3. When litigation is occasioned by the ambiguity of a will, the costs of all parties shall come out of testator's general personal estate.—*Lamphier v. Despard*, 1 Con. & L. 200.—[*See 4 I. E. R.* 334; 2 Dr. & War. 59. (C.)]

4. When the misapplication of the funds of a public body had gone on for a great length of time, and no imputation was cast upon the trustees, they, though removed, were allowed their costs out of the fund: this, however, not to be a precedent for cases which should be defended afterwards, and in which the same point should arise.—*Att.-Gen. v. Drummond*, 3 Dr. & War. 162; 2 Con. & L. 98. (C.)

5. The costs of parties brought before the Court as prior incumbrancers upon an estate, and of their trustees, are to be paid out of the fund in the same priority with their demands, and not by the ptf. in the first instance. When, however, the fund is deficient, the ptf. will be obliged to pay them their costs.—*Hall v. Hill*, 5 I. E. R. 11. (C.)

6. Practice as to attorneys applying to be paid their costs out of the funds decreed to their clients.—*Anon.*, 5 I. E. R. 38. (E.E.)

7. A bill was filed in this Court by the conuzee to recover the amount of a judgment. The real and personal representatives of the conuzor were made parties. *Held*, that the defts., co-heiresses-at-law of the conuzor, who, by their answer, did not claim any interest in the premises affected by the judgment, were not entitled as against the ptf. to their costs of the suit; but only against the surplus fund arising from the sale of the premises decreed to be sold.—*Rutherford v. Cottnam*, 8 I. E. R. 391. (E.E.)

8. The ptf. in a stayed suit, when liable to pay a deft. costs, is bound to pay them though no funds for the purpose have been realised.

—*Tangney v. Holmes*, 13 I. E. R. 114. (R.)—[*Affirmed: ibid.* 207. (C.)]

9. The ptf. in a stayed suit, who has paid the costs of a deft. according to the rule in *Lofie v. Forbes* (2 I. E. R. 443), is not entitled to them out of the funds in the receiver's hands, unless the estate is clearly sufficient to pay them according to their priority.

In *Lofie v. Forbes* there was a fund sufficient to pay all creditors.—*O'Keeffe v. Holmes*, 13 I. E. R. 116. (R.)

10. The costs of proving a will in the common form are always paid out of the residue, and should not be charged on a legatee.—*Nugent v. N.*, 8 I. Jur. N. S. 52. (P.)

11. Unpaid costs have the same priority as the demand in establishing which they were incurred.—*In re Hawkesworth's Estate*, 10 I. Jur. N. S. 255. (C.A.)

12. A testator's widow by will declared that she, in pursuance of all power and authority vested in her by his will, bequeathed £800, of which she was possessed, to her daughter for life, and that, at her death, £400 should be given to testatrix's grandson, the other £400 to be equally divided among her four granddaughters (naming them). *Held*, that that £800 was the proper sum to bear the costs of establishing claimants' respective claims; and that the daughter's personal representative, who unsuccessfully contended that she was entitled absolutely to that £800, was entitled to his costs out of that fund.—*Touhy v. Burke*, 10 I. Jur. N. S. 292. (C.)

#### XXX. 4. a. Costs of Employing Counsel.

13. No alteration is allowed in a bill of costs after service of the copy, without the permission of the Remembrancer, and notice to the other party.

Party allowed counsel's attendance at the signing of the draft report, when an application had been made to delay the signing thereof.—*Bourne v. Farran*, 6 I. E. R. 659. (E.E.)

14. The ptf.'s solicitor is entitled to give out briefs and fees to counsel upon the same day that he sets down the cause to be heard *pro confesso*.—*Ivie v. Gahan*, 9 I. E. R. 223. (R.)

15. When an injunction or receiver is prayed by the bill, the defts. interested in resisting the motion are entitled to the costs of two briefs on the filing of their answers. The ptf. is not entitled to the costs of briefs unless he has moved, or served a *bona fide* notice of motion; or unless some act has been done by the defts. after the briefs were *bona fide* made up, which rendered the motion or service of notice unnecessary.

The bill prayed an injunction. Upon the coming in of the answer the solicitor prepared two briefs for the injunction motion. The suit was compromised before the briefs were given out or notice of motion served. *Held*,

that the ptf. was not entitled to the costs of the briefs against the deft.—*Broadbent v. Hughes*, 10 I. E. R. 65. (R.)

1. A fee to counsel for settling a draft report, is not allowed in taxation of costs between party and party.

In allowing the costs of attested copies it is discretionary with the Taxing Master whether he will allow for the copy of the whole or a part only of a document.

Practice before the 1st G. O. of April 1847, as to fees to counsel in the Master's office.—*Clanmorris v. Mahon*, 10 I. E. R. 144. (C.)

2. Motion, by the successful party, to be allowed the costs of two counsel upon the arguments in this Court, and in the C. P.; the case having been important.

The Court allowed costs of one counsel here, and of two in the C. P.—*In re Whitsitt*, 4 I. Jur. 183. (I.E.C.)

3. The Taxing Masters do not in cause or other petitions, or on motions, allow to counsel refreshing or consultation fees; but this practice will, as to refreshing fees, be altered by a G. O. of the Court of Ch.—*Doner v. Walsh*, 5 I. Jur. 345. (C.)

4. A cause petition had been moved under the Ch. Reg. Act, s. 15, for which the solicitor charged £22 in his bill of costs. The Taxing Master struck off £1. 1s. Held, on a motion to review the taxation, that the Court had no power to alter the amount of a fee to counsel. The case was sent before the Taxing Masters to report upon.—*Murray v. Shadwell*, 6 I. Jur. 125. (R.)

5. On a motion to allocate funds, a cross notice being moved at the same time, though questions of difficulty are raised, and the motion lasts several days, no refresher fees to counsel will be allowed on taxation; nor will the Taxing Officer be directed to review his taxation, though he certify that the rule is a hardship on the parties in the particular case.—*Houston v. Barry*, 6 I. Jur. 25. (R.)

6. Refresher fees on motions will not be allowed on taxation between party and party. Order at the Rolls.—*Houston v. Barry*, 6 I. Jur. 49. (R.)

7. The costs of a third counsel for the petitioner, upon the hearing of a cause petition, disallowed, as between party and party, even under circumstances which rendered the employment of the three counsel not unreasonable.—*Collis v. Stewart*, 6 I. Jur. 51. (C.)

8. On a motion made in Feb. to draw out purchase money which had been lodged in Court by a public company, an order was made for that purpose, and several deeds referring to the title of the party applying were entered as read. Briefs of these deeds in full were allowed on taxation; and a motion in Nov. to review the taxation, and amend the order by striking out the deeds, was refused.

The counsel who was first retained for the motion having become unwell, a second brief and fee was allowed, as the Court does not approve of the practice of counsel handing over their briefs to another to move for them.—*Poor-law Commrs. v. Fitzgerald*, 7 I. Jur. 110. (R.)

9. Fees upon the briefs of the two counsel on each side, as a general rule, not to be reduced; and in all important cases a brief and fee to be allowed to a third counsel.—*Muskerry v. Putland*, 5 I. Jur. N. S. 118. (C.A.)

10. On taxation of costs only two counsel shall be allowed on a motion, except under very special circumstances.—*In re Grady*, 10 I. Jur. N. S. 49. (C.)

11. An insolvent deft.'s provisional assignee is not entitled to a fee for counsel to approve of a deed which the assignee is called upon to execute under a decree.—*Wallace v. Macan*, Fl. & K. 554. (R.)

12. Costs of appearing by counsel at the argument are not allowed to a trustee who has brought in the fund under the Trustee Relief Act, when all the beneficiaries are free from disability, and the case has been fully argued on their behalf, although the contrary practice prevails in England.—*Lockhart's Trust*; *ex parte Lockhart*, 11 I. Jur. N. S. 245. (R.)

#### XX. 5. *Payment and tender of Costs: when necessary: their Effect.*

13. A bill, filed by husband and wife, to foreclose a mortgage, the wife's separate property, was dismissed with costs. The Court refused, on petition under the 3 & 4 Vic., c. 105, to appoint a receiver over other property to which the wife was entitled for her separate use.—*Hackett v. Farrell*, 4 I. E. R. 515; Fl. & K. 549. (R.)

14. An order of the House of Lords, dismissing an appeal, was by side-bar order made a rule of Court. The Court directed the Clerk of Writs and Appearances to issue a subpoena for the costs of the appeal.—*O'Ferrall v. McCan*, 5 I. E. R. 105; Fl. & K. 635. (R.)

15. When a party, ordered to pay costs, absents himself to avoid personal demand and service of the certificate of the costs, the H. L. will order service to be substituted on his agents in the appeal.—*Carter v. Palmer*, 8 Cl. & F. 708, note.

16. When a party is served with the certificate of costs, and personal demand is made, and he does not pay them, the H. L. will, on petition by the party entitled, order the recognizances to be estreated to pay the costs, together with costs of the petition.—*Callaghan v. C.*, 8 Cl. & F., 709, note.

17. An award directed that A. should pay B. money, and that B. should pay A. half the

costs when taxed. *Held*, that a tender by A. of the balance between the sum awarded and the half of the taxed costs was not a compliance with the award. — *Watt v. W.*, 7 I. E. R. 334. (E.E.)

1. A decree directed the deft. to pay the ptf.'s costs which were afterwards received from the deft. by the ptf.'s solicitor, under a power of attorney from his clients. The deft. appealed from the decree, which was reversed. The bill was eventually dismissed, with costs. The costs paid by the deft. to the ptf.'s solicitor had been retained by him, with the consent of the ptf. to defend the appeal (the costs of which exceeded that sum); and in part payment of the costs already due. *Held*, that, though there was no actual transfer of the money, yet in point of law, the payment to the principal was complete; and that the deft. was, therefore, not entitled to an order upon the solicitor of the ptf. for the repayment of those costs. — *Smith v. Clarke*, 3 Dr. & War. 344. (C.)

2. After a demurrer was allowed under the 64th G. O. (1843), the ptf. moved for liberty to amend, and serve new subpoenas against the demurring defts. Motion refused, the costs of the demurrer being unpaid. — *Sherlock v. Disney*, 1 I. Jur. 127. (R.)

3. Bill by A. to raise a mortgage. Cross-bill by inheritor, impeaching deeds on the ground of fraud. A demurrer to the cross-bill for multifariousness was allowed, and liberty given to the ptf. to amend within a week after the costs should be taxed. A petition was presented by A. to the I. E. Court. The inheritor, on showing cause, raised the same questions as by the cross-bill, and offered to submit them to the decision of the Commissioners, who refused to entertain them; but directed that the order should not be made absolute if proceedings were taken by the inheritor. Bill by inheritor for the same purpose as the cross-bill. Order made that further proceedings should be stayed in that suit until the costs of the demurrer should be paid. — *Allman v. Crofts*, 2 I. Jur. 289. (R.)

### XXX. 6. Security for Costs.

4. In a suit against an attorney, to set aside a conveyance made as a security for untaxed costs, the Court refused to order the deed to be lodged in Court. — *Carr v. Moulds*, H. & J. 714. (E.E.)

5. The ptf. being resident out of the jurisdiction, and his bill having been reported prolix, the Court restrained him from proceeding in the cause until he paid the costs of the reference, and report of prolixity, though the deft. had neglected to compel him to give security for costs. — *La Touche v. Lawler*, 2 Jon. 629. (E.E.)

6. When, during the suit's progress, a ptf. goes abroad in order to attend to his affairs, and not with a view to abscond from his creditors,

but with the intention to return to this country, he will not be required to give security for costs.

A motion to stay a ptf.'s proceedings until he shall give security for costs should be made as early as possible; but circumstances may exist under which such a motion would never be too late. — *Home v. Thompson*, S. & Sc. 622. (R.)

7. A ptf., a non-commissioned officer residing with his regiment in India, will not be compelled to give security for costs.

A motion, that a ptf. residing abroad shall give security for costs, is an application made to the Court's discretion. — *Fisher v. Bunbury*, S. & Sc. 625. (R.)

8. Proceedings of a ptf., who had misdescribed his residence in the bill, were stayed until he gave security for costs.

Executors and administrators, like other suitors, must give security for costs.

Before serving notice of a motion to stay proceedings until ptf. gives security for costs, it is not necessary to apply to ptf.'s solicitor for security. — *Shaw v. Dempsey*, S. & Sc. 628. (R.)

9. A motion, to stay the ptf.'s proceedings until they should give security for costs, was refused with costs, because the deft.'s affidavit to support the motion misrepresented some, and suppressed other material facts.

*Quere*—Can such a motion be sustained after a decree to account has been pronounced? — *Murphy v. Archdall*, S. & Sc. 630. (R.)

10. A London stockbroker, whose name was still used in the firm there, being appointed executor of one who had contracted to grant, for a large sum, a lease of mines in Ireland, filed a bill for specific performance; and in his affidavit, to oppose a motion to stay his proceedings until he should give security for costs, stated that he had given up his residence in England, and had at some expense removed his family to Ireland, where he had taken a permanent residence. In one passage he stated his intention to reside in Ireland altogether; but in other passages that he intended to reside in Ireland until this suit, and all other affairs of his testator in Ireland should be finally arranged and settled. Motion refused, without costs. — *Pike v. Vigors*, S. & Sc. 635. (R.)

11. When a ptf. resides abroad, and it is ordered that his proceedings shall be stayed until he gives security for costs, the security of a person residing abroad, who has large real estates within the jurisdiction, will not be accepted by the Court.

Such a surety, along with a co-surety to answer for interlocutory costs, might be accepted.

Circumstances may exist under which the usual number of sureties will be dispensed with.

The proceedings of a ptf. residing abroad were ordered to be stayed until he gave security for costs. Having allowed a long time to elapse without giving security, the Court further ordered him to give security before a certain day;

and that, in default, his bill should stand dismissed with costs.—*Knight v. Lord de Blaquiere*, 1 I. E. R. 375; S. & Sc. 648 and 649. (R.)—[See *Powell v. Smith*, S. & Sc. 654. (R.)]

1. A ptf., who is a seafaring man, will not be required to give security for costs, although he is abroad, and has not any residence or property within the jurisdiction:—*Gouran v. Barnett*, S. & Sc. 651. (R.)

2. A motion that a ptf., an army surgeon, residing abroad with his regiment, should give security for costs, was refused with costs.—*Wright v. Everard*, S. & Sc. 651. (R.)

3. In a bill for dower, the proceedings of the ptf., who resided out of the jurisdiction, were stayed until she should give security for costs.

*Secus*—If the bill was a cross-bill, or a bill for an injunction to restrain proceedings at law

The ptf. was allowed the option of giving security, or of lodging the amount in Court.—*Maguire v. M.*, S. & Sc. 652. (R.)

4. A motion to stay the proceedings of a ptf., who appeared by the bill to be resident abroad, until he should give security for costs, was refused, when the month's notice to answer had been served, and the time for appearing had expired.—*Eyre v. Dwyer*, S. & Sc. 653. (R.)

5. When it appears on the face of the bill that ptf. is residing abroad, a motion to stay his proceedings until he shall give security for costs may be made without notice.—*Lord Yarborough v. Brazier*, 2 I. E. R. 463; S. & Sc. 653, *note*. (R.)

6. Proceedings stayed until ptf., residing abroad, give security for costs. He suffered a long time to elapse without giving it. The Court then ordered him to give security before a day named; in default, his bill to stand dismissed with costs.—*Powell v. Smith*, S. & Sc. 654, *note*. (R.)

7. The Court will not allow a co-ptf. to be withdrawn from the record without requiring security to be given to all the defts. for past costs.—*Sweeny v. Hall*, 1 I. E. R. 22; S. & Sc. 662. (R.)

8. A person, who had resided in England, came to Ireland to assert his title to lands here. Failing in an ejectment, he filed a bill in which he was described as A. B., late of R., in England, but now of the city of Cork. During the preceding three years, he had occasionally been in Ireland, and had stopped at a public-house in Cork, but had not as yet taken any fixed abode in Ireland. In his affidavit, made to oppose a motion to stay his proceedings until he should give security for costs, he stated that he had made Ireland his fixed domicile and residence; and intended to bring his wife from England to live with

him. The motion was refused, but without costs.—*Rushton v. Heazle*, S. & Sc. 654. (R.)

9. Ptf., residing out of the jurisdiction, and suing as executor, may be compelled to give security for costs.—*Cathcart v. Hewson*, Hayes, 173. (E.E.)

10. A., being in this country by license from the Secretary of State, filed a bill. If, pending the suit, his license expires, and he leaves the country, deft. may compel him to give security for costs. The demand sought to be established by the bill is not such a security as the Court requires.—*O'Connor v. Bernard*, 1 Jones, 175. (E.E.)

11. A co-ptf. cannot be withdrawn from the record without security for past costs being given to all the defts.—*Sweeny v. Hall*, 1 I. E. R. 22; S. & Sc. 662. (R.)

12. Application that ptf., out of the jurisdiction, an officer serving with his regiment in India, should give security for costs, refused with costs.—*Everard v. —*, 1 I. E. R. 421. (R.)

13. A ptf. residing abroad did not within a reasonable time give the security for costs, as ordered. The Court ordered him to give it before a day named; and that, in default, his bill should stand dismissed without costs.—*Hardwicke v. Warren*, 2 I. E. R. 156; S. & Sc. 645. (R.)

14. Ptf. residing abroad ordered to give security pursuant to former order, on or before the first day of next Term; in default, his bill to be dismissed with costs.—*Knight v. Wilson*, 2 I. E. R. 158. (R.)

15. A ptf. holding in Jamaica the office of stipendiary magistrate, under 3 & 4 W. 4, c. 73, is not bound to give security for costs.—*Cocking v. Alexander*, Fl. & K. 391. (R.)

16. *Semble*—Where a security for future costs is given in consideration of the solicitor prosecuting a cause, on the subject-matter of which the security is given, it is maintenance.

When a security is expressed to be given for costs generally, can it be sustained to the extent of costs which have been incurred at the date of the execution of the deed?—*Uppington v. Bullen*, 2 Dr. & War. 184; 1 Con. & L. 291. (C.)

17. A *femme couverte* and infant, as co-ptfs., by the same next friend, filed a bill in vacation. The deft. filed a demurrer within the month allowed by the rules of Court, and at the time of filing it, served a notice on the ptf. that he would apply, on the sitting of the Court, to have the proceedings stayed, unless security for costs were given, or the next friend changed. *Held*, that the defendant had not, by demurring, taken such a step as waived his right to require security for costs.

The poverty of the next friend of an infant

will be no ground for the defendant's requiring security for costs. But the poverty of a next friend of a *femme covert* is a ground for requiring security for costs to be given; and the same rule prevails when the same person is next friend both of a *femme covert* and infants who are co-ptfs.—*Drinan v. Mannix*, 5 I. E. R. 190; 3 Dr. & War. 154; 2 Con. & L. 87. (C.)

1. When the plaintiff resides out of the jurisdiction, each deft. is entitled to a separate security for costs, to be immediately available whenever costs in the cause, or of interlocutory proceedings, are awarded to him against the ptf. Even when the order is, that the ptf. give one security for the costs of all the defts., and such security is given accordingly, it is to be considered as representing a fund to be applicable, from time to time, in payment of the costs of each of the defts., according to the priority of the orders by which they were awarded.—*Eyre v. Mackay*, 6 I. E. R. 115. (R.)

2. When the ptf. comes to reside permanently within the jurisdiction, and the order is rescinded, the recognizance entered into as security for the costs of the suit will be vacated.—*Sterne v. Goodisson*, 7 I. E. R. 89. (R.)

3. A motion that the ptf., resident out of the jurisdiction, do give security for costs, must be made upon notice, and is not of course.—*Ivie v. Keogh*, 7 I. E. R. 90. (R.)

4. A motion to restrain the ptf., until he gives security for costs, must be upon notice.—*Nugent v. Hill*, 7 I. E. R. 90, *note*. (R.)

5. The beneficial owner of an old judgment, to avoid liability to costs in a suit to be instituted to raise its amount, procured it to be assigned to a pauper, and filed a bill in his name. *Held*, that the proceedings should be stayed until the ptf. gave security for costs.—*Burke v. Lidwell*, 1 Jon. & L. 703. (C.)

6. Security for costs was required from a ptf. on the ground of poverty, when he had no beneficial interest in the property to be recovered, which had been assigned to him collusively to evade liability to costs.—*Burke v. Hutchinson*, 7 I. E. R. 508. (C.)—[See *Worrall v. White*, 9 I. E. R. 572; 3 Jon. & L. 513 (C.)]

7. A deft., who having appeared to an injunction bill, suffers the ptf. to make his order for the injunction absolute, is too late to require security for costs.—*Foster v. Eyres*, 7 I. E. R. 638. (R.)

8. Service of notice of motion to give security for costs will not stop the ptf's. proceeding to hear the cause.—*Ivie v. Gahan*, 8 I. E. R. 371. (R.)

9. It is no answer to a motion to dismiss the bill for want of prosecution by one deft., that another deft. has obtained an order staying

the ptf. until he gives security for costs.—*Kelly v. Magee*, 9 I. E. R. 216. (R.)

10. Security for costs refused, notwithstanding affidavits stating the poverty of the ptf.; that he was a trustee as to one moiety of the subject of the suit; disclosing facts which would be a good defence; and raised a suspicion of champerty and collusion between the ptf. and his solicitor.—[*Burke v. Hutchinson*, 7 I. E. R. 508, explained.]—*Worrall v. White*, 9 I. E. R. 572; 3 Jon. & L. 513. (C.)

11. *Semble*—It is not an objection to an equitable mortgage given for costs due, that they had not been ascertained or delivered.—[*Ex parte Boville* (2 Mont. & Ayr. 382, n.) observed on.]—*Bristow v. Warner*, 10 I. E. R. 246. (C.)

12. Security for costs refused after the time for answering had expired, and a notice had been served to have the bill taken as confessed.—*Nolan v. French*, 10 I. E. R. 211. (R.)

13. Security for costs refused after the time for answering had expired.—*Freel v. Trant*, 11 I. E. R. 278. (R.)

14. Bill filed on the 8th June, the ptf. residing out of the jurisdiction. Defts. appeared on the 14th August; the time for answering expired on the 14th Oct. Notice of a motion for security for costs was served on the 1st Nov. No further proceedings were had. Motion for security refused with costs.—*Daniel v. Cunningham*, 1 I. Jur. 36. (E.E.)

15. A mortgagee resident out of the jurisdiction presented a petition for a receiver, and obtained a conditional order. Upon the motion to show cause, the respondent objected to the petitioner being heard without his giving security. The petitioner was allowed to proceed, his solicitor undertaking to pay such costs as the Court would direct.—*Prater v. Portarlington*, 1 I. Jur. 259. (R.)

16. The bill prayed that a policy of assurance should be delivered up to be cancelled, and a discovery in aid of a defence to an action at law on it. Ptf's. resident in England were ordered to give security for costs.—*Anderson v. Dowling*, 12 I. E. R. 307. (R.)

17. On the 16th June an order was made for appointment of a receiver over a term of years, in which the respondent had an equitable interest. On the 19th June these lands were seized by the sheriff under a *fi. fa.* issued by another judgment creditor. The Court refused to set aside the order for the receiver, upon the application of an execution creditor. The party moving this motion being out of the jurisdiction, was ordered to give security for costs.—*Scott v. Nixon*, 2 I. Jur. 91. (R.)

18. The next friend of a married woman should be a person of substance, else the Court will require security for costs to be given.—*Keogh v. K.*, 2 I. Jur. 155. (R.)

19. On the 12th Nov. 1849, an order was made that the ptf. should give security for

costs. The ptf. not having done so, an order was made that the ptf. should give the security within one month, or, in default, that the bill should be dismissed with costs.—*Popera v. Phinket*, 2 I. Jur. 258. (R.)

1. Motion for security for costs. Notice served before the expiration of the time for answering in vacation. Motion granted.

The deft. was granted fourteen days to answer after the security was given.—*O'Beirne v. Cornwall*, 3 I. Jur. 27. (R.)

2. An officer on half-pay, resident abroad, is not privileged from giving security for costs.

When a ptf. becomes liable to give security for costs, after answer, the filing of the replication will not preclude the deft. from obtaining the order.

The deft. became aware of the ptf.'s liability to give security for costs on the 25th of June, but did not serve notice of motion until the 29th of Oct. *Held*, not too late.

*Semble*—The notice should be served before the time for answering has expired, if it expires in the vacation.

The cases and practice as to security for costs considered. Form of the order.—*Long v. Tottenham*, 1 I. C. R. 127; 3 I. Jur. 76. (R.)

3. If the next friend of a married woman be insolvent, the Court will stay the proceedings until the next friend be changed, or she shall give security for costs.—*M'Keon v. Walsh*, 1 I. C. R. 608. (R.)

4. When an answer is not required by the notice of a cause petition, the respondent may move for security for costs at any time before he takes a step in the cause, and before the petition is set down in the Lord Chancellor's list for hearing.

But if interrogatories be annexed to the petition and the respondent is required to answer them by the notice, he must move for security for costs before he takes a step in the cause, and before the time for answering has expired.

In England the motion may be made at any time before the deft. takes a step in the cause; in Ireland, at any time before he has taken a step in the cause, unless he is in contempt.—*Long v. L.*, 1 I. C. R. 618. (R.)

5. The amount of the security for costs required in a cause petition is £50 instead of £100, the amount required in a suit commenced by bill.—*M'Heath v. Taylor*, 2 I. C. R. 117. (R.)

6. An affidavit, made in a cause petition matter, to resist a motion for an injunction, is not a waiver of the respondent's right to security for costs.

Security for costs ordered in a suit for an injunction to restrain proceedings in an action at law, the petition also seeking other relief.—*Leeson v. L.*, 4 I. C. R. 28. (R.)

7. When it appears by the cause petition, that the petitioner resides out of the jurisdic-

tion, the respondent cannot move for security for costs, after the cause petition has been set down.—*Bentley v. Robinson*, 4 I. C. R. 37. (R.)

8. A., residing out of the jurisdiction, filed a bill to recover the amount of judgments. B., a notice party, entered an appearance in the common form. On a motion by B., further proceedings were stayed until security for costs should be given by A.

In a cross-bill, or bill for an injunction by a ptf. out of the jurisdiction, it is not usual to order such security to be given.—*Knight v. Nagle*, 7 I. Jur. 15. (R.)

9. An officer in the navy of the E. I. Company's service will be required to give security for costs.—*King v. Field*, 7 I. Jur. 328. (R.)

10. In a suit simply for renewal, and to restrain proceedings in ejectment to recover possession of the lands, the respondent is not entitled to security for costs, though the petitioner resides out of the jurisdiction.—*Harwood v. Tenison*, 5 I. C. R. 340. (R.)

11. A cause petition had been filed against a minor respondent, but no Master had been nominated pursuant to the 2nd G. O. of 1851, and the 190th G. O. of 1843. On a motion by a respondent to strike the cause out of the Lord Chancellor's list—*Held*, that this was not such an irregularity as would entitle the respondent to have it struck out. An order was then made for the appointment of a guardian *ad litem*.

*Semble*—When a respondent is precluded from appointing a guardian *ad litem*, under the Ch. Reg. Act, s. 21, by reason of the petitioner's solicitor not complying with the general rules by nominating a Master, and a motion for the purpose is thereby rendered necessary, the petitioner's solicitor should be charged with the costs of such motion.

When a petitioner out of the jurisdiction lodges the usual sum of £50 as security for costs, and the costs of the matter are likely to exceed that amount, the order for lodging that sum may be made without prejudice to an application for a further lodgment afterwards, if the costs are likely to exceed that sum.—*O'Dell v. Massey*, 1 I. Jur. N. S. 170. (R.)

12. A petitioner who, pending a cause, goes to reside out of the jurisdiction, will not be ordered to give security for costs, unless it appears distinctly that he has gone to reside abroad permanently.—*Norris v. Duckworth*, 6 I. C. R. 57. (R.)

13. A sum had been lodged in Court as security for costs. An application that it should be increased, upon the ground that it was insufficient to cover the costs already incurred, was refused with costs.—*Shannon v. Fegan*, 2 I. Jur. N. S. 74. (C.)

14. When the period for answering expires during the vacation, and, together with notice of the affidavit in answer being filed, the

respondent serves notice of a motion to obtain security for costs, the right to move is not waived by the step taken in the cause by filing the affidavit.—*Alker v. A.*, 3 I. Jur. N. S. 50. (R.)

1. This Court will not establish, as a general rule, that the security to be given for costs shall not exceed a particular sum. The special circumstances of each case must be enquired into.

*Scoble*—In inexpensive cases, £100 may suffice.—*O'Keeffe v. Hughes*, 3 I. Jur. N. S. 204. (P.)

2. On motion, that the ptf., resident out of the jurisdiction, do give security for costs; the Court requires from the deft. an affidavit of merits.—*Murray v. Mulligan*, 5 I. Jur. N. S. 313. (P.)

3. A next-of-kin, a caveator, who merely requires to cross-examine the attesting witnesses to the will relied on by the ptf., is not liable to give security for costs by reason of his being abroad.—*Stewart v. S.*, 6 I. Jur. N. S. 323. (P.)

4. A next-of-kin, applying under an order of a Master in Ch. for an assignment of an administration bond to be put in suit against a surety, the administrator having made default, is not liable to give the surety security for costs on an allegation that he is a pauper. Applicant's *laches* does not prevent the assignment of the bond.—*In the Goods of Collins*, 7 I. Jur. N. S. 267. (P.)

5. A petitioner did not comply with an order to give security for costs. *Held*, that the proper application for the respondent to make was, not to at once dismiss the petition with costs; but for an order that the security be given within a limited time; and that, in default, the petition do stand dismissed with costs.—*Martin v. Bunbury*, 7 I. Jur. N. S. 274. (R.)

6. The Clerk of the Inspectors of Fisheries appointed under the 24th & 25th Vic., c. 109, whose salary is paid by the Paymaster-General, though he resides out of the jurisdiction, is exempt from giving security for costs.—*Wynne v. Knox*, 14 I. C. R. 149. (R.)

### XXX. 7. Setting off Costs.

7. Ptf's. in an ejectment recovered against the defts., with costs, which they assigned to their attorney, ptf. in the equity suit, against the same defts. The assignment was not executed by all the parties. The bill was dismissed with costs, amounting to less than the costs at law. *Held*, that the attorney was not entitled to set off the costs of dismissing the bill against so much of the costs of the action at law, either in his character of attorney, or of assignee of the ptf's. at law.

The solicitor's lien for costs is subordinate and to be postponed to the equities between the parties.—*Gwynn v. Krous*, 7 I. E. R. 274. (R.)

8. Deft. at law filed a bill of discovery in aid of his defence against the ptf., who withdrew his record, which had been set down for trial; and became liable to the deft.'s costs of the day, which were taxed. Ptf. in equity, after the deft. had answered, entered a rule to dismiss his bill with costs, which were taxed; and a subpoena was issued by deft. in equity to pay them. Upon motion of the ptf. in equity, the Court set off the costs payable to him in the suit at law against those payable by him to the deft. in equity.—*Marquis of Salisbury v. Maguire*, 7 I. E. R. 499. (R.)

9. The Court will not allow a claim for costs to be set off against a demand not arising in the suit itself, though arising in another suit concerning the same matter.—*Reilly v. Shiel*, 1 I. Jur. 31. (E.E.)

10. Several objections to title were taken by a purchaser, some of which were allowed and others disallowed. On motion that the purchaser be discharged—*Held*, that the costs of the successful objections should be set off against those which were disallowed.—*Ruskell v. Church*, 1 I. Jur. 259. (R.)

11. A motion was refused, with costs, to be paid by A. and B. to C., a deft., who was liable to pay a sum decreed against him, which A. afterwards became entitled to as executor. The Court refused to set off the costs against the sum decreed.—*Brennan v. Kenny*, 2 I. C. R. 592; 4 I. Jur. 112. (R.)

12. The Court has not jurisdiction in a petition matter under the 12 & 13 Vic., c. 53, to order the interest on a mortgage due by a solicitor to his client, and retained by the solicitor, to be set off against costs furnished by the solicitor, where the solicitor denies his intention of giving this set-off, except as against some costs not included in the bill which was the subject of the petition.

When, on a petition praying a reference for taxation of costs, and that on the taxation the Master might be directed to have regard to an undertaking on the solicitor's part to charge costs out of pocket only, the Court simply ordered a taxation without mentioning the undertaking, it was not by this order intended to reserve the question upon the undertaking; or that that question should not be open to the Taxing Master.

*Quære*—Whether the Court has jurisdiction upon a petition under the 12 & 13 Vic., c. 53, to decide on the validity or construction of such an undertaking?—*Borough v. Hamilton*, 2 I. Jur. N. S. 179. (R.)

### XXX. 8. When Stayed by, or on Appeal.

13. Deft. was restrained from proceeding against relators for costs of an information dismissed with costs, upon affidavit made of an intention to appeal, and upon terms.—*Att.-Gen. v. Corp. of Dublin*, 2 Moll. 355. (C.)—[See 1 Bl., N. S. 312.]

14. When there has been a decree with costs in the Court below, the deft. may, upon show-



ing that he is bringing a *bona fide* appeal, obtain an order from the Court to respite the payment of costs pending the appeal.

When a case has been sent to a Court of Law, and this Court (Chancery) gives a decree with costs, including the costs at law, and this decree is reversed "with costs of the suit in the Court below," the deft. is entitled as of course to the costs at law.—*Smith v. Clarke*, 5 I. E. R. 423; 3 Dr. & War. 344; 2 Con. & L. 160. (C.)

1. After dismissal of a bill with costs, the defts. were stayed from enforcing them, pending an appeal to the H. L.; the ptf. giving security, and paying interest upon them.—*M'Carthy v. M'C.*, 11 I. E. R. 399. (C.)

### XXX. 9. Taxation of Costs.

[See 12 & 13 Vic., c. 53, Solicitors Act.]

#### a. Generally.

##### 1. General Jurisdiction.

##### 2. Under particular Statutes.

#### b. Costs of Taxing Costs.

#### c. Effect of Taxation, and of its Omission; Appeal, Re-hearing, and Revivor for Costs.

#### d. When a Party shall pay Taxed Costs; when only Fixed Costs.

#### e. When a Party shall pay only Costs in the Cause: when Extra Costs.

#### f. Allowances beyond Taxed Costs; of Costs whether as between Party and Party, or Solicitor and Client.

### XXX. 9. a. 1. Taxation of Costs generally.

2. Only one fee is allowed to a solicitor for attendance on a motion.—*Doolan v. Tibeau*, 2 Jones, 314. (E.E.)

3. In a tithe composition suit all the defts. appeared by one attorney. Those defts. who were tenants from year to year answered the bill separately at length. On motion—*Held*, that ptf. might dismiss his bill against those defts. upon paying them their costs; and the Court directed the Taxing Officer to disallow the costs of the whole or of any part of any answer which should appear to have been filed improperly and unnecessarily.—*Armstrong v. Bannon*, 2 Jones, 258. (E.E.)

4. The bill prayed a sale, and an account, and payment of prior and contemporaneous incumbrances. A prior *elegit* creditor answered at unreasonable length. The Court directed the Remembrancer, when taking the costs, to pay regard to the answer's length.—*O'Brien v. O'B.*, Jon. & C. 193. (E.E.)

5. Costs ordered to be taxed fourteen years after security given for payment of them, it appearing that the costs had not been paid, although payments had been made on account of them; that the security had been given *pendente lite*, while the relation of attorney and client existed between the parties. No account having been then settled between them,

the client being then in embarrassed circumstances, some oppression having been used towards him by the attorney, but the vouchers having been given up to the client, it was ordered that the bills of costs should be *prima facie* evidence of the business done, and of the reasonableness of the charge, with liberty to the client to surcharge and falsify.—*Fowler v. Moore*, 2 Jones, 415. (E.E.)

6. Judgment had been entered on a bond and warrant of attorney given twenty-seven years ago for costs due to a solicitor. The Court refused, on an allegation that they had not been taxed or settled, a reference to taxation at the instance of the client's surety, and against the executor's executor of the solicitor, who had died twenty years before.—*Maxwell v. O'Dell*, S. & Sc. 194. (R.)

7. The Master has not jurisdiction under G. O. 201, to tax costs, except with the consent of both solicitor and client.—*Massey v. Millar*, S. & Sc. 425. (R.)

8. Under G. O. 201, the Master has jurisdiction to tax mere conveyancing costs between solicitor and client.—*Re Smith's Trustees*, Fl. & K. 627. (R.)

9. The H. L. having dismissed an appeal, its order was, by side-bar order, made a rule of Court. *Held*, that the Clerk of Writs and Appearances should issue a subpoena for the costs of the appeal.—*O'Ferrall v. M'Cann*, Fl. & K. 635. (R.)

10. The Court will not review a Master's taxation of costs unless he has erred in principle.—*Darley v. Nicholson*, 1 Con. & L. 391. (C.)

11. A solicitor, pending a suit to administer the assets of a deceased client, brought an action against the executrix, and obtained judgment for the entire amount of very heavy untaxed bills of costs, relating, for the most part, to proceedings at law and an arbitration. He afterwards filed a charge under the decree to account in the administration suit, insisting on his demand on foot of the judgment. It appearing that the bills of costs contained several extraordinary and apparently excessive charges, the Court, on the motion of the deft. in the cause, grounded on an affidavit specifying the objectionable items, referred it to the Master to tax the costs for which the judgment had been obtained; with liberty to the Master, as to the costs of proceedings in other Courts, to refer to the Taxing Officers of those Courts.—*Gower v. Donovan*, 5 I. E. R. 329. (R.)

12. An administrator employed a solicitor to recover debts due to his intestate, and gave him a power of attorney, under which he received moneys, and acted generally. Out of the moneys so received he retained sufficient to pay his costs, which had never been furnished to the administrator, or taxed. After his death they were furnished to his

executor, who approved of them. *Held*, on petition, that the administrator *de bonis non* of the intestate was entitled to have the bill of costs referred for taxation, and would have been equally entitled had there been actual payment to, instead of retention by the solicitor.

The general rule is, that if a personal representative, or any other person acting in a fiduciary character, employs a solicitor, and pays his bill, the *c. q. t.*, or person otherwise beneficially entitled to the estate out of which the costs are to come, cannot require a taxation of the bill, the relation of attorney and client subsisting only between the former parties.

The solicitors, whose bill was sought to be taxed, were in receipt of moneys under a power of attorney, some of which they retained for their costs. *Held*, that this retention was not such a payment as precluded taxation.

It is now settled, that the Courts are at liberty, if a third person pay a solicitor's bill, and the costs are taxable, to refer it for taxation.

*Semle*—That a bill of costs will not be referred for taxation after payment, if the party entitled to call for the taxation had had a previous offer by the solicitor to have the bill taxed, and refused it.—*Langford v. Mahony*, 5 I. E. R. 569; 4 Dr. & War. 81; 2 Con. & L. 817. (C.)

1. As a general rule, it is improper to introduce into counsels' briefs both the original and amended bills.—*Higgins v. Bateman*, 2 Dr. & War. 70. (C.)

2. No alteration in a bill of costs allowed after copy served, except by the Remembrancer's permission, and on notice to the other party.

Party allowed counsel's attendance at the signing of the draft report, upon an application to delay that signature.—*Bourne v. Farran*, 6 I. E. R. 659. (E.E.)

3. Mortgagee's solicitor, at the time of the loan, perused the title deeds, and was paid by the mortgagor the costs thereof. After decree for sale in the mortgage cause, the same solicitor prepared the abstract of title under G. O. 138. That abstract, though deducing the title to the time of sale, did not contain any new deeds. The Master refused to allow the costs of perusing the deeds upon this occasion. On appeal—*Held*, that the Master should not be directed to review his taxation.—*Scott v. King*, 7 I. E. R. 483. (R.)

4. A bill of costs having been referred for taxation, the parties agreed in the office upon the sum to be reported. Afterwards, the client discovered entries in his own handwriting of advances made to the solicitor for which he had not received credit. He applied that the costs should be referred back to the Master for taxation. *Held*, that the motion should be refused with costs.—*Austin v. Chambers*, 3 Dr. & War. 178. (C.)

5. The Court has not jurisdiction, when directing taxation of a solicitor's bill of costs, to order any account of dealings between the parties wherein the solicitor did not act as such, even though he has given credit in the bill for such items.—*Sneyd v. Conroy*, 8 I. E. R. 469. (R.)

6. A client, on petition, obtained an order against his solicitor to tax costs as between solicitor and client, upon undertaking to pay the balance. *Held*, that this order was not a bar to the more extended relief to which the client was entitled.—*Gomley v. Wood*, 9 I. E. R. 418; 3 Jon & L. 678. (C.)

7. This Court has not authority to order the personal representatives of a deceased solicitor to have his costs taxed, even though they are in possession of the client's deeds.—*Turkington v. Kiernan*, 9 I. E. R. 477. (R.)

8. In the taxation of costs allowances were claimed which the Taxing Master refused to make, the question not being raised by the requisition. The Court referred it to the officer to make the allowances if he thought fit to do so.—*Walshe v. Sheehy*, 1 I. Jur. 78. (R.)

9. A Court of Equity will direct a taxation though all the costs be for conveyancing.—*S. & W. R. Co. v. O'Ferrall*, 1 I. Jur. 193. (R.)  
[Such costs are now taxable at Law and Equity, 12 & 13 Vic., c. 53.]

10. A suit having terminated, the debts were ordered to have their costs out of the fund. C., who acted as solicitor in his own name for one debt., B., and in the name of S., a former solicitor, for another, without disclosing this circumstance, had his costs taxed in the presence of the ptf.'s solicitor and obtained payments of the amounts respectively. C. also represented to the debt. B., for whom he acted in his own name, that he was entitled to costs as between solicitor and client, and received from B. £100, the fund being insufficient to discharge the claim of the debts. *Held*, on appeal, that the petitioner was bound to show distinctly that she was prejudiced by the solicitor not disclosing that he appeared for both debts., or that the taxation would have been different; that some overcharge or imposition amounting to fraud should be specifically pointed out, to induce the Court to open the taxation; and that having paid the £100 without pressure, and allowed four years to elapse, showed that it was the failure of the fund which induced the petitioner to complain of the charges.

The petition also prayed that the costs of C., a third party, which had been paid out of the fund, to the surplus of which the petitioner was entitled, should be re-taxed, because improper items had been introduced which amounted to fraud. The Court refused to make the order in the absence of C., although the circumstances under which the application was made might have warranted the Court in making the order if C. had been

before the Court.—*Dickson v. Caulfield*, 2 I. Jur. 75. (R.); *ibid*, 217. (C.)

1. The Taxing Master cannot entertain a question of retainer. Form of order on a petition for the taxation of costs.—*In re Bunbury, solicitor*; *ex parte Boughton*, 8 I. Jur. 190. (R.)

2. A railway company having taken lands occupied by D.'s tenants, and the parties not having agreed to the compensation offered, steps were taken for holding an inquisition, in which one solicitor acted for D. and the tenants. The company afterwards acceded to the valuation made for the tenants; a verdict was taken by consent for D.; and the company gave a written undertaking to pay any sum to which the solicitor was entitled as solicitor for D. and his tenants, when ascertained by the proper officer, under their Act of Incorporation. They took a conveyance from D., the costs of which and of making title were taxable in Ch. under their Act. The costs of ascertaining the compensation for the tenants should properly under it have been settled with their claim by Justices of the Peace; and the costs of an inquisition were taxable in a Court of Law. The solicitor, having furnished separate bills of costs for D. and the tenants, to which the company objected, petitioned for taxation and to enforce payment. *Held*, that the costs of D. only could be taxed or enforced in this Court, and that the undertaking gave no jurisdiction as to the costs of the tenants.—*The Marquis Drogheda v. G. S. & W. Ry. Co.*, 12 I. E. R. 103. (C.)

3. A landlord is entitled to have the costs of obtaining leave to proceed at law, against a tenant over whose interest there is a receiver, taxed as against the fund in Court.—*Ferguson v. St. George*, 4 I. Jur. 90. (R.)

4. When petitions under the Ch. Reg. Act are unnecessarily prolix, the Court will direct the Master to have regard in the taxation of costs to the matter improperly introduced.—*Johnstone v. Linde*, 1 I. C. R. 19; 3 I. Jur. 8. (C.)

5. A solicitor was in custody under an attachment. The Court granted a writ of *habeas corpus*, directed to the Marshal of the Four Courts Marshalsea, to bring him before the Taxing Master upon the taxation of bills of costs.—*Walsh v. Wilson*, 2 I. C. R. 79. (R.)

6. Untaxed costs having been introduced by the solicitor into an account which he swore was subsequently stated and settled between himself and his client, who promised to pay the balance due on foot of the account, the Court had not jurisdiction, under the Solicitors Act, to order the taxation of the costs. The only course whereby the client can obtain relief, is by cause petition, or bill filed for the purpose of opening the account.—*Anderson v. Cassidy*, 5 I. Jur. 23. (R.)

7. A solicitor having taken proceedings for several bills of costs due to him by a receiver, some of them being Chancery costs, and some civil-bill costs: the receiver presented his petition to stay proceedings till the costs were taxed.

The bills were referred to the officer to tax them as between solicitor and client. He was directed if the civil-bill costs had not been taxed, to refer them to the Assistant Barrister for taxation.—*In re Tully*, 6 I. Jur. 209. (R.)

8. The Taxing Master having reduced counsel's fees, on taxation between party and party, not because the amount was excessive, but because the fee had been increased at the instance of the counsel, the Court directed the Master to review his taxation as to those items.

*Semble*—It would be illegal for the Bar, as a body, to fix a minimum fee for any particular class of business; but any individual member of the Bar may decline to take a fee less than a certain amount.

The Taxing Masters, in taxation between party and party, should only allow the usual and accustomed fee payable on each particular class of business, though a larger fee has been paid to counsel.—*O'Brien v. Cantwell*, 12 I. C. R. 221; 6 I. Jur. N. S. 354. (R.)

9. A petition for taxation was presented more than a year after the bill of costs had been furnished, by one of two trustees, behind his co-trustee's back. *No rule*: though the solicitor had commenced against the petitioner alone an action at law for the amount.—*In re M'Cay a solicitor*, 11 I. Jur. N. S. 297. (R.)

10. On taxation between solicitor and client there is not any inflexible rule against allowing a consultation or refresher fee of more than two guineas, if the larger fee was paid with the client's knowledge and authority.—

When a solicitor resides in the country, and carries on his Dublin business by an agent, special charges for attendances in Dublin may be allowed on taxation between solicitor and client, if the client knows that a special sum, larger than that ordinarily chargeable, is charged, and if the case was such as required the solicitor's personal attendance in Dublin.

*Semble*—Such a special charge should not be allowed for attending at the hearing, and the consultation before it.—*Belfast Harbour Commissioners v. Lawther*, 17 I. C. R. 147. (R.)

11. Order to amend (by striking out a mistakenly inserted item) a bill of costs which had been referred, but not lodged, for taxation.—*In re Abbott & Moore*, 17 I. C. R. 200. (R.)

#### XXX. 9. a. 2. Jurisdiction under particular Statutes touching Taxation of Costs.

(Solicitors Act, 12 & 13 Vic., c. 53.)

12. A solicitor must advance the sum payable to the Chancery fund on a bill of costs

referred for taxation; but will be entitled to have it, and his other costs of taxation, included in the sum certified on foot of the bill, in case it is not reduced by more than one-sixth. If more than one-sixth be struck off, he must bear all the costs of the taxation, the client's as well as his own.—*Hodgens v. Wheeler*, 3 I. E. R. 323; Fl. & K. 162. (R.)

1. When lands are purchased by commissioners under the 2 & 3 Vic., c. 61, for the purposes of the Act, and the purchase money is lodged in Court, the Court will, under the words "reasonable costs, charges, and expenses," in the 29th section, award to the parties entitled, the costs necessarily incurred by them in obtaining payment from the Court, and in having the money invested upon trusts similar to those to which the lands purchased were subject.—*In re The Shannon Commissioners*, 3 I. E. R. 355; Fl. & K. 13. (R.)

2. Upwards of £32,000 were paid, within ten years, by a Town Council, to their solicitor for costs. Some of his bills were taxed by the Second Remembrancer; the rest were taxed by or under the immediate direction of another solicitor, who was appointed by the Town Council for that purpose. It was sworn that this taxation was faithful and strict. On the other hand, it was stated that portions of those costs had been incurred for business improperly transacted, or useless in its results. Within the same ten years, the Town Council expended nearly £30,000, on costs to other solicitors and a parliamentary agent. Portions of those costs were taxed by the Master of the Q. B., and part by the solicitor of the Town Council and by his town agent. Almost all had been paid more than a year before information filed. The greater part of the parliamentary business was transacted before, but the costs were taxed after the 10 & 11 Vic., c. 69, and the 12 & 13 Vic., c. 78, became law.

The Master was directed to enquire, when taking the accounts, what portions of costs, for which the Town Council might claim credit, were duly and properly incurred, and were properly chargeable against the borough funds. With respect to so much of such costs as had not been taxed, the Master was to be at liberty, if he thought fit, to require that portion to be taxed, or to tax or moderate them himself.—*Att.-Gen. v. Belfast Corporation*, 4 I. C. R. 119. (C.)

3. On a petition praying a reference for taxation of costs; and that the Master should be directed to have regard, on the taxation, to the solicitor's undertaking to charge only costs out of pocket; the Court, without mentioning that undertaking in the order, simply directed a taxation. *Held*, that this order did not reserve the question upon the undertaking; neither was it thereby intended that that question should not be open to the Taxing Master.

*Quære*—Has the Court jurisdiction, upon a petition under the 12 & 13 Vic., c. 53, to decide on the validity or construction of such

an undertaking?—*Borough v. Hamilton*, 2 I. Jur. N. S. 179. (R.)

#### XXX. 9. b. Costs of Taxing Costs.

4. When a solicitor retains deeds, &c., claiming a lien for costs, this Court, upon the client's petition, may, upon its inherent authority over its officers, refer the bill for taxation; and, if more than one-sixth is taxed off, disallow the solicitor's costs of taxation; order that the client's costs upon the taxation shall be deducted from the taxed costs; and that the solicitor shall deliver up the deeds, &c., upon payment of the balance. The Court declined to follow the decision in *Rogers v. Peterson*, 4 Mee. & W. 588.—*In re Lawlers*, 3 I. E. R. 102; see note, 105: Fl. & K. 73. (R.)

5. On taxation of a bill of costs, the solicitor must advance the sum payable to the Chancery fund.—*Hodgens v. Wheeler*, 3 I. E. R. 323; Fl. & K. 162. (R.)

6. An order referred it to the Master to tax bills of costs, furnished by a solicitor in pursuance of the statute, and stayed his action to recover them; the client undertaking to pay the balance. The Master reported that, upon taxation, more than one-sixth had been struck off each bill. *Held*, that the solicitor should pay as well his own costs of the taxation, as his client's.—*Power v. Nagle*, 3 I. E. R. 105; Fl. & K. 78. (R.)

7. An attorney, who had received money on account of costs, contended that a balance remained due, and threatened to file a bill to recover it. The client obtained a reference upon petition praying that the sum received by the attorney should be ascertained, and his costs taxed as between party and party. The client was wrong respecting the principle of the taxation, and also in praying repayment of the whole amount received by the attorney, instead of merely the balance over-paid. Nevertheless, *Held*, that the attorney should pay all the costs of the reference and other proceedings in the matter, save the costs of so much of the petition and answering affidavit as were incidental to the principle of taxation.—*Armstrong v. Pollock*, 6 I. E. R. 668. (E.E.)

8. When costs are taxed, and more than one-sixth is struck off, the Court will disallow the costs of taxation.—*Downing v. Hodder*, 4 I. C. R. 27. (R.)

9. Several bills of costs, including costs for business in the I. E. Court, were furnished to the client at different times. The attorney having refused to sign an undertaking to pay the costs of taxation, in case one-sixth of the costs were taken off, upon the petition for taxation, it was objected that if less than one-sixth was taken off some of the bills, the costs of the petition and taxation should be apportioned. The order for taxation was made in the usual form, directing that, if the costs, when taxed were less by one-sixth than the

costs furnished, the petitioner should pay the costs of petition and taxation, and, if not less by one-sixth, then respondent should pay them.—*In re Martin*, 7 I. Jur. 196. (R.)

1. Where costs are referred for taxation, the petitioner (the client) may lodge in the office the copy of the costs furnished to him by the solicitor, and may issue a summons to tax, and the summons will be dealt with in the taxation according to the result and directions of the order.

If the solicitor lodge a copy of costs for taxation pursuant to order, he is not allowed the costs of such copy, unless he has first served notice on the client to lodge the copy of the costs served on him, and he has refused to do so.

If either the client or the solicitor, after having been served with notice, refuse to attend the taxation, the Master will be directed to proceed with the taxation *ex parte*; but the Taxing Masters feel a difficulty in carrying out this rule in the absence of the necessary documents.—*Kelly v. Moore*, 7 I. Jur. 303. (R.)

2. Where, after the usual order of reference to tax was made, neither party lodged the costs nor issued a summons to tax, and a motion was made for an attachment against the solicitor for thus disobeying the order of reference, the Court made no rule on the motion, and let each party abide his own costs.—*Minchin v. Dillon*; *Byrne v. Dillon*, 7 I. Jur. 329. (R.)

3. An English solicitor having transacted business in England for a client then residing there, who subsequently came to reside in Ireland, served his bill of costs on the client in Ireland, and proceeded at law in Ireland to recover the amount. On petition by the client for a taxation of the bill under the statute,—*Held*, that the Court had not jurisdiction to order the taxation in Ireland of an English bill of costs. The question of costs of the motion having stood over till the termination of the action at law, and more than one-sixth having been struck off the bill on a reference to the Master of the Law Court, no costs of the petition or of this motion were given.—*Roe v. Dodd*, 1 I. Jur. N. S. 250. (R.)

**XXX. 9. c. Effect of Taxation and of its Omission; Appeal, Re-hearing, and Revision for Costs.**

[As to Appeal, see also XXX. 10. e., post.]

4. When a decree is pronounced to pay the p<sup>ts</sup>. a sum of money and costs, the costs bear interest (under the 27th sec. of 3 & 4 Vic., c. 105), not from the date of the decree, but from the date of the certificate of taxation.—*Lidwell v. L.*, 7 I. E. R. 91. (R.)

5. In appeals respecting costs, the Court entertains not only questions whether a principle of taxation was correct or not, but also whether a given principle was applicable or not to the particular items.

On taxation between solicitor and client, the costs of a case laid before counsel for an opinion on a point decided by the decree disallowed, on the ground that the solicitor was not justified in endeavouring to re-open the question.

On a reference, A. and B. had a common interest in one question, and A. a separate interest in another. On the former the Master directed one charge to be filed for both. During the proceedings on it the Taxing Master allowed only one term fee to the solicitor who acted for both A. and B. *Held*, that he was right in disallowing the second, and the taxation was affirmed.

In the course of the cause, the opinion of a strange counsel was taken, and the Taxing Master allowed only the costs of a short case, such as might have been laid before a counsel acquainted with the cause. The Court refused to interfere with this discretion, considering it doubtful if in strictness the case should have been allowed at all.

A solicitor is entitled to charge for fully instructing every counsel employed at the hearing. When A. and B. had a common interest in one question at the hearing, and A. only was interested in another question, and the Taxing Master disallowed the charges for so much of the briefs to A.'s counsel as related to the former question, the taxation was sent back to be reviewed.—*Newby v. Drew*, 12 I. E. R. 24. (C.)

6. Upon consent, an order was made in Jan. 1841 staying further proceedings in a cause (in which there were two p<sup>ts</sup>., a trustee and c. q. t.), and directing that the costs of the p<sup>ts</sup>. should be taxed and ascertained, the defts. undertaking to pay such costs. They were not taxed until after the death of the principal p<sup>tf</sup>. (the c. q. t.), which occurred in Dec. 1848. A motion to compel the defts. to pay the costs, so taxed, was refused, with costs, although the solicitor of the p<sup>ts</sup>. offered an undertaking to procure for the defts. from the personal representative of the deceased p<sup>tf</sup>. a receipt for the taxed costs of the cause.—[*Barry v. Stawell* (Fl. & K. 1, considered).]—*Upton v. M'Garry*, 13 I. E. R. 164. (C.)

7. The Court of Ch. in Ir. pronounced against P. a decree, with costs. P. paid them to the solicitor of the opposite party. The solicitor, with his client's assent, applied the amount in paying costs due by the client to himself, and in paying the costs of an appeal which P. took to the H. L. against the decree. The H. L. reversed the decree, with costs. Thereupon P. applied for an order directing the repayment of these costs. The H. L. refused to make such an order, and left P. to apply to the Court below, on the judgment now pronounced.—*Clark v. Smith*, 9 Cl. & F. 126.

[P. applied to the Court below for an order directing the solicitor to repay him the amount. *Held*, that the motion should be

refused.—*Smith v. Clarke*, 5 I. E. R. 423; 3 Dr. & War. 344. (C.)]

1. The owner of certain lands, by a marriage settlement granted them in trust, among others, to pay certain debts which were set out in a schedule attached thereto. The creditors, having instituted a suit, obtained in Chancery, a decree establishing their rights. From this there was an appeal, which was resisted by the principal creditor only, to the House of Lords; and their Lordships differing in opinion, the decree below was affirmed; but no order was made as to the costs. It appeared also that if the appeal had succeeded, none of the scheduled creditors would have obtained anything on foot of their demands. *Held*, that each of the creditors in the schedule to the deed should contribute rateably to the costs of resisting the appeal.

The proper course for seeking the costs against the deft. is to set down the cause for hearing before the Chancellor upon the House of Lords order.

An application may be made for an order to the Taxing Master here to tax the H. L. costs.—[See also *Hamilton v. Synge*, 4 I. C. R. 182. (R.); 4 I. C. R. 551. (C.)]—*Hamilton v. Synge*; *Simpson v. Synge*, 7 I. Jur. 121. (R.)

### XXX. 9. d. When a Party shall pay Taxed Costs: when only Fixed Costs.

2. The deft. having succeeded in two interlocutory applications, with costs to be paid to him by the ptf.; they were measured by the Court, pursuant to the 159th G. O. The bill was afterwards dismissed for want of prosecution. Upon taxation, the Master, notwithstanding the award of the sum for costs, taxed the deft.'s costs of the two applications to sums greater than those awarded. *Held*, that the sum awarded by the Court was final and conclusive, and that the Master was not authorised to tax those costs.

The 159th G. O. applies to all interlocutory motions.—*Woodley v. W.*, 7 I. E. R. 77. (R.)

### XXX. 9. e. When a Party shall pay only Costs in the Cause: when Extra Costs.

3. Ptf. obtained an order to set aside a minor's appearance, and that the minor should appear and answer by the officer. The minor's uncle obtained this order to be set aside, and that the minor might appear and answer by him as guardian. *Held*, that he was not bound to pay the costs of the first order, which were costs in the cause.—*Wallen v. Barry*, 6 I. E. R. 124. (E.E.)

4. When, at the time a motion is made, no order is made respecting its costs, they follow the costs in the cause, especially in the case of an injunction bill.—*Bourne v. Farran*, 6 I. E. R. 659. (E.E.)

5. In taxing costs between party and party,

counsel is not allowed a fee for settling a draft report. In allowing the costs of attested copies, it is discretionary with the Taxing Master whether he will allow for the copy of the whole, or of part only of a document. Practice before 1st G. O. (April 1847) touching fees to counsel in the Master's office.—*Clanmorris v. Mahon*, 10 I. E. R. 144. (C.)

6. On taxation between solicitor and client, the costs of a case laid before counsel for an opinion on a point decided by the decree disallowed, on the ground that the solicitor was not justified in endeavouring to re-open the question.

On a reference, A. and B. had a common interest in one question, and A. a separate interest in another. On the former, the Master directed one charge to be filed for both. During the proceedings on it, the Taxing Master allowed only one term fee to the solicitor who acted for both A. and B. *Held*, that he was right in disallowing the second, and the taxation was affirmed.

In the course of the cause the opinion of a strange counsel was taken, and the Taxing Master allowed only the costs of a short case, such as might have been laid before a counsel acquainted with the cause. The Court refused to interfere with this discretion, considering it doubtful if in strictness the case should have been allowed at all.

A. solicitor is entitled to charge for fully instructing every counsel employed at the hearing. When A. and B. had a common interest in one question at the hearing, and A. only was interested in another question, and the Taxing Master disallowed the charges for so much of the briefs to A.'s counsel as related to the former question, the taxation was sent back to be reviewed.

In appeals respecting costs, the Court entertains not only questions whether a principle of taxation was correct or not, but also whether a given principle was applicable or not to the particular items.—*Newby v. Drew*, 12 I. E. R. 24. (C.)

7. A cause was ready to be heard *pro confesso*. Upon application of a deft.'s solicitor, the ptf. did not set down the cause. The Taxing Master, upon taxation between solicitor and client, having disallowed the costs of making out briefs for the hearing, this Court refused to direct the Master to review his taxation. Upon taxing costs between solicitor and client, the Taxing Master refused to allow for business done for a deceased client, unless upon the written direction of the client. The Court refused to direct a review of the taxation on that ground, although there was an affidavit of the solicitor that the business was done by the express direction of the client.

The Court will not direct the Master to review his taxation, unless a question of principle is involved.—*Kelly v. Achmuty*, 2 I. Jur. 62. (R.)

costs furnished, the petitioner should pay the costs of petition and taxation, and, if not less by one-sixth, then respondent should pay them.—*In re Martin*, 7 I. Jur. 196. (R.)

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An application may be made for an order to the Taxing Master here to tax the H. L. costs.—[See also *Hamilton v. Synge*, 4 I. C. R. 182. (R.); 4 I. C. R. 551. (C.)]—*Hamilton v. Synge*; *Simpson v. Synge*, 7 I. Jur. 121. (R.)

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4. When, at the time a motion is made, no order is made respecting its costs, they follow the costs in the cause, especially in the case of an injunction bill.—*Bourne v. Farran*, 6 I. E. R. 659. (E.E.)

5. In taxing costs between party and party,

counsel is not allowed a fee for settling a draft report. In allowing the costs of attested copies, it is discretionary with the Taxing Master whether he will allow for the copy of the whole, or of part only of a document. Practice before 1st G. O. (April 1847) touching fees to counsel in the Master's office.—*Clanmorris v. Mahon*, 10 I. E. R. 144. (C.)

6. On taxation between solicitor and client, the costs of a case laid before counsel for an opinion on a point decided by the decree disallowed, on the ground that the solicitor was not justified in endeavouring to re-open the question.

On a reference, A. and B. had a common interest in one question, and A. a separate interest in another. On the former, the Master directed one charge to be filed for both. During the proceedings on it, the Taxing Master allowed only one term fee to the solicitor who acted for both A. and B. *Held*, that he was right in disallowing the second, and the taxation was affirmed.

In the course of the cause the opinion of a strange counsel was taken, and the Taxing Master allowed only the costs of a short case, such as might have been laid before a counsel acquainted with the cause. The Court refused to interfere with this discretion, considering it doubtful if in strictness the case should have been allowed at all.

A. solicitor is entitled to charge for fully instructing every counsel employed at the hearing. When A. and B. had a common interest in one question at the hearing, and A. only was interested in another question, and the Taxing Master disallowed the charges for so much of the briefs to A.'s counsel as related to the former question, the taxation was sent back to be reviewed.

In appeals respecting costs, the Court entertains not only questions whether a principle of taxation was correct or not, but also whether a given principle was applicable or not to the particular items.—*Newby v. Drew*, 12 I. E. R. 24. (C.)

7. A cause was ready to be heard *pro confesso*. Upon application of a deft.'s solicitor, the ptf. did not set down the cause. The Taxing Master, upon taxation between solicitor and client, having disallowed the costs of making out briefs for the hearing, this Court refused to direct the Master to review his taxation. Upon taxing costs between solicitor and client, the Taxing Master refused to allow for business done for a deceased client, unless upon the written direction of the client. The Court refused to direct a review of the taxation on that ground, although there was an affidavit of the solicitor that the business was done by the express direction of the client.

The Court will not direct the Master to review his taxation, unless a question of principle is involved.—*Kelly v. Achmuty*, 2 I. Jur. 62. (R.)



**XXX. 9. f. Allowances beyond Taxed Costs : of Costs, whether as between Party and Party, or Solicitor and Client.**

1. In a charity cause, in which no improper point has been made, it is usual to tax all parties' costs as between solicitor and client, not as between party and party.—*Gaffney v. Hevey*, 2 Dr. & Wal. 25. (C.)

2. In a redemption suit, the ptf., as a general rule, must pay the costs of all necessary parties. A question arose between two defts., as to which of them was entitled to the sum brought into Court by the ptf.; and the cause stood over from day to day to have that question argued. *Held*, that refreshing fees to the defts.' counsel were part of the costs in the cause to be paid by the ptf.—*Wynne v. Brady*, 5 I. E. R. 239. (E.E.)

3. Taxation of costs between solicitor and client; solicitor's fee for perusing and signing approbation of a draft deed submitted for approbation of his client, who was to be an executing party.—*Westby v. Greene*, 5 I. E. R. 449. (R.)

4. The taxation of costs is sufficiently provided for by the 156th G. O. Therefore, the Court refused to direct taxation as between solicitor and client.—*Att.-Gen. v. Drummond*, 2 Con. & L. 98; 3 Dr. & War. 162. (C.)—[*Affd.*: 2 H. L. Cas. 837.]

5. £700 being claimed for costs of business done for the client, between 1808 and 1819, and a suit in respect of them instituted between the parties, they were, in 1840, taxed by agreement before the Master to £500. The client having discovered, amongst his own papers, and in his own handwriting, memoranda specifying sums of money given by him to the solicitor, for which the latter had not given credit—*Held*, that the client was not entitled to have the costs retaxed in 1842.—*Austin v. Chambers*, 3 Dr. & War. 178. (C.)

6. The 159th G. O. does not affect the taxation of costs as between solicitor and client.—*Brangan v. Gorges*, 7 I. E. R. 225. (R.)

7. Costs of registry searches directed by counsel refused to be allowed to the solicitor on a taxation as between solicitor and client.

Costs of proceedings in a cause taken after its object had been, with the solicitor's knowledge, otherwise obtained, not to be allowed, on a taxation between solicitor and client, except under special circumstances.—*Lady Langford v. Mahony*, 3 Jon. & L. 97. (C.)

8. A mortgagor, in consideration of the mortgagee abstaining from proceeding to foreclose, undertook to pay all his costs, as between solicitor and client. Having failed to perform his promise to pay off the mortgage, and being again threatened with proceedings, he paid the mortgagee's solicitor his costs. On a petition under the Solicitors Act—*Held*, that he was not entitled to a tax-

ation of the costs as between party and party, there not having been any fraud or undue pressure; and the mortgagees not being parties to the proceeding.

*Quære*—Whether the rule that a mortgagee is entitled, as against the mortgagor, to all costs between solicitor and client prevails in Ireland?—*Ex parte Fletcher*, 2 I. C. R. 595. (R.)

9. Refresher fees on motions will not be allowed on taxation between party and party.—*Houston v. Barry*, 6 I. Jur. 49. (R.)

10. The costs of a third counsel for the petitioner upon the hearing of a cause petition, disallowed, as between party and party, even though the employment of three counsel was not unreasonable.—*Collis v. Stewart*, 6 I. Jur. 51. (C.)

11. A solicitor having taken proceedings for several bills of costs due to him by a receiver in a cause, some being Chancery costs and some civil-bill costs, the receiver presented his petition to stay proceedings till the costs were taxed. The bills were referred to the officer to be taxed as between solicitor and client; and he was directed, in case the civil-bill costs should appear not to have been taxed, to refer the civil-bill costs to the Assistant Barrister for taxation.—*In re Tully*, 6 I. Jur. 209. (R.)

12. When costs are referred for taxation, the petitioner (the client) may lodge in the office the copy of the costs furnished to him by the solicitor, and may issue a summons to tax. The summons will be dealt with in the taxation according to the result and directions of the order.

If the solicitor lodge a copy of the costs for taxation pursuant to order, he is not allowed the costs of such copy, unless he has first served notice on the client to lodge the copy of the costs served on him, and he has refused.

If either the client or the solicitor, after having been served with notice, refuse to attend the taxation, the Master will be directed to proceed with the taxation *ex parte*; but the Taxing Masters feel a difficulty in carrying out this rule in the absence of the necessary documents.

When, after the usual order of reference to tax was made, neither party lodged the costs nor issued a summons to tax, and a motion was made for an attachment against the solicitor for disobeying the order of reference, the Court made no rule on the motion; and let each party abide his own costs.—*Kelly v. Moore*, 7 I. Jur. 303. (R.)

13. A general cause petition was filed against several respondents. The chief respondent, when about to file his affidavit, laid the draft affidavit before counsel, with a case for his opinion to advise proofs. Several other affidavits were subsequently filed. The petition was heard, and dismissed, as against this respondent, with costs. The costs of this case and opinion not having been allowed by the

**Taxing Master**, on taxation between party and party—*Held*, in accordance with the opinion of the other two Taxing Masters, but without laying down any general rule, that the respondent was entitled to the costs of the case and opinion; but that if the petition, had been dismissed for want of prosecution, the respondent would not be entitled to such costs; that a case for direction of proofs should be allowed for at some stage of the proceedings; that the filing of the answering affidavit by the respondent is in the nature of issue joined, and appears to be the time at which such case should be allowed.

As a general rule the costs of an attendance on a third party to borrow a necessary document are not allowed; but, if expense is thereby saved, the Taxing Master may exercise his discretion in allowing such costs.—*Abbott v. Geraghty*, 7 I. Jur. 373. (R.)

1. The solicitor for the petitioner was changed in the progress of the suit, which was brought to a conclusion by the new solicitor, and decided in petitioner's favour. The costs were furnished by the new solicitor as between party and party, and by the former solicitor as between solicitor and client; and by consent both bills were referred to taxation together. When the summons to tax came on, the former solicitor refused to produce the papers for the taxation of the party and party costs, until his costs as between solicitor and client were first taxed and paid. It was ordered that the Taxing Master should have both bills under taxation at the same time, and should strike out of the solicitor and client costs all items not properly vouched; the documents necessary for that being sufficient at the same time for vouching the other bill.—*King v. Edie*, 2 I. Jur. N. S. 176. (R.)

2. The Taxing Master having, on taxation between party and party, reduced counsel's fee, not because the amount was excessive, but because the fee had been increased at the counsel's instance, the Court directed a review of the taxation respecting those items.

On taxation between party and party, the Taxing Masters should allow only the accustomed fee payable on each particular class of business, though a larger fee has been paid to counsel.—*O'Brien v. Cantwell*, 12 I. C. R. 221; 6 I. Jur. N. S. 334. (R.)

3. The practice is, on taxation between party and party, to allow the costs of two counsel only, on the hearing of a cause petition matter.

Under special circumstances, the Court ordered the Master to allow the costs of a third counsel.

In taxation of costs between party and party no fee to counsel is allowed for settling the draft affidavit of the petitioner, in reply to the respondent's affidavit in answer.—*Cloran v. Clancarty*, 13 I. C. R. 1. (R.)

4. When, after argument, final judgment is postponed, additional Court fees are necessary

on the day of its delivery, as well as refreshers to counsel.—*Gamble v. Robinson*, 9 I. Jur. N. S. 55. (P.)

5. On taxation of costs only two counsel will be allowed fees on a motion, except under very special circumstances.—*In re Grady*, 10 I. Jur. N. S. 49. (C.)

XXX. 10. *Costs in Cases of: in Suits for: by or to whom payable.*

- a. Abandonment of Motion, &c., after notice to Appear, &c.
- b. Account.
- c. Administration Suits.
- d. Amendment.
- e. Appeal.
- f. Attorney-General and Crown.
- g. Bankrupt and Insolvent: their Assignees.

- h. Bank of England.
- i. Bill or Petition, Dismissal of.
- j. Cause standing over, or struck out of list: Costs of the Day.
- k. Charity.
- l. Commissioners.
- m. Contempt.
- n. Creditors.
- o. Cross-cause.
- p. Decree to Administer Assets.
- q. Demurrer or Plea allowed; submitted to; overruled, or ordered to stand for answer.

- r. Discovery.
- s. Dower.
- t. Executors, Administrators, Trustees, Committees &c.
- u. Exceptions, Allowed or Overruled.
- v. Heir-at-Law, or Next-of-kin.
- w. Husband and Wife.

- x. Incumbrancers: Mortgagees and Mortgagees, equitable and legal.
- x.\* Incumbered Estates Court. See PRACTICE, COSTS, XXX. 10cc.\* LANDED ESTATES COURT.
- y. Infant, Prochein Ami, and Guardian.

- y.\* Injunction.
- z. Insufficient Answer.
- aa. Interpleader.
- aa.\* Intervenients.
- bb. Irregularity of Process.
- cc. Issue-at-Law.
- cc.\* Landed Estates Court. (See also PR. LIV. a. LANDED ESTATES COURT.)

- cc.\* Landlord and Tenant.
- cc.\* Legatees.
- dd. Lunacy.
- ee. Misconduct: Proceedings, Vexatious or Unnecessary.
- ff. Parties improperly joined, or served with Notice of Motion, &c.
- ff.\* Partition.
- ff.\* Partnership.
- gg. Pauper.
- hh. Perpetuating Testimony: Commission to Examine.
- hh.\* Probate.
- ii. Proving Debts before Master.
- ii.\* Railway Company.

jj. Receiver.

kk. Review.

ll. Separate Costs.

mm. Solicitor Personally to Pay.

nn. Specific Performance: between Vendor and Vendee, and other Parties generally: on Sales Judicial.

nn.\* Trustees. See *supra*, 10. t.

oo. Witness.

pp. In Cases not specified above.

XXX. 10. a. Abandonment of Motion, &c.: after Notice to Appear, &c.

1. A cause, wherein a decree to account had been pronounced, was abandoned by the ptf., who, without having been served with any restraining order, came in, and proved his debt in another cause. A creditor, whose debt was piousne to the ptf.'s, was also a deft. in the abandoned cause. *Held*, that this deft. was not entitled to be paid, out of the ptf.'s portion of the fund brought into Court in the second cause, the costs incurred by him in the abandoned cause.

*Semle*—The deft. should have applied for the carriage of the decree in the abandoned cause; and had his costs added to his demand.—*Marquis of Downshire v. Tyrrell*, 2 I. E. R. 66. (E.E.)

2. In a suit in the Exchequer, ptf. discontinued it before decree, without obtaining an order providing for payment of the costs incurred therein, and came in under a decree in this Court. *Held*, that this Court could not give the costs of the Exchequer suit.—*Finlay v. Heeran*, 7 I. E. R. 485. (R.)

XXX. 10. b. Account.

XXX. 10. c. Costs of Administration Suits.

3. Ptf. having filed a bill against the remainderman, the Court gave no costs to any party, so far as the suit related to the construction of the will creating the entail, but gave the remainderman the costs of the residue of the suit as against ptf.—*Flood v. Digby*, 2 Jon. 582. (E.E.)

4. The costs incurred by a ptf. in litigating and reducing considerably a creditor's demand, which is prior to ptf.'s, are not costs which ptf. is entitled to be paid in preference to that creditor's demand. At the final hearing, that creditor obtained a decree for payment of his prior demand and his costs.—*Jauge v. Jackson*, Fl. & K. 45. (R.)

5. The decree in an administration suit provided that the costs of the solicitor of the inheritor should be paid out of the surplus fund, if any. Some part of the costs had been incurred in increasing the fund for those beneficially interested. The inheritor was insolvent. *Held*, that he was entitled to be paid in the first instance, without waiting for

a surplus fund to be formed.—*Grey v. Matthews*, Fl. & K. 309; 3 I. E. R. 530. (R.)

6. When the necessity of going to the Court is caused by the will of the testator, the costs of the suit must come out of the testator's general personal estate.—*Lamphier v. Despard*, 1 Con. & L. 207; 2 Dr. & War. 65. (C.)

7. By settlement £2500 were charged on an estate for lives renewable for ever, for the issue of the marriage, subject to appointment. Part, being appointed to one child on her marriage, was settled. The residue was never appointed. After the death of the first settlor, A., solicitor of B., the other child, acting under a power of attorney, obtained a renewal, and instituted, but never prosecuted, a suit in B.'s name to raise his portion of the unappointed charge. On the death of B., A. obtained limited administration to him; and, with the parties entitled to the married child's share of the charge, filed a bill to raise the charge. A receiver was appointed, and funds got in. The lands having been sold in a creditor's suit and the settlements lodged in the office by order, without prejudice to A.'s lien—*Held*, that A. had not any lien for costs on the deeds, since B., through whom he got the deeds, had not had any exclusive right to them; and that there could not be any lien transferred to the funds.

That A. was entitled out of the funds to the costs of procuring the renewal, and also to the costs of the limited administration out of the funds reported to B.'s representative; but that he was not entitled out of the funds in the cause to his costs of the suits instituted by him in B.'s lifetime, and as his administrator after his death.—*Molesworth v. Robbins*, 8 I. E. R. 1. (R.)—[*Affd.*, 1 E. R. 223; 2 Jon. & L. 358. (C.)]

8. A deft. died after appearance, but before answer. He was struck out of the bill, with costs, by side-bar rule, and his administrator was made a party by amendment. *Held*, that the administrator was entitled to the costs incurred by his intestate.—*Short v. Carroll*, 9 I. E. R. 468. (R.)

9. The costs of a suit, in the nature of an ejectment bill, to recover devised property, on a construction, though doubtful, of a will, are not within the rule in administration suits, that the costs come out of the estate.—*Johnson v. Brady*, 11 I. E. R. 386. (C.)

10. A creditor, ptf. in an administration suit to carry out the trusts of a voluntary deed, including personal estate, is entitled to his costs in the first instance, having put the personal estate in a train to be realised.—*O'Dowda v. O'D.*, 11 I. E. R. 464. (C.)

11. In an administration suit by one of the next-of-kin of an intestate, the other next-of-kin are within the 15th G. O., and the ptf. must pay their costs if they are required to answer. The objection need not be made at the first hearing.—*Betty v. Smith*, 11 I. E. R. 467. (C.)

1. In administration suits, concerning personal estate, when there is no fund to pay the ptf., the general rule is, that he does not get costs out of a fund belonging exclusively to creditors of a higher degree, unless they be salvage costs, or there are special circumstances. The ptf., a simple contract creditor, knew that the judgment debts would, as they did, exhaust the assets. Her object in the suit was to have a certain fund decreed to be equitable assets. She failed. No costs were given.—*Fisher v. King*, 11 I. E. R. 460. (C.)

2. An administrator whose accounts, as put forward by his answer, were completely falsified, was decreed to pay the whole costs of the suit.—*Orr v. Milliken*, 1 I. Jur. 217. (C.)

3. Costs of all necessary parties to an administration suit occasioned by a question on a will come out of the general assets, and cannot be thrown on a particular fund, though the only difficulty arises between the parties interested in that fund, and there is no question as to the rest of the assets.—*Williams v. Armstrong*, 12 I. E. R. 356. (C.)

4. A creditor who has brought an action at law against an administrator, and has notice of a decree to administer the assets, is not in general entitled to his costs of appearing on a motion to enjoin him from proceeding with the action.

A civil-bill decree against an administrator is in the nature of a judgment *de bonis propriis*. Therefore the Court, though it will enjoin a creditor from enforcing such a decree against the assets, after a decree to administer them, will not restrain him from enforcing it against the administrator personally.

*Semble*—A decree to administer assets is a defence to a civil-bill against the administrator, if pronounced before the hearing of the civil-bill. *Secus*—If pronounced after the hearing, but before an appeal to the Judge of Assize.—*Powell v. P.*, 12 I. E. R. 501. (R.)

5. When a bill would not be sustainable, a petition under the Ch. Reg. Act cannot be supported. Such a petition is equally open to an objection for multifariousness.

Upon a petition, plainly open to such an objection, the Court will not pronounce a summary order of reference without notice.

Costs of proceedings before the Court in such a petition are within the jurisdiction of the Court only, and not of the Master. On petitions for the administration of assets, the Court, in making an order of reference to the Master, will include a direction that the petitioner's costs already incurred shall be payable to him in the same order as his demand (if any), and out of the same fund or by the same party.—*Cuming v. Taylor*, 1 I. C. R. 25; 3 I. Jur. 65. (C.)

6. A. bequeathed £20,000, in trust for the building and endowment of a college for clerical students connected with the General Assembly of Irish Presbyterians; to be built where the trustees should decide, and to be

under such rules, &c., as they should determine, subject to the advice and directions of the Assembly. The suit was to administer A.'s assets; and to carry into execution the trusts of her will. *Held*, that the costs incurred by the trustees in the settlement of a scheme for the due application of the £20,000, were to be borne by that bequest, and not by the general residuary fund.

The General Assembly (who were not parties to the cause) presented a petition for leave to intervene in the office as if they had been joined, and that their costs of doing so might be allowed to them out of the £20,000. The order made on the petition merely provided that they should be at liberty to intervene, if they thought fit, and reserved until the final hearing all questions as to any claim by them for costs. Under this order they proceeded before the Master.

*Held* (at the final hearing), that they were not entitled to their costs as against any fund, since they were not parties to the cause so as to be liable to costs; and the order permitting them to intervene did not provide for their costs as prayed by the petition.—*Dill v. Brown*, 3 I. C. R. 127; 4 I. Jur. 355. (C.)

7. The Court will not decide, on the first hearing of a cause petition for an administration, that the extra costs caused by setting it down as a general cause petition, instead of for a summary reference, should be paid by the petitioner.—*Green v. Giles*, 3 I. C. R. 487. (C.)

8. When an administration suit is instituted by persons claiming as next-of-kin, upon fair grounds, and the petitioners get the assets brought into Court, they will be entitled to the costs of suit, out of the assets, though failing to sustain any claim as next-of-kin.—*Ryan v. R.*, 8 I. Jur. 274. (M.O.)

9. In suits to administer real and personal estate when there are no specific incumbrances affecting the real estate, the petitioner is entitled to his costs out of the fund in priority to all creditors.

*Semble*—When two matters are consolidated duplicate costs for carrying on the proceedings in them should not be allowed.

Observations on the practice of solicitors acting for several parties who have conflicting interests.—*Smith v. Murphy*, 10 I. C. R. 42. (R.)

10. A., possessed of £4000 stock, bequeathed £2000 of it to B. £1000 of the remainder he bequeathed for the use of Protestant schools of St. Peter's parish, and another, £1000 for the use of the school attached to the Episcopal chapel in B.-street. The chapel in B.-street had no school attached to it. B.-street was in St. Peter's parish. *Held*, that with regard to the second £1000, the will showed a general charitable intention, which might be executed *cy-pres*, in favour of Protestant schools in St. Peter's parish. It was referred to the Master to settle a scheme.

The costs, down to and including the hearing, ordered to be paid out of the residue;

the costs of the reference to be borne by the fund.—*Daly v. Att.-General*, 11 I. C. R. 41; 5 I. Jur. N. S. 297. (C.)

1. The day before she died, testatrix, V., bequeathed a legacy to her sister, B. The will was then properly attested by two witnesses. Immediately after they had signed, B., at V.'s request, and as she thought for greater security, signed her name to the will. After V.'s death, B. cut her own name off the will. *Held*, that she signed as an attesting witness, and must pay the costs incurred by her spoliating the will.—*Toker v. Maguire*, 6 I. Jur. N. S. 24. (P.)

### XXX. 10. d. Costs of Amendment.

2. When a suit is necessitated by the difficulty of construing a will, the costs are payable out of the estate; the testator having created the difficulty.—*Commrs. of Ch. Don. & B. v. Cotter*, 1 Dr. & War. 498. (C.)—[*Rev. g.* on another point, 2 Dr. & Wal. 615. (C.)]

3. Application, for costs of amendments not yet answered, refused.—*Hughes v. Maitland*, 5 I. E. R. 167. (R.)

4. By amendment, after answer, ptfs. made a new case, of which they had been aware on filing the original bill; and prayed relief on the new case, omitting the old prayer. On motion—*Held* that ptfs. should pay deft. £10 for the costs of so much of his answer to the original bill as would have been unnecessary if ptfs. had originally put forward their new case, besides paying 20s., late currency, on making the amendments.—*Walsh v. Studdert*, 2 I. E. R. 213. (R.)

5. When there is an amended bill, the costs of briefing the original bill will not be allowed.—*Higgins v. Buteman*, 2 Dr. & War. 70. (C.)

6. A., deft. as an acting executor, died. The Court allowed ptf. to amend by making the other executors parties in A.'s stead, without paying A.'s costs.—*Rye v. Coppinger*, 12 I. E. R. 314. (R.)

### XXX. 10. e. Costs of Appeal.

7. An order made by the House of Lords, dismissing an appeal, had, by the usual sidebar rule, been made a rule of Court. The Court directed the Clerk of Appearances and Writs to issue a subpoena for the costs of the appeal.—*O'Ferrall v. M'Can*, Fl. & K. 635; 5 I. E. R. 105. (R.)

8. After a day appointed for hearing, and extended on terms, the party did not comply with those terms. The H. L. dismissed the appeal with costs.—*Mahon v. Irwin*, 4 Cl. & F. 559.

9. A petition for re-hearing may be dismissed with costs, though the petitioner be given some relief.—*Uppington v. Bullen*, 2 Dr. & War. 184; 1 Con. & L. 291. (C.)

10. When a party is served with the certificate of costs, and a personal demand is made, yet he does not pay them, the H. L. will, on petition of the party entitled, order the recognizances to be estreated to pay costs, together with costs of the petition.—*Callaghan v. C.*, 8 Cl. & F. 709, n.

11. When a party, ordered to pay the costs, absents himself to avoid personal demand and service of the certificate of the costs, the H. L. will substitute service on his agents in the appeal.—*Carter v. Palmer*, 8 Cl. & F. 708, n.

12. While a case was pending in the H. L., deft. in a similar case offered ptf. to be bound by the decision in the pending case. Ptf. took no notice of the offer, but compelled deft. to go on with his defence. Judgment was given against deft., who appealed, and prosecuted the appeal to a hearing after an adverse decision in the case previously pending. Judgment being pronounced against him in his own case, he was ordered to pay the costs.—*Farrell v. Gleeson*, 11 Cl. & F. 702.

13. When the H. L. varies a decree, but only on a point which had not been raised in the Court below, nor made a ground of appeal, the appellant must pay the costs of the appeal.—*Wallace v. Patten*, 12 Cl. & F. 491.—[*See Wallace v. Patten*, 5 I. E. R. 809; Long. & T. 479. (E.E.)]

14. The H. L. will not grant costs of an appeal to come out of an estate, upon the mere miscarriage of the Court below, when the subject of litigation, though actually decided by the Court, might have required to be tried as a question of fact.

The H. L. strongly condemned the practice of each party printing an appendix to his case, and desired that in future a joint appendix only should be printed.—*Piers v. P.*, 2 H. L. Cas. 331; 13 Jur. 569.—[*Rev. g.* 10 I. E. R. 841. (C.)]

15. It is not necessary that the £10 lodged on appeal motions should be lodged before serving the notice of appeal.—*Mannix v. Drinan*, 11 I. E. R. 398. (C.)

16. After dismissal of a bill with costs, the debts were stayed from enforcing them, pending an appeal to *Dom. Proc.*, the ptfs. giving security and paying interest upon them.—*M'Carthy v. M'C.*, 11 I. E. R. 399. (C.)—[*See 1 H. L. Cas. 708; rev. g.* 9 I. E. R. 620. (C.)]

17. A decree declared the ptf. and others, specialty and simple contract creditors, entitled to a charge on lands. An appeal to the House of Lords, was defended by the ptf. at his own expense. The decree was affirmed, without costs. Before the appeal was decided, a final decree was pronounced, directing a sale, and giving the ptf. his costs in priority with his demand. *Held*, that he was not entitled to his costs of defending the appeal, as costs in the cause; but that as the other creditors had an interest in, and had derived a benefit from the defence of the appeal, they were

bound to contribute to the costs, out of the funds reported to them, rateably, in proportion to the amount of their respective demands.—*Hamilton v. Synge*, 4 I. C. R. 182; 7 I. Jur. 121. (R.)—[*Affd.*: 4 I. C. R. 551. (C.)]

1. An objection having been made to the competency of an appeal to the H. L., the Appeal Committee directed that that objection should be heard before the House, which gave judgment in favour of the appellant. The appeal was then heard, and was dismissed on the merits, with costs. The House directed that the costs, which had been incurred by reason of the objection to the competency of the appeal, should be deducted from the general costs.—*Lambert v. Peyton*, 8 H. L. Cas. 2.—[*See s. c.*, 7 H. L. Cas. 423; 6 I. C. R. 31. (C.A.); 6 I. C. R. 9. (R.)]

2. Costs of the appeal added to the appellant's security.—*Eyre v. M'Dowell*, 7 I. Jur. N. S. 41. (H.L.); 9 H. L. Cas. 619.

3. The Appeal Committee cannot decide what documents are, and what are not necessary to be printed in the appendix to a case. A question on this point, though known by the parties to exist, was not made the subject of discussion during the argument on the appeal. The H. L. would not hear it discussed afterwards, and refused to make any order touching the costs of the appendix.

The decision appealed against was reversed, and the cause remitted. The Court below was left to deal with the general question of costs.—*Spread v. Morgan*, 11 H. L. Cas. 588.—[*See* 9 I. C. R. 535; *Dr. Rep. temp.* Nap. 525. (C.)]

XXX. 10. f. *Costs of Attorney-General and of the Crown.*

4. The Attorney-General, made a party to a cause as representing a charge belonging to a deceased bastard, is not entitled to costs if nothing is reported due on the charge.—*Murphy v. Osborne*, 9 I. E. R. 254. (C.)

5. In proceeding on a *sci. fa.* on a recognition, costs cannot be given against the Crown.—*The Queen v. Hobart*, 11 I. E. R. 397. (C.)

6. As a general rule, intervenients do not get their costs; but the Attorney-General, when he intervenes as a necessary party, will be allowed his costs.—*Daly v. Burke*, 8 I. Jur. N. S. 73. (P.)

7. The Att.-Gen., served with notice of a motion for administration to goods in which the Crown had not any interest, and as to which it made no case, is not entitled to the costs of appearing on the motion when other persons unsuccessfully impeached the legitimacy of the deceased.—*Redmond v. Barber*, 8 I. Jur. N. S. 812. (P.)

XXX. 10. g. *Costs of Bankrupt and Insolvent: of their Assignees.*

8. The assignee of an insolvent mortgagor was made a party to a suit to foreclose the mortgage, but died during its progress. The mortgaged premises were the mortgagor's only property. The ptf., in order to induce a creditor of the mortgagor to become his assignee, undertook to pay him his costs in the suit. *Held*, that the ptf. was entitled to those costs as part of his own costs of suit.—*Maxwell v. Smyth, Jo. & Car.* 72. (E.E.)

9. After a decree to account, ptf. (in whose name as an insolvent's assignee the bill was filed), applied to have it taken off the file, because the attorney had used his name without his knowledge or consent. At the bar he only asked to be indemnified against costs, the suit being for the estate's benefit. *Held*, that the motion should be refused with costs.—*Bell v. Dawson, H. & Jon.* 801. (E.E.)

10. The ptf. compelled a deft., assignee of an insolvent, to answer the bill; but afterwards compromised the suit with the substantial defts., though noticed not to do so without providing for the assignee's costs. On motion, the Court refused to dismiss the bill without costs.

The assignee having answered the bill at length, the Court directed the officer, in taxing the costs, to allow the assignee only such costs as he had properly incurred.—*O'Reilly v. Ward, H. & J.* 815. (E.E.)

11. Insolvent, when deft., is not entitled to his costs.—*Conlan v. Jackson*, 1 I. E. R. 276. (E.)

12. An insolvent mortgagor's assignee having died during a foreclosure suit, another creditor agreed to become assignee, and be made deft., on ptf. undertaking to pay his costs, to expedite the suit, and save expense to the fund. *Held*, that ptf. was entitled to be paid those costs out of a fund in bank to the credit of the cause.—*Maxwell v. Scanlan*, 1 I. E. R. 277, n.

13. In a foreclosure suit, the provisional assignee having been made a deft., in consequence of the insolvency of one of the mortgagors, was declared entitled to his costs against the ptf.; the latter to have them over against the fund.—*Sproule v. Oates*, 2 I. E. R. 323. (E.E.)

14. It is discretionary with the Commissioner of Bankruptcy to give any costs or charges to the summoned party suspected of having the bankrupt's property, or supposed to be indebted to him.—*In re O'Connor*, 3 I. E. R. 364. (B.)

15. *Quære*—Is a mortgagee entitled to the costs of a foreclosure suit prosecuted by him after a notice from the assignee of the mortgagor, a bankrupt, requiring him to proceed to sell the mortgaged premises, under the G. O. in bankruptcy of 1832?

In such a case the mortgagee was held entitled to the costs of a foreclosure suit, the notice from the assignee not offering to pay

him the costs incurred up to the time of its service on him.—*Bernard v. Sadler*, 4 I. E. R. 61. (E.E.)

1. The provisional assignee of an insolvent deft. is not entitled to a fee for counsel to approve of a deed which he is called upon to execute under a decree.—*Wallace v. M'Cann*, Fl. & K. 554; 4 I. E. R. 522. (R.)

2. During a foreclosure suit the mortgagor was discharged as an insolvent. His assignee was made a deft. That assignee died. A new assignee having been appointed, he appeared by the former assignee's attorney. *Held*, that the new assignee was entitled to his own costs, and those of the first assignee.—*Lahey v. Bell*, 5 I. E. R. 108. (E.E.)

3. The provisional assignee of a bankrupt mortgagor is not entitled to his costs against the mortgagee, ptf. in a foreclosure suit.—*Hughes v. Kelly*, 3 Dr. & War. 482; 2 Con. & L. 223; 5 I. E. R. 286. (C.)

4. The provisional assignee of the Insolvent Court, made a party deft. as such, stands in the place of the debtor; and is not entitled to his costs as against the ptf., when the debtor would not be so entitled.—*Walker v. Molloy*, 6 I. E. R. 218. (E.E.)

5. A bill, by an uncertificated bankrupt, stated that all, except one, of the creditors who had proved under the commission, had proved, and that between that creditor and the assignee there was collusion. *Held*, that the bill was not maintainable. A demurrer by the assignee was allowed, but without costs, since the assignee should have submitted to the jurisdiction.—*Wyse v. Waters*, 1 I. Jur. 180. (R.)

6. In 1827 a commission of bankruptcy issued. Proceedings were taken in Ch. relative to the estate of the bankrupt. Several of the Commissioners having died before 1836, when the 6 W. 4, c. 14, came into operation, the commission did not pass to the Commissioners then appointed. Also in 1845, by order of the Court of Ch., a sum was transferred to the matter of the commission. Until 1850 no creditor applied for a renewal of the commission; and there was no assignee. On petition by the solicitor for the former assignee, an order was made that his costs should be taxed without the renewal of the commission.—*In re Pepper & Locke*, 2 I. Jur. 164. (C.)

7. An order was made in 1847, superseding a commission of bankruptcy against a party, with costs, to be paid by the petitioning creditors. Before those costs were paid, that party was, in 1849, discharged under the Act for the Relief of Insolvent Debtors. *Held*, that the assignee in the insolvency matter, having been a petitioning creditor in the bankruptcy matter, took the costs under the order of 1847, subject to the lien of the solicitor who had obtained that order; and could not be allowed to set off as against that lien a debt due to himself by the insolvent when

those costs were incurred. Upon motion, the Court varied the order of 1847, by directing the petitioning creditors to pay to the solicitor the amount of the taxed costs.—*In re Petticrew*, 2 I. C. R. 102. (C.)

8. An insolvent mortgagor's assignee filed a bill for an account, and to redeem a mortgage. Two cause petitions for the same purpose were afterwards filed, which were dismissed with costs. A new assignee moved under the B. and I. Act to be substituted by suggestion as ptf. The Court, on a cross notice by the deft., ordered the costs of the dismissed petitions to be paid before the suggestion was entered.—*M'Conkey v. Gwynn*, 8 I. C. R. 33. (R.)—[Affirmed: 10 I. C. R. 261. (C.A.)]

9. When property is sold under a *fi. fa.*, with notice to the execution creditor of an act of bankruptcy committed by the debtor, the assignees are entitled to damages, besides the produce of the sale. The execution creditor must pay the damages, together with the costs, of which the sheriff must bear a portion.—*Re Nolan*, 6 I. Jur. N. S. 71. (B.)

10. When the Master had, in his discretion, settled the entire of a fund upon a wife and her children, the Court refused on appeal by the petitioners, the husband's assignees in bankruptcy, to interfere with that discretion, or to charge the fund with their costs. Motion refused, with costs.—*James v. Smith*, 6 I. Jur. N. S. 337. (R.)

11. A trader filed a petition against himself. Afterwards a creditor filed another, and got priority; and the costs of the petition filed by the trader were not given him.—*Re Daly*, 6 I. Jur. N. S. 418. (B.)

12. Although a party establishes his claim, costs will not be given when private transactions demand investigation.—*Re Curran*, 10 I. Jur. N. S. 59. (B.)

13. A trader, who under the arrangement clauses petitions the Court, obtains the usual protection, and procures an order for the assignee to receive and possess his estate, cannot, even by special arrangement with his attorney, lodge with, or transfer to him any portion of his assets, as security for his costs, so as to create a lien in the attorney's favour. An attorney, who in an arrangement matter voluntarily hands over to the official assignee scrip or railway shares, deposited with him by his client (the trader), will have no equitable claim on foot of those shares for costs due to him by his client.

An attempt to fasten on a trader's assets, of which the attorney has got possession, a special lien by special contract, as security for his costs, those assets being bound by an order of the Court procured by that attorney, must fail; since it would be against the rights and equities of the several creditors bound by the vesting order.

When proceedings are taken *bona fide*, without the Court's authority, or the assignee's sanction, the attorney is not entitled to any lien for costs; but, when the assignees concede the right of proving for those costs, the Court will sanction it.—*Re North*, 10 I. Jur. N. S. 297. (B.)

1. Traders, by falsely representing their circumstances, obtained forbearance. They contrived to have their trade carried on by members of their family, and to place property beyond the reach of their general creditors. They fully and truly disclosed their trade dealings; but the Court, nevertheless, adjourned for twelve months the granting of the certificate, and gave the opposing creditors costs out of the estate.—*Re Scotts*, 11 I. Jur. N. S. 20. (B.)

### XXX. 10. h. *Bank of England.*

#### XXX. 10 i. *Bill or Petition, Dismissal of.*

[See PRACTICE. BILL, DISMISSAL OF.]

2. The 25 G. 3, c. 51, s. 3, applies to cases in which the ptf. dismisses his bill by rule in the office, not to cases in which it is dismissed by the act of the Court. In dismissing the bill without costs, the Court deals with the deft.'s acts; not with the ptf.'s.

When the subject matter of the suit was, by the ptf.'s act, transferred to the Crown pursuant to statute, the Court would not dismiss the bill without costs. The ptf.'s demand having been satisfied by the Crown, and the deft. being justly liable to pay it to the Crown, the Court would not permit him to dismiss the bill with costs, for want of prosecution.—*Bunbury v. O'Brien*, H. & J. 803. (E.E.)

3. Ptf., having compelled a deft., an insolvent's assignee, to answer the bill, compromised the suit with the substantial defts., though noticed not to do so without providing for the assignee's costs. On motion, the Court refused to dismiss the bill without costs.

The assignee having answered the bill at length, the Court directed the officer, in taxing the costs, to allow the assignee only such costs as he had properly incurred.—*O'Reilly v. Ward*, H. & J. 815. (E.E.)

4. A process-server pleaded guilty to an indictment for perjury respecting the service of process. *Held*, that ptf. and his attorney should, in this *special* case, pay defts. all their costs of setting aside the process, except those of the prosecution, over which the Court considered it had not any control.

*Quare*—Is ptf. generally liable for costs of setting aside process against defts. who have convicted the process-server of perjury?

*Semble*—The process-server's affidavit is conclusive touching the fact of service, until a conviction for perjury is had.—*Egan v. Doherty*, 2 I. E. R. 68. (E.E.)

5. When a bill is filed in consequence of a difficulty arising upon a will, under which the

adverse parties claim, the Court, in dismissing it, will not give costs.—*Graham v. Thynne*, 2 I. E. R. 407. (E.E.)

\*6. When dealings between solicitor and client, or principal and agent, are in their inception voidable in equity, but have been saved from impeachment because the client or principal has confirmed them by acts, the solicitor or agent will not be entitled to costs of a suit instituted by the client or principal to impeach those dealings, though the bill be dismissed.—*De Montmorency v. Devereux*, 2 Dr. & Wal. 410; 7 Cl. & F. 188; West, 64; 4 Jur. 403.—[Affg. 1 Dr. & War. 119. (C.)]

7. Upon a motion to dismiss with costs a bill for want of prosecution, the Court will not allow ptf. to go into the merits of the case to show that the bill should be dismissed without costs.—*Carroll v. Donoghoe*, Fl. & K. 98. (R.)

8. A suit abated by the marriage of the sole ptf. Deft. moved that it be revived within a certain time, or, in default, that the bill be dismissed with costs. *Held*, that the bill should be dismissed without costs.—*Westropp v. Healy*, Fl. & K. 141. (R.)

9. On dismissing the ptf.'s bill, the Court will not give costs when the deft. has imperfectly stated his case in his answer.—*Steele v. Mitchell*, 3 I. E. R. 11. (C.)

10. A petition claiming exemption from payment of the rentcharge in lieu of tithe, may be dismissed with costs, the Court, after argument, holding that it had jurisdiction so to dismiss it, although the statute is silent as to costs.—*Chambers v. Earl of Shannon*, 5 I. E. R. 335. (R.)

11. Deft. at law filed a bill of discovery against the ptf. in aid of his defence. Ptf. at law withdrew his record, which had been set down for trial, and became liable to the deft.'s costs of the day, which were taxed. Ptf. in equity, after the deft. had answered, entered a rule to dismiss his bill with costs, which were taxed, and subpoena issued by the deft. in equity for payment of them. Upon motion of the ptf. in equity, the Court set off the costs payable to him in the suit at law against those payable by him to the deft. in equity.—*Marquis of Salisbury v. Maguire*, 7 I. E. R. 499. (R.)

12. When a bill is dismissed, the Court cannot decree the costs to be paid by a deft. whose misconduct occasioned the suit.—*Cochrane v. O'Brien*, 8 I. E. R. 241; 3 Jon. & L. 380. (C.)

13. Deft. having served a notice under the 76th G. Rule, and being served by the ptf., in reply, with notice that, upon obtaining an order for which he had applied, to take the bill as confessed against other defts., he would file a replication, is entitled to costs



up to the day of service of ptf.'s notice.—*Jones v. Hewett*, 8 I. E. R. 517. (E.E.)

1. Ptf. amended his bill *bona fide* after the deft. was entitled to move to dismiss it. The Court refused to dismiss the bill, but made the ptf. pay the costs of the motion.—*Moore v. Lator*, 9 I. E. R. 148. (R.)

2. When a cause is set down for a dismiss, the deft. setting it down is alone entitled to costs, and any other defts. appearing will not get costs.—*Purcell v. P.*, 11 I. E. R. 516. (C.)

3. During the progress of a suit, the ptf. obtained leave to sue *in forma pauperis*. The bill was subsequently dismissed with costs, for which the ptf. was arrested. *Held*, that the order dismissing the bill with costs generally, was erroneous, and that the ptf. should be therefore discharged.—*Staunton v. Barrington*, 1 I. Jur. 347. (R.)

4. Where there are several creditors and suits, and a decree has been made in one of them, and an order has stayed the proceedings in the other suits on the usual terms, the defts. in the stayed suits may move to dismiss the bill for want of prosecution, for the purpose of being paid their costs, and are not bound to wait until funds are allocated or realised in the suit which proceeds.—*Milward v. Fagan*, 12 I. E. R. 313. (R.)

5. An appeal from a decree for the ptf. was argued in the H. L. Before judgment the ptf. died. The deft. revived the cause against his executors. The H. L. reversed the decree, and dismissed the bill "with costs of the suit in the Court below."—*Held*, that the decree made in the Court below on this order should be couched in the same words. Its words giving costs payable by the executors, the decree was varied on a re-hearing.—*Eyre v. Hollier*, 12 I. E. R. 607. (C.)

6. Bill to raise a mortgage; answer by the deft. B. and wife in Dec. 1849. A petition was subsequently presented to the I. E. Court by a brother-in-law of B., upon which an order for sale was made. In May 1850, a motion by B., that the bill might be dismissed for want of prosecution, was refused with costs.—*Bernard v. Bond*, 2 I. Jur. 235. (R.); *ibid*, 311. (C.)

7. Though a bill has been filed on the authority of a reported case, which is afterwards reversed, the Court has not jurisdiction on a motion under the 82nd G. O. to order that the bill shall be dismissed without costs.—*Cronin v. Murphy*, 1 I. C. R. 233. (R.)

8. The owner of a judgment, affecting only a life estate, presented a cause petition for its sale; and brought before the Court the creditors on the estate who had charges created before 1840, and prayed to redeem them. They declined to be redeemed. The Court dismissed with costs the petition against the

creditors on the inheritance.—*Elliot v. Osborne*, 4 I. Jur. 189. (C.)

9. A bill for tithe rentcharge was filed against several defts. Sixty-three of them agreed to pay, and were struck out of the bill. An irregular side-bar order was entered that the bill be dismissed as against them, with costs. They paid the rentcharge due by each, and the costs of subpoena and parliamentary appearance. The remaining eight defts. only owed 8s. 9d. rentcharge at the time of filing the bill, and the ptf.'s solicitor then wrote to them saying they were only nominal defts. The bill was afterwards set down to be heard against them, and they then consented to pay whatever costs should be taxed against them. Costs, being the general costs of the suit, were taxed against them to £36. 2s. 0½d.

The Taxing Master was directed to review the taxation, and report what amount of costs would have been properly chargeable against them, if the side-bar order had not been made; but the Court, under the 1 & 2 Vic., c. 109, s. 28, had ordered "that the sixty-three defts. should be struck out of the bill, on paying the rentcharge due by each, and the proportion of the costs of the suit to which they would be liable, under that sec., as if one general bill of costs had been made against all the defts."

When a side-bar order to dismiss a bill as against some defts. is irregularly entered, and injustice, respecting the costs of the suit, is done to other defts., the Court will relieve against the injustice.

A defendant struck out of a bill for tithe rentcharge, under the 1 & 2 Vic., c. 109, s. 28, is liable not only to the costs of subpoena and appearance, but to his portion of the general costs.

When a suit is instituted to recover a very small amount, it should be dismissed, as being beneath the dignity of the Court.—*Chaine v. Dunganon*, 6 I. Jur. 174. (R.)—[*Affd.*: 7 I. Jur. 89. (C.)]

10. The Court will not, on the consent of parties, reinstate cause petitions dismissed for want of prosecution under the 20th or 27th G. O. of July 1851, unless there are sufficient grounds, irrespectively of the consent, for reinstating them.

When a cause petition is dismissed under the 20th G. O., the Court will not, on motion, give costs to a respondent who did not appear when the cause was called on.

In future, no order to amend a cause petition will be made, except on production of the Rolls certificate or the Lord Chancellor's order, referring the matter to the Master, under the 15th sec. of the Ch. Reg. Act 1850.—*Porter v. Archbold*, 4 I. C. R. 651; 1 I. Jur. N. S. 116. (R.)

11. A bill was filed by the assignee of an insolvent mortgagor, for an account, and to redeem a mortgage.

Two cause petitions, for the same purpose, were afterwards filed, which were dismissed, with costs. A new assignee moved, under the

Bankruptcy and Insolvency Act, to be substituted by suggestion as ptf. *Held*, that the costs of the dismissed petitions must be paid before the suggestion was entered.—*M'Conkey v. Gwynne*, 10 I. C. R. 261. (C.A.)—[*Affg.* Rolls decision, 8 I. C. R. 83. (R.)]

1. When, on the death of one of two petitioners, an order is made on behalf of the respondent that the surviving petitioner shall revive within a limited time, or that the petition will be dismissed; the dismissal will be with costs.—*Corr v. C.*, 6 I. Jur. N. S. 212. (R.)

2. Charges of fabrication and fraud, made in a petition, failed. It was dismissed, with costs.—*Stubber v. S.*, 10 I. Jur. N. S. 153. (F.)

XXX. 10. j. *Cause standing over, or struck out of List: Costs of the Day.*

3. Ptf.'s solicitor ordered to pay the costs of the day, because of his non-attendance in Court when the case was called on.—*Courtney v. Stack*, 2 Dr. & War. 251; 1 Con. & L. 366. (C.)

4. This is a bill for a redemption, in which, as general rule, the ptf. must pay the costs of all necessary parties. Spode is a party deft.; he is, therefore, entitled to his general costs in the cause. This is the ordinary case of a cause being ordered by the Court to stand over from one day to another, nothing in particular appearing on the face of the record, but merely the cause standing over at the desire of the Court. The ptf. must, therefore, pay the refreshing fees; for where a party is entitled to his costs generally, and the cause stands over from day to day, the refreshing fees are costs in the cause.—*Wynne v. Brady*, 5 I. E. R. 243. (E.E.)

5. When a cause at hearing is directed to stand over, the ptf. to pay the costs of the day, if there are not any special directions in the order, the costs of the day only include dockets of refreshers, refreshing fees of two guineas to each counsel, attendance on counsel, and one day's attendance at the hearing.—*Hamilton v. H.*, 2 I. Jur. 227. (R.)

6. It is in the discretion of the Court to make summary orders. If, in consequence of a serious question arising, the Court say "no rule," it may reserve all questions of costs until the case comes in a more formal manner before it.—*Hatchell v. Chancellor*, 3 I. Jur. 13. (C.)

7. When parties file affidavits so recently that their opponents cannot answer them before the hearing, if the parties filing insist on using the affidavits, the Court will allow the petition to stand, and make the party causing the delay pay the costs occasioned thereby.—*Anderson v. O'Connor*, 4 I. Jur. 275. (C.)

8. When in a proceeding under the Ch.

Reg. Act one party files an affidavit so shortly before the hearing as to take the opposite party by surprise, and insists upon using that affidavit, the Court will allow the case to stand over; and will order the party on whose behalf the affidavit has been filed to pay the costs of the day.—*Figgis v. F.*, 2 I. C. R. 38; 4 I. Jur. 275. (C.)

XXX. 10. k. *Charity.*

9. Relators refused to proceed further in an information. New relators, who offered an indemnity for all past and future costs, were appointed.—*Att.-Gen. v. Mayor and Corp. of Cashel*, S. & Sc. 833. (R.)

10. Misapplication of the funds of a public body went on for a great length of time. No imputation was cast upon the trustees, who were removed. They were allowed their costs of the fund.

This case is not to be a precedent for cases to be thereafter defended, in which the same point should arise.—*Att.-Gen. v. Drummond*, 3 Dr. & War. 162; 2 Con. & L. 98. (C.)

XXX. 10. l. *Costs of Commissioners.*

11. The Court will, under the words, "reasonable costs, charges, and expenses," in the 2 & 3. Vic. 61, s. 29, award all necessary costs incurred by parties in obtaining payment out of Court of the purchase-money of lands required for the purposes of the commission, or of having it invested in trusts similar to those to which the lands so required were subject.—*In re The Shannon Commissioners*, Fl. & K. 13; 3 I. E. R. 355. (R.)

12. The Court will, under the words, "and to make such other order in the premises as to the Court shall seem just and reasonable," of the 6 G. 4. c. 193, s. 29, give the costs of attending the inquisition to ascertain the value of the lands required by the company.—*In re The Ulster Canal Company*, Fl. & K. 16. (R.)

13. The Court will not, under the 1 & 2 Vic., c. 56, order the Poor-law Commissioners to pay the costs relating to the re-purchase of lands, to be settled to the same uses as those to which the lands sold were subject.—*In re Lord Mountsdford*, Fl. & K. 368. (R.)

14. Under the 5 & 6 Vic., c. 62, the Commissioners of Woods and Forests are bound to pay the costs of a reference to ascertain the rights of parties to the purchase-money of premises purchased under the Act, as expenses incidental to the purchase.—*In re Commissioners of Woods & Forests*, 7 I. E. R. 487. (R.)

XXX. 10. m. *Costs of Proceedings Touching Contempt.*

15. Deft. having been arrested under process of contempt for not answering a bill, swore his answer just before the expiration of the time within which ptf. was bound to have him

brought to the bar of the Court, and, at the same time, served ptf. with notice not to remove him from Dublin. The answer was afterwards filed. Ptf. brought deft. to the bar of the Court. Deft. applied for costs of his removal. *Held*, not entitled to them.—*Stopford v. Cronin*, 2 Jon. 536. (E.E.)

1. A conditional order for an attachment for non-payment of rent was granted against a tenant to the Court. On a motion to show cause, a reference to the Master was directed to ascertain the amount due. The carriage of this order was given to the petitioner, who delayed proceeding thereon till after service by the tenant of a notice of motion in the Rolls Court, that the cause shown should be allowed; and for the costs of the original motion to show cause. *Held*, that the tenant's proper course was to apply to the Master under the 122nd G. O. of 1843, for a report that the petitioner had not proceeded on the order, that no rule should be made on the motion; and that each party abide his own costs.—*Agar v. Phaire*, 1 I. Jur. N. S. 43. (R.)

2. A. bequeathed £20,000 in trust, for the building and endowment of a college for clerical students connected with the General Assembly of Irish Presbyterians; to be built where the trustees should decide; and to be under such rules, &c., as they should determine; subject to the advice and directions of the Assembly. The suit was to administer A.'s assets, and to carry into execution the trusts of her will. *Held*, that the costs incurred by the trustees in the settlement of a scheme for the due application of the £20,000 were to be borne by that bequest, and not by the general residuary fund.

The General Assembly (who were not parties to the cause) presented a petition for leave to intervene in the office as if they had been joined, and that their costs of doing so might be allowed to them out of the £20,000. The order made on the petition merely provided that they should be at liberty to intervene if they thought fit, and reserved until the final hearing all questions as to any claim for costs by them: under this order they proceeded before the Master. *Held* (at the final hearing), that they were not entitled to their costs as against any fund, since they were not parties to the cause so as to be liable to costs, and the order permitting them to intervene did not provide for their costs as prayed by the petition.—*Dill v. Brown*, 3 I. C. R. 127; 4 I. Jur. 355. (C.)

### XXX. 10. n. Costs of Creditors.

[See also PRACTICE, CREDITOR'S SUIT—PRACTICE, COSTS, 10. c., ADMINISTRATION SUITS.]

3. In the case of a deficient fund, if a creditor who has obtained a separate report after the final hearing, procures the cause to be re-heard, the decree may be altered by refusing costs to a deft. who had been decreed them: the facts detailed in the report being such as, if known at the final hearing, would

have prevented the Court from giving him costs.—*Robinson v. Harris*, H. & J. 412. (E.E.)

4. The costs of the ptf. and of the several parties to the cause, having been ordered to be paid out of the fund, and a puisne creditor, not a party, but whose demand had been decreed to be paid, having obtained leave to attend the taxation of costs,—*Held*, that he was entitled to the costs of reading over the bills of costs of the several parties to the cause.—*Phillips v. Page*, H. & J. 819. (E.E.)

5. A puisne creditor filed a bill to redeem a prior mortgagee; and for a sale, offering by his bill to pay the prior mortgagee what should appear due to him. The prior mortgagee was proceeding to foreclose, and by answer accepted the offer. On the hearing, he insisted that the fund was deficient, and that ptf. should by the decree undertake to redeem him. *Held*, that ptf. was only bound to undertake to pay him whatever additional costs and expenses ptf.'s suit had caused him.—*Att.-Gen. v. Redmond*, 2 Jon. 254. (E.E.)

6. An insolvent mortgagor's assignee was made deft. in a foreclosure suit, but died during its progress. The mortgaged premises were the mortgagor's only property. To induce one of the mortgagor's other creditors to become his assignee, ptf. undertook to pay him his costs in the suit. *Held*, that ptf. was entitled to them as part of his own costs.—*Maxwell v. Smyth*, Jo. & Ca. 72. (E.E.)

7. Costs of a creditor *bona fide* carrying the decree into effect for the benefit of all parties, and making the fund available, are an exception to the general rule, that ptf.'s costs stand in the same degree with his demand. The rule in *Taylor v. Gorman*, 1 Dr. & Wal. 235, n., qualified.—*Kelly v. K.*, 1 I. E. R. 317. (R.)

8. Ptf. in a creditor's suit is entitled, in priority to the demands of the other creditors, to the costs incurred by him *bona fide*, and for the benefit of all parties, and with their assent, in making out title to the premises decreed to be sold.

*Semble*—He is entitled to his costs in the cause in equal priority with his demand; but, if by his exertions, he realises a personal fund for the benefit of all the creditors, he is entitled to his costs as the first charge upon that fund.—*Maguire v. Dundass*, 1 I. E. R. 25; Jo. & Ca. 2. (E.E.)

9. By the Court's settled practice, ptf. in a creditor's suit is entitled to costs only according to the priority of his demand.—*Gray v. Crawford*, 1 I. E. R. 274; Jo. & Ca. 174. (E.E.)

10. Ptf., one of many creditors under a composition deed, filed a bill to carry its trusts into execution. He was obliged to make all the parties to the deed debts, besides several scheduled creditors who had refused to join as co-ptfs. *Held*, that not-

withstanding the suit was, in its result, altogether for debts' benefit, and the fund had been made available by ptf.'s exertions, still, according to this Court's settled practice, ptf. was only entitled to be paid his costs in equal priority with his demand.—*Taylor v. Gorman*, 1 Dr. & Wal. 235, n. (C.)

1. A judgment creditor of the tenant for life filed his bill against those representing the estate, and an *elegit* creditor of the inheritance in possession; and prayed an account of what, without wilful default, he might have received. It appearing to the Court that the conduct of the ptf. was inequitable, as the account prayed for by him might have been taken in a Court of Law—*Held*, that the *elegit* creditor was entitled to his costs as against the ptf.

The ptf. having filed a bill against the remainderman, the Court gave no costs to any party, so far as the suit related to the construction of the will of the party creating the entail; but gave the remainderman the costs of the residue of the suit against the ptf.—*Flood v. Digby*, 2 Jones, 582. (E.E.)

2. If lands have been sold under a decree, and judgment creditors, knowing that the fund cannot reach them, necessitate the filing a supplemental bill against them, they will not get their costs in that suit.

*Semble*—They will be compelled to pay the costs occasioned by such vexatious conduct.—*Barrett v. Birmingham*, 1 I. E. R. 417; S. & Sc. 419. (R.)

3. In a creditor's suit the heir-at-law of the debtor, who has been decreed his costs out of the surplus fund, cannot have them against the ptf. if that fund prove deficient.—*Hunt v. Bateman*, Long. & T. 379. (E.E.)

4. When there are several creditors' suits, and proceedings in the last instituted are stayed, and the ptf. ordered to go in under the decree in the first cause, and prove his demand, including his costs properly and necessarily incurred, and the costs which he should be liable to pay to the several debts, he is personally liable, in the first instance, to pay the costs of the debts, who are not obliged to wait until funds are allocated or realised in the first cause. But when the restrained cause, though unnecessary, was not vexatiously instituted, and the ptf. had been compelled to pay the costs of some of the debts, the Court ordered the receiver in the first cause to pay to him the amount of the costs which he had been so compelled to pay.—*Loftie v. Forbes*, 2 I. E. R. 443. (R.)

5. The costs incurred by a ptf. in litigating and reviving the demand of a creditor, which is prior to the ptf.'s, and for the payment of which, with costs, the decree provides, are not costs which the ptf. is entitled to be paid in priority to the demand of such creditor.—*Jauge v. Jackson*, Fl. & K. 45. (R.)

6. A creditor who proves his demand under a decree to administer assets, will not be heard upon the final hearing of the cause to ask for costs incurred by him in the office in reducing the ptf.'s demand; there being no special case made for that purpose by the report.—*Loughny v. Dillon*, 3 I. E. R. 55. (E.E.)

7. A simple contract creditor, who institutes a suit to administer personal assets, and seeks to have his costs as against judgment and specialty creditors who may come in under the decree, ought to make a case for it by his bill, and show that a suit was necessary for the due administration of the assets, and payment of his debt; or else that, by his exertions, he has made a fund available, which would otherwise have been lost.—*Drake v. Ford*, 3 I. E. R. 56. (E.E.)

8. Before the passing of the 5 & 6 W. 4, c. 55, a judgment creditor proceeded by *elegit* and inquisition, but was kept out of possession of the estate by prior creditors. He afterwards obtained an order extending a receiver obtained on the petition of a prior creditor to the matter of his petition on his judgment. *Held*, that he was entitled to the costs of the proceedings at law in the same priority with his demand.—*Barry v. Wilkinson*, 3 I. E. R. 121. (E.E.)

9. When the bill prayed a sale, and account and payment of prior and contemporaneous incumbrances, and a prior *elegit* creditor had put in an answer of unreasonable length, the Court directed that the Remembrancer should, in taxing the costs, have regard to the length of the answer.—*O'Brien v. O'Brien, Jo. & Ca.* 193. (E.E.)

10. The final decree ordered a debt. to have his costs against the ptf., and the ptf. to have them over with his own costs, out of the money arising from the sale. The ptf. was a puisne reported creditor. The Court refused to pay him the amount of those costs (for payment of which the defendant was proceeding against him by attachment), out of rents brought in by the receiver; but stayed the debt's proceedings, until further order. Such a decree for costs is not to be enforced against the ptf., unless the fund be insufficient, or he be guilty of *laches* in the prosecution of the suit.—*Crofts v. Poe*, 3 I. E. R. 151. (E.E.)

11. A creditor who has been stayed from proceeding in his suit, and compelled to come in under the decree in another suit, will not be ordered to contribute to the costs of the ptf. in that suit, as between attorney and client. The rule only applies to persons coming in voluntarily under the decree.—*O'Brien v. Fitzgerald*, 3 I. E. R. 159. (E.E.)

12. Costs of the suit given to the ptf., a simple contract creditor, in priority to the demands of judgment and specialty creditors; the suit being necessary, and having been properly conducted.—*Jameson v. Farrer*, 3 I. E. R. 346. (E.E.)

1. Creditors who prove under a decree obtained in a suit instituted by a legatee to administer the assets of the deceased, are not bound to contribute to the difference between the ptf.'s costs between attorney and client, and party and party.—*Lynch v. Skerrett*, 3 I. E. R. 504. (E.E.)

2. By the settled practice of the Court of Ch., a ptf. in a creditor's suit, is entitled to his costs only in the priority of his demand, except such costs as have been plainly incurred for the benefit of the parties in the cause, such as making out title to the estate to be sold.—*Nelson v. Brady*, 1 Con. & L. 239; 2 Dr. & War. 148; 4 I. E. R. 359. (C.)

3. On a bill filed by the executors of a judgment creditor to raise the amount due on the judgment, it appeared that the ptf. were overpaid. *Held*, that they should pay the costs of the suit.—*Graves v. Wright*, 1 Con. & L. 267; 2 Dr. & War. 77. (C.)

4. The demand of the creditor having been paid off in the progress of the suit, is no reason for depriving him of his costs.—*Wynne v. Brady*, 5 I. E. R. 239. (E.E.)

5. The costs of unnecessarily re-docketing judgments not to be allowed.—*Macken v. Newcomen*, 7 I. E. R. 114; 2 Jon. & L. 16. (C.)

6. Construction of the Rule as to judgment creditors. In a suit instituted before the G. Rule of June 1842, the ptf. having served judgment creditors, defts. not in possession by receivers, with subpoena to hear judgment, were decreed to pay the costs of their appearing, and not to have them over.

If they appeared without subpoena, they should bear their own costs.

Such of the judgment creditors as had answered since that Rule, decreed to pay their own costs, unless they had been served with a notice to press, in which case the ptf. were decreed to pay them.

Judgment creditors having receivers, entitled to answer and appear, and to have their costs.—*Bank of Ireland v. O'Malley*, 7 I. E. R. 121. (C.)

7. More than six years' interest cannot be recovered on a judgment affecting only a reversion, on the ground of the lands having been in possession of a prior incumbrancer, when the possession of the prior incumbrancer (whose charge overrode both life estate and inheritance) was during the continuance of the previous life estate.

Judgment creditors made notice parties, who put in an answer relying on a point which might have dismissed the bill, but afterwards availed themselves of the decree, and proved their demands under it—*Held*, entitled only to such costs as they would have had without answering.

*Semble*—A bill by a judgment creditor, for a sale in the lifetime of the conuzor, cannot be sustained as against judgment creditors

whose judgments are before November 1840.—*Vincent v. Going*, 7 I. E. R. 463; 1 Jon. & L. 697. (C.)

8. Ptf., in a suit in the Exchequer, discontinued that suit before decree, without obtaining an order for payment of the costs incurred in it; and came in under the decree in a suit in this Court. *Held*, that this Court has not power in this suit to give the costs in the Exchequer suit.—*Finlay v. Heeran*, 7 I. E. R. 485. (R.)

9. A creditor instituted a suit against the real and personal representatives of the principal debtor, and against one of his sureties (omitting the other surety), and obtained a decree to account. He afterwards filed a supplemental bill against the representatives of the other surety, but since they did not derive any benefit from the proceedings in the original suit, and since ptf. might have framed it so as to have obtained therein the relief sought by the supplemental bill—*Held*, that he was not entitled to the costs of the original suit, as against the representatives of the second surety.—*Cuffe v. Young*, 2 Jon. & L. 17. (C.)

10. If the person liable to pay tithe rent-charge fail to do so, within ten days after service of notice, as prescribed by 1 & 2 Vic., c. 109, the rentcharger is then entitled to prepare his petition; and is justified in refusing to receive the arrears without the costs incurred in preparing his petition and incidental thereto.

What are reasonable costs in such case.—*Macartney v. Graydon*, 8 I. E. R. 99. (R.)

11. The practice of giving priority to costs of resisting claims in creditors' suits observed on.—*Carroll v. Darcy*, 10 I. E. R. 321. (C.)

12. When a receiver has been appointed in a suit, and a judgment creditor who is a notice party, and might obtain full relief in the suit, presents a petition to extend the receiver, he shall not have the costs of the petition, though there be a suspicion of collusion between the ptf. and deft. in the suit.—*Honan v. Galway*; *Clift v. Galway*, 1 I. Jur. 36. (E.E.)

13. Defts., as judgment creditors who had been served with a notice to consent, to be paid according to the priority, made to pay costs.—*Burke v. Killikelly*, 1 I. C. R. 1. (C.)

14. An order was made in 1847, superseding a Commission of Bankruptcy against a party, with costs, to be paid by the petitioning creditors. Before those costs were paid, that party was, in 1849, discharged under the Act for the Relief of Ins. Debtors. *Held*, that the assignee in the insolvency matter, who had been one of the petitioning creditors in the bankruptcy matter, took the costs under the order of 1847, subject to the lien of the solicitor who had obtained that order; and could not be allowed to set off against that lien a debt due to himself by the insolvent when those costs were incurred. Upon motion, the

Court varied the order of 1847, by directing the petitioning creditors to pay the solicitor the amount of the taxed costs.—*In re Petticrew*, 1 L. C. R. 102. (C.)

1. In an administration suit by a judgment creditor, when the ptf. recovers part of his demand rateably with other judgment creditors, he is entitled to be paid his full costs out of the fund in the first instance.—*Perry v. Magrath*, 6 L. Jur. 349. (C.)

2. A decree declared the ptf. and other creditors entitled to a charge upon lands. There was an appeal to the House of Lords, which was resisted by the ptf. at his own expense. The decree was affirmed without costs. Before the appeal was decided, a final decree was pronounced in the Court of Ch. here, directing a sale, and giving the ptf. his costs in the same priority as his demand.

*Semle*—That the ptf. could not in any way have obtained the costs of resisting the appeal as part of his costs in the cause.

*Held*, that as the other creditors had an interest in, and had derived a benefit from, his resistance to the appeal, they were bound to contribute to the costs reported to them, rateably in proportion to the amount of their respective demands.—[Affirming Rolls decision: 4 L. C. R. 182.]—*Hamilton v. Syngue*, 4 L. C. R. 551; 7 L. Jur. 121. (C.)

3. When there are no incumbrances prior to his, a petitioner having the carriage of the suit is entitled to his costs out of a fund the produce of real estate, in the first instance, and in priority to the demands and the costs of creditors, in equal priority with him.—[*Taylor v. Gorman*, (1 Dr. & Wal. 235, n.) observed on.]—*Watson v. Fitzpatrick*, 11 L. C. R. 213. (R.)

4. On a compensation motion the Court will not allow, out of the funds, the costs of creditors opposing it, when the estate is duly protected, on the motion by the solicitor having the carriage of the proceedings.—*Clendinning v. Brett*, 6 L. Jur. N. S. 166. (L.E.C.)

5. Administration refused to a creditor who had cited next-of-kin to accept and refuse, though the estate was insolvent, and considerable delay had occurred on the next-of-kin's part in applying for a grant; but the creditor was allowed his costs out of the estate.—*Forster v. Murphy*, 8 L. Jur. N. S. 135. (P.)

6. One interested as a creditor, &c., is not in general entitled to the costs of citing the next-of-kin to accept or refuse administration, if the latter appear and accept, unless a conditional decree has been made; and unless such person has cited all the prior parties the 31<sup>st</sup> Rule (Contentions) does not apply, which directs him to enter a side-bar rule that the deft. do extract within fourteen days, or in default the administration to be given to the ptf.—*Wade v. Stephens*, 8 L. Jur. N. S. 158. (P.)

XXX. 10. o. *Cross Cause*. [See PRACTICE, XXX, 1, *Generally*.]

XXX. 10. o.\* *Crown*.

7. The deft. demurred to the inquisition and return of the sheriff to a writ of extent. The demurrer was allowed.

The Crown applied for liberty to quash the former proceedings, and to issue a new extent. *Held*, that the Court might make it part of the terms upon which they would grant the application—that the Crown should pay the deft. the costs of the former proceedings.—*The Queen v. Perrin*, 4 L. E. R. 429. (Rev. Exch.)

XXX. 10. p. *Decree for Administration of Assets*. [See PRACTICE, XXX. 10. c., ADMINISTRATION SUITS.]

XXX. 10. q. *Demurrer or Plea allowed; submitted to; overruled; or ordered to stand for Answer*.

8. A demurrer to that part of a bill which sought ptf.'s costs as administrator, was overruled. *Held*, that the ptf. was entitled to the costs of the hearing.—*Howlett v. Lambert*, 2 L. E. R. 254. (R.)

XXX. 10. r. *Discovery*.

9. Deft. demurred to the bill, on five grounds, one of which suggested a fact *dehors* the bill, and another contained an inadmissible averment. Demurrer overruled. *Held*, that, nevertheless, at the hearing, deft. was entitled to demur *ore tenus*, and newly assign some of the original causes; but if he did so, should pay the costs of the hearing.—*Daly v. Kirwan*, 1 L. E. R. 156. (R.)

XXX. 10. s. *Dower*.

10. When a petition is presented by a widow, who is guardian of her minor children, to have her right to dower ascertained, and the amount paid out of the annual rents, the heir-at-law being a minor, the dowress is entitled, when her right is declared, to have the costs of her petition, and the proceedings thereunder, out of the minor's estate.—*In re Purcell's Minors*, 2 L. Jur. N. S. 225. (R.)

11. A., on his marriage with C. in 1804, conveyed lands, of which he was equitable tenant in tail, to B., as an indemnity against incumbrances on other lands purchased by B. from A. On his father's death afterwards, the legal fee descended on A. In 1813, C. joined A. in conveying the estates to the use of himself, his heirs, and assigns—*habendum*, free from dower. They levied a fine to the uses of this deed, whereby A. had charged lands held *p. a. v.*, with an annuity of £200, by way of jointure, for C. After A.'s death, these lands proved only sufficient to pay prior incumbrances. C. filed against all persons (except *bona fide* purchasers for value since 1813) interested in the lands, a bill claiming dower, and for an account. *Held*, that, as

against B, the bill should be dismissed with costs; but that the account should be decreed against the heirs of those claiming as volunteers under A. As against them also the bill would have been dismissed, if, before levying the fine, the legal fee had been actually conveyed for indemnity purposes; the Court would not have had jurisdiction to relieve against the fine.—*Loyd v. L.*, 2 Con. & L. 592. (C.)

**XXX. 10. t. Executors, Administrators, Trustees, Committees, &c.** [See also PRACTICE, XXX. 10. c., ADMON. SUITS.]

1. An executor, filing a bill against agents of his testator, is liable for the balance and costs only to the amount of assets, the institution of the suit not being an admission of assets.

A submission to arbitration by an executor is not *per se* an admission of assets.—*Mocher v. Fraser & Reed*, Beat. Rep. 578. (C.)

2. A solicitor's executors were, *Held*, entitled to costs of a suit instituted by them to raise the amount of judgments given for untaxed bills of costs, on account of the dealings between the conuzor and his devisee with the conuzee, though more than one-sixth was struck off one bill on taxation, and though deft. had offered a reference to arbitration, and to pay whatever might be found due after taxation, and after all proper credits had been allowed.—*Humfrey v. Gurley*, 1 Dr. & Wal. 183. (C.)

3. A trustee who refuses to join in his co-trustee's answer, and does not put in a different answer, is not entitled to his costs.—*Young v. Scott*, 1 Jones, 71. (E.E.)

4. Under a decree to sell lands, a trustee for the inheritor was declared the purchaser. There was a report of bad title. *Held*, that he was entitled to his costs out of the fund in Court, the inheritor having been ignorant of his own title, and never had the means of knowing it; and he having acted in good faith.—*Kirby v. O'Shee*, 1 Jones, 164. (E.E.)

5. In a creditor's administration suit, the deceased's executor is entitled to his costs, though the estate proves insufficient to pay the debts. To such a case, the rule regulating costs according to priorities is inapplicable.—*Harwood v. Bland*, 2 I. E. R. 11. (C.)

6. When ptf. brings before the Court, as deft., a party, named executor, who had refused to act, and states that fact in his bill; that deft. is entitled as against ptf. to the costs of an answer in the nature of a disclaimer.—*Weldon v. W.*, 1 Dr. & Wal. 379. (C.)

7. A demurrer to so much of the bill as sought an account, &c., of ptf.'s costs and expenses as administrator was overruled. *Held*, that ptf. was therefore entitled to his costs of the hearing.—*Howlett v. Lambert*, 2 I. E. R. 254. (R.)

8. When a cause is continued after the death of an executor who has been a party, he will be declared entitled to his costs up to the time of his death. The administrator *de bonis non* of the original testator will not be declared entitled to those costs.—*Wood v. St. George*, 1 Con. & L. 365. (C.)

9. When a legatee is admittedly entitled to a fund under a will, but claims more, and threatens a suit for payment, the executors are entitled to retain, to meet the costs of the suit, the fund to which the legatee's title is admitted.—*Ridge v. Newton*, 1 Con. & L. 381; 2 Dr. & War. 239; 5 I. E. R. 389. (C.)

10. The executor of a mortgagor was not entitled to costs against the ptf. in a foreclosure suit when there were no personal assets of the mortgagor forthcoming, and there appeared to be a deficient fund.—*Grace v. Lord Mountnorris*, 2 Dr. & War. 432. (C.)

11. The trustees in this case allowed their costs out of the fund.—*The Att.-Gen. v. Drummond*, 3 Dr. & War. 162; 2 Con. & L. 98. (C.) —[The case is reported in 1 Dr. & War. 353. (C.); Affirmed, 2 H. Lds. Cas. 837.]

12. An English creditor of an intestate employed Irish solicitors, carrying on business in partnership, to recover his debt out of the arrears of an annuity and a judgment debt, the property of the intestate, to which three estates were liable. The solicitors obtained administration in this country to the intestate for the English creditor; instituted a suit in his name to recover the amount of the arrears and the judgment; and obtained from the administrator a power of attorney authorising them to act for him in all matters connected with the administration. The owners of two of the estates charged paid their proportions of the sum to the solicitors; obtained releases from them in the name of the administrator; and were struck out of the suit. The owner of the third estate refused to pay his share; and by his answer, filed before the others had paid their shares, insisted that the other two estates were exclusively liable to the demand of the ptf. An amended bill was afterwards filed against him, making the owners of the other two estates parties. Before the suit was heard the administrator died. His executors proved his will in this country, and attempted to obtain administration *de bonis non* to the intestate. They failed in obtaining it. It was granted to the owner of one of the estates charged with the annuity, who had paid her share of the arrears, she being one of the next-of-kin to the intestate. After the grant of administration, the Irish solicitors furnished an account to the executors of their client. From that account it appeared that they had retained large sums out of the money paid to them in the course of the suit; and had incurred costs exceeding by a small sum the entire amount of the money retained by them. The bills of costs were furnished at the same time. They contained charges

for the expense of proving the will in this country; of the attempt made to obtain administration *de bonis non* to the intestate; and charges, to a very large amount, for registry searches, made under the advice of counsel, for the purposes of the suit, some of which appeared to have been made after the release of the owner of two of the estates, against those estates. That account was acquiesced in by the executors, although there was no formal settlement of it, nor any taxation of the costs. The administrator *de bonis non* of the intestate having petitioned to tax those bills—*Held*, affirming an order of the M. R., that the settlement with the executors of the deceased administrator was not a bar to her right to a taxation.

That the solicitors, acting under a power of attorney from the administrator, were bound to apply the moneys received by them in payment only of the charges properly allowable against the assets of the intestate.

When a trustee employs a solicitor in matters concerning the trust estate, and pays him out of the proceeds of that estate, the *c. g. t.* is not entitled to have the solicitor's bill of costs taxed; but the trustee will only be allowed in his account such charges as were fair and reasonable. — *Lady Langford v. Mahony*, 5 I. E. R. 569; 4 Dr. & War. 81; 2 Con. & L. 317. (C.)

1. When the misapplication of the funds of a public body has gone on for a great length of time, and no imputation was cast upon the trustees, they, though removed, were allowed their costs out of the fund.—*Att.-Gen. v. Drummond*, 3 Dr. & War. 162; 2 Con. & L. 98. (C.)

2. Trustees will be allowed the costs of separate answers, if the Master finds that the circumstances were such as to justify them in so answering. — *Dudgeon v. Gormley*, 2 Con. & L. 422; 4 Dr. & War. 158. (C.)

3. When a petition was presented by a co-trustee, under the 1 W. 4, c. 60, to appoint a person as trustee in the place of the other trustee, who was out of the jurisdiction, and had not been heard of for twenty years, costs were refused to be granted to the petitioner. — *In re Chambers*, 3 Dr. & War. 496. (C.)

4. Defts. (trustees), who had severally filed similar demurrers, instead of joining in one demurrer, not allowed the costs of the demurrers, although successful. — *Cooke v. Lord Courtown*, 6 I. E. R. 279. (R.)

5. Costs given to a trustee up to the decree to account only, when his account had been much reduced in the office.—*Foxier v. Andrews*, 7 I. E. R. 695; 2 Jon. & L. 199. (C.)

6. A trustee, who was required by the bill to answer certain interrogatories, answered them and disclaimed. *Held*, that he was only entitled to the costs of the disclaimer.—*Murphy v. O'Shea*, 8 I. E. R. 329; 2 Jon. & L. 422. (C.)

7. A deft. having died after appearance, but before answer, was struck out of the bill with costs, by side-bar rule. His administrator was made a party by amendment. *Held*, the administrator was entitled to the costs incurred by the deceased deft.—*Short v. Carroll*, 9 I. E. R. 468. (R.)

8. The costs of a suit to set aside a deed for fraud will not be given against a solicitor, who was a party to the fraud, and is a party to the suit in respect of other liabilities, unless they are prayed against him by the bill. — *Roddy v. Williams*, 3 Jon. & L. 1. (C.)

9. A creditor presented a petition. A petition was subsequently presented by the trustees of the debtor's estate, who served notice of cause against the order granted to the first petitioner, which notice was withdrawn, the notice of withdrawal making no offer as to costs. *Held*, that the petitioner was entitled to his costs generally, to be paid personally by the trustees.—*In re Scott*, 2 I. Jur. 8. (I.E.C.)

10. W., having made a settlement with a general power of revocation, made a will by which, after reciting that he had been induced to execute the settlement contrary to his intentions, and that it was fraudulently obtained from him, he directed its trustees and executors to use their best exertions and take all steps necessary to have the deed cancelled. He then disposed of the property included in the deed. *Held*, a good revocation under the power.

In a suit between claimants under a will and an inconsistent deed executed by the testator, the costs are not to be paid out of the assets, on the ground that the difficulty was created by the testator; but are subject to the ordinary rule in adverse suits.

Costs given against a trustee under the trust deed, which was held to have been revoked, when he had also a beneficial interest, and insisted on its validity. — *Irwin v. Rogers*, 12 I. E. R. 159. (C.)

11. A., who was deft. as acting executor, died. The Court gave leave to the ptf. to amend, by making the other executors parties in the place of A., without paying A.'s costs.—*Rye v. Coppinger*, 12 I. E. R. 314. (R.)

12. A lunatic claimed as heir-at-law of T., who had devised estates to trustees for charitable purposes by a testamentary instrument, of which the validity as a will was impeached. A suit was instituted. An issue to try the validity of the instrument was directed as necessary to free the lunatic's estate from doubts. The trustees were directed to conduct the suit as ptf's. The verdict was against the will. *Held*, that, though the trustees were not entitled to their costs under the decree, yet the Court could, on petition, give them their costs out of the lunatic's estate.—*In re Turnley*, 12 I. E. R. 581. (C.)



1. When trustees have presented a petition for the purpose of lodging money in Court under the 11 & 12 Vic., c. 68, they need not present a second petition in order to ascertain the costs. The trustees should retain their probable amount; and, if upon taxation any balance remains in their hands, it may be lodged in Court by side-bar order.—*In re Desmond*, 2 I. Jur. 21. (R.)

2. An executor took out probate, the entire personal estate being included in a mortgage by the testator. A bill to foreclose was filed by the mortgagee, in which the executor necessarily incurred expense. *Held*, on application for these costs, that the executor was not entitled to them unless there were personal assets after payment of the mortgage.—*Marshall v. McAreavy*, 2 I. Jur. 105. (C.)

3. Trustees of real estate, upon trust, to sell to pay prior charges, are entitled to costs of a suit to carry out the trusts; but only out of the surplus, after payment of the charges.

When the fund was deficient, the Court refused them costs.—*White v. Villiers*, 3 I. C. R. 125. (C.)

4. By marriage settlement, £1000 were settled in trust for the husband and wife for their lives, and the life of the survivor, and then for all and every, or such one or more, exclusively of the other or others of the children or child of the intended marriage, or the issue of any such children or child who might happen to die leaving such issue, at such ages, days, or times; and if more than one, in such shares and proportions, &c., as the wife should appoint; in default, as the husband should appoint. The husband covenanted to effect a policy upon his life, and to assign it to the trustees upon the same trusts. There were six children. The wife died. The husband appointed the fund and policy, and assigned his life interest therein to the eldest daughter, who had just attained age. The trustees, acting under the advice of counsel, refused to transfer the fund and policy to the appointee. Circumstances were stated in their answer calculated to excite some suspicion as to the *bona fides* of the appointment; but the validity of the appointment itself and assignment were not impeached. *Held*, that the trustees were not entitled to the costs of a suit brought against them by the daughter to compel the transfer, though they were not decreed to pay the costs of the suit.—*Mallet v. Osborne*, 2 I. Jur. N. S. 72. (C.)

5. A trustee, who has acted fairly and *bona fide*, will not be deprived of his costs of a suit against him to compel him to account, merely because a claim made by him has been disallowed in the office, and the Master has found him a debtor on the account, if the petitioner's claim against him has been greatly reduced.—*Norris v. Duckworth*, 3 I. Jur. N. S. 188. (R.)

6. The trustees of a bridge, authorised by statute to levy a sum out of the county, with

the approval, and in accordance with a resolution of the Grand Jury, brought into Parliament a bill to enable them to levy a further sum. The bill was thrown out by the Lords, for non-compliance with the standing orders of the House. *Held*, that the trustees could not be allowed the costs of the bill.—*The Att.-Gen. v. Le Hunt*, 8 I. C. R. 437. (R.)

7. A testator named his wife and two gentlemen, who relinquished the office, testamentary guardians of his children. The Court appointed their mother their sole guardian, who, at her death, desired that her executor and another might be guardians. The Court, however, nominated the two gentlemen originally named. (The executor of the mother, in accordance with her wish, opposed, though unsuccessfully, that appointment. *Held*, that he should have credit for his costs incurred in that opposition.—*Johnstone*; *re Johnstones*, 6 I. Jur. N. S. 27. (R.)

8. An executor, who propounded a will, was also residuary legatee. The residuary clause would pass nearly £6000. The will was drawn by two R. C. clergymen, of whom one was a total stranger to the testator, V., and the other was the executor's son. V., very advanced in life, died the day after the execution of the will.

V.'s sister and sole next-of-kin, who impeached the entire will, had been privy to its drawing, but not allowed to be present. The verdict confirmed the will, save the residuary clause, which it condemned. *Held*, that V. had been wilfully misled by the drawers touching the meaning of the residuary clause; that the general principle regarding executors' costs of proving a will did not apply; and that each party should bear his own costs.

*Semble, contra*—If the ptf. had omitted from his pleading the residuary clause, or if the deft. had admitted the will, except that clause.—*Kelly v. K.*, 6 I. Jur. N. S. 227. (P.)

9. When executors and residuary legatees under an earlier will impeached a later one, on the grounds of incapacity of the testatrix, and undue influence and fraud practised upon her, and not only failed to sustain those pleas, but were themselves by the evidence plainly guilty of fraud and contrivance in the preparation of the earlier will, they were condemned in the costs of the suit, though they were put forward to sustain charitable gifts in that will. Next-of-kin being also legatees under such fraudulent will, and not impeaching it, but impeaching the last will, which was decreed for—refused costs. But next-of-kin, not being legatees in and impeaching such will, allowed the costs of the pleadings, &c. The Court, considering it unnecessary for their protection to appear, none of the next-of-kin were allowed the costs of the trial of the issue.—*Gamble v. Robinson*, 9 I. Jur. N. S. 55. (P.)

10. A. devised real estate in trust for her husband, for his life; and directed the trustees to sell and convey the property absolutely to

him for a named sum, applicable to the purposes of the will, provided that he declared, within one year after her death, that he accepted the proposal.

*Semble*—The right of pre-emption to him was a gift. The trustees, therefore, were not bound to make out title to him, nor were they entitled to receive, out of A.'s assets, and to the prejudice of the persons entitled to the residue, the costs of making out title.

Solicitors having been employed by the trustees to make out the title, the costs were allowed on taxation against the trustees, personally, under the Solicitors Act (12 & 13 Vic., c. 63), ss. 3, 4.—*In re Davison & Torrens*, 17 I. C. R. 7. (R.)

1. Costs of appearing by counsel at the argument are not allowed to a trustee who has brought in the fund under the Trustee Relief Act, when all the beneficiaries are free from disability, and the case has been fully argued on their behalf, although the contrary practice prevails in England.

The costs of lodgment, and of the motion for costs, will be given.—*Lockhart's Trust, ex parte Lady Lockhart*, 11 I. Jur. N. S. 245. (R.)

### XXX. 10. u. *Exceptions, Allowed or Overruled.*

2. If exceptions to the report be argumentative, the Court will visit with costs the excepting party.—*Vereker v. Lord Gort*, 1 I. E. R. 175. (C.)

3. When objections to a Master's report are filed and allowed, if the objector neglects to get a Master's order for payment to him of the costs occasioned by the objections, and subsequently moves the Rolls for payment of those costs, he must pay the costs of the motion, even though allowed the costs of the objections.

When objections are argued in the office, the Master should make a ruling under the 4 & 5 W. 4, c. 78, s. 12, touching the costs. If he reserves the question of costs the, M. R. will not make any order concerning them, except upon a special certificate of the Master.—*Pepper v. Foster*, 5 I. Jur. 177. (R.)

4. When, on exceptions to the Master's report, an issue is directed, upon which a verdict favourable to the excepting party is given, the ordinary rule respecting the costs of exceptions applies, and each party must bear his own costs of the issue.—*Nixon v. Dane*, 6 I. C. R. 226. (C.)

### XXX. 10. v. *Heir-at-law: Next-of-kin.*

5. A mortgagee's infant heir is entitled to the costs incurred on a reference, under the 1 W. 4, c. 60.—*Earl of Miltown v. Lord Trimleston*, Fl. & K. 838. (R.)

6. A bill was filed to recover a judgment debt out of the conuzor's real and personal estates. *Held*, that deft., a minor, the conuzor's heiress-at-law, was not entitled as against

ptf. to the costs of putting in an answer.—*Downes v. Hogan*, 2 I. E. R. 112. (E.E.)

7. In a creditor's suit the debtor's heir-at-law, who has been decreed costs out of the surplus fund, cannot, if it proves deficient, have them against ptf.—*Hunt v. Bateman*, Long. & T. 379. (E.E.)

8. Under the decree in an administration suit, the inheritor's solicitor was declared entitled to be paid his costs out of the surplus, if any. *Held*, that, under the special circumstances, he was entitled to his costs, though the fund proved deficient.—*Grey v. Mathews*, 3 I. E. R. 430; Fl. & K. 309. (R.)

9. When the heir-at-law, being made a deft., impeaches the testator's will by his answer, although the decree afterwards establish the will, he is entitled to his costs.—*Wilson v. Simpson*, 7 I. E. R. 336. (E.E.)

10. A bill was filed in this Court by the conuzee to recover the amount of a judgment, to which the real and personal representatives of the conuzor were made parties. *Held*, that the defts., co-heiresses-at-law of the conuzor, who, by their answer, did not claim any interest in the premises affected by the judgment, were not entitled as against the ptf. to their costs of the suit; but only against the surplus fund arising from the sale of the premises decreed to be sold.—*Rutherford v. Cottam*, 8 I. E. R. 391. (E.E.)

11. The heir-at-law of a mortgagor is not entitled to his costs against the ptf. in a creditor's suit.—*Pepper v. Foster*, 10 I. E. R. 352. (C.)

12. Although an heir-at-law may contest an action brought to recover property, which he would inherit if no valid disposition had been made *aliunde*, and on failing will generally be entitled to his costs, when he abandons his position as heir-at-law, and defends in a different capacity, he falls within the rule as to ordinary defts., and the costs abide the event of the trial.—*Ffrench v. F.*, 2 I. Jur. 177. (C.)

13. V., having produced to two persons a paper, told them that it was his will, and requested them to witness his execution of it. The paper was folded so that only a blank space at the bottom was visible to the witnesses; the writing, if any, was hidden.

One witness deposed that he saw not any trace of writing inside the paper. The other, averring that it contained some writing, could not say what that writing was.

V., in their presence, signed his name on the blank portion. They attested the paper in his presence, and in that of each other. *Held*, a valid will.

The next-of-kin did not call any witnesses. *Held*, that they were entitled to their costs out of the estate.—*Byrne v. Hogan*, 6 I. Jur. N. S. 114. (P.)

1. The executor and general residuary legatee allowed the mother and next-of-kin of the testatrix, who had a jointure out of the lands, to enjoy the whole profits thereof for her life, and did not prove the will; and the mother took out letters of administration to her daughter as to an intestate. In a suit to prove the will after the mother's death—*Held*, that the next-of-kin of the testatrix were entitled to their costs of seeing it formally proved.—*Giles v. Dickenson*, 6 I. Jur. N. S. 272. (P.)

2. Next-of-kin, caveators, who appeared, but did not plead, are not liable to costs at suit of an executor propounding a will, and moving to dismiss the suit for want of a plea. *Cliff v. Jones*, 6 I. Jur. N. S. 324. (P.)

3. When the heir-at-law successfully resists probate of a will of real estate, the Court of Probate has no jurisdiction to charge the real estate with the costs of the litigation.—*Newton v. N.*, 13 I. C. R. 245; 7 I. Jur. N. S. 129. (C.A.)

4. An heir-at-law, who fails to establish the contents of an alleged lost will, is not exempted from costs, though he swears that he propounded the will from representations made to him touching its validity, which representations he believed.

A will propounded, and impeached only by a plea alleging a later will, cannot be decreed for unless some evidence of execution be given; an affidavit will suffice.—*Whitney v. W.*, 7 I. Jur. N. S. 392. (P.)

5. When a will of an aged person was drawn from instructions taken by her spiritual adviser, who, though not taking any beneficial interest under it, yet took most extensive fiduciary powers as sole trustee and executor for the benefit of the next-of-kin; and an alleged memorandum containing such instructions was not forthcoming; and the will was drawn from such memorandum by the attorney of the clergyman, who did not see the testatrix in reference thereto, nor witness it; and the draft made by the attorney was not shown to the testatrix nor produced at the trial, the Court gave the next-of-kin their costs out of the estate, though the will was established.—*Keogh v. Wall*, 9 I. Jur. N. S. 418. (P.)

6. The rule of the Prerogative Court as to favouring next-of-kin as to costs still holds; and therefore in this case, on account of the great age of the testator and the peculiar position of the principal legatee, the Court thought the next-of-kin should be excused from paying costs, though they had pleaded incapacity and undue influence, and withdrew from the case during its progress.—*Douce v. Reed*, 9 I. Jur. N. S. 39. (P.)

7. An heir-at-law who pleaded fraud and undue influence as to the making of a codicil, and did not make due enquiries of the drawer of the will and others as to the circumstances;

and who put forward a witness whose evidence was palpably untrue, and known to be so by the deft., who failed altogether in his opposition; was condemned in costs. An heir-at-law stands on the same ground as to costs as a next-of-kin.—*Campbell v. C.*, 9 I. Jur. N. S. 95. (P.)

8. Next-of-kin, legatees under a fraudulent will, not impeaching it; but impeaching a later will, which was decreed for; refused costs.

Next-of-kin, not legatees in, but impeaching the fraudulent will, allowed costs of the pleadings, &c. The Court, considering it unnecessary for their protection to appear, none of the next-of-kin were allowed costs of the trial of the issue.—*Gamble v. Robinson*, 9 I. Jur. N. S. 55. (P.)

9. A legatee, who is next-of-kin, impeaching as legatee a later will, because of want of capacity or undue influence, and failing, is, in general, liable to costs.

Next-of-kin are more favoured regarding costs.

Three wills, differing materially from each other, were written within four days. The latest will was established; but the next-of-kin, who had intervened, got his costs.—*Doyle v. Leary*, 10 I. Jur. N. S. 58. (P.)

#### XXX. 10. w. Husband and Wife.

10. Bill to foreclose a mortgage vested in trustees for a wife's separate use. The husband was made a deft. *Held*, that he was entitled to his costs out of the fund.—*Dillon v. M<sup>c</sup>Carthy*, 3 I. E. R. 192. (E.E.)

11. When a bill filed by husband and wife is dismissed with costs, the husband is alone liable for the costs, although the bill related exclusively to the separate property of the wife.—*Hackett v. Farrell*, 4 I. E. R. 515. (R.)

12. When husband and wife file a bill respecting the real property of the wife, and the husband dies before the decree, the wife surviving is not liable for the costs of this suit.—*Johnson v. Biron*, 5 I. E. R. 154. (E.E.)

13. When the entire of a fund in Court being the wife's *chose in action*, is put under settlement for the benefit of the husband and wife, and their issue, the costs of the settlement, &c., cannot be paid out of the fund, but must be defrayed by the husband.—*Harpur v. Ball*, 8 I. E. R. 580. (R.)

14. In a proceeding in which a married woman and her husband are co-pts. or co-petitioners, a sequestration cannot issue for costs against her separate estate. *Semble*—It is otherwise if she sues by her next-of-kin.—*Keogh v. Cathcart*, 12 I. E. R. 215. (C.)—[*Rev. the Rolls decision*; 11 I. E. R. 280.]

15. A person having instituted proceedings in the Consistorial Court to obtain probate of a pretended will; *Maria D.*, a married woman,

who was entitled to administration as next-of-kin of E. (in the event of the will being defeated), employed the ptf.s., who were proctors, to appear in her behalf. D., the husband, had no property; but his wife had considerable separate estate, and both wife and husband signed the proxy, authorising the ptf.s. to act in the progress of the suit. The evidence showed that the wife was active during its progress; and two petitions were presented by her, stating that she had employed the ptf.s. as her proctors, and requiring to have their costs taxed, offering to pay same when ascertained. On a bill filed to have the costs as against the wife's separate estate—*Held*, that the ptf.s. were entitled to have their costs as against the wife's separate estate.

That a debt. could not refer to the contents of a bill as originally filed, to show that the ptf.s. then made a case entirely different from that in the amended bill, now at issue between the parties.

That the costs of such parts of the ptf.s. bill as were altered by amendments, was a matter for taxation.—*Swift v. Donnellan*, 2 I. Jur. 193. (C.)

### XXX. 10. x. Incumbrancers: Mortgagor and Mortgagee, Legal and Equitable.

1. *Semble*—When a supplemental suit is necessitated by a judgment creditor's refusal to permit his demand to be proved under the decree at the estate's expense, he will be compelled to pay the costs of the supplemental suit.—*Averall v. Wade*, S. & Sc., 399, n. (R.)

2. If judgment creditors, knowing that the fund cannot reach them, necessitate the filing of a supplemental bill against them, they will not get their costs in that suit.

*Semble*—They will be compelled to pay the costs occasioned by such vexatious conduct.—*Barrett v. Birmingham*, S. & Sc. 419. (R.)

3. In an incumbrancer's suit in Ireland—*Held*, that, according to the practice in Ireland, ptf.s. were entitled to costs only in equal priority with their demands.—*Peyton v. M'Dermott*, 1 Dr. & Wal. 198. (C.)

4. Costs of assigning a judgment to a trustee of a conuzee for family purposes, to which assignment the conuzor was not a party, are not chargeable against the conuzor.—*D'Arcy v. Burke*, 2 I. E. R. 1. (C.)

5. Ptf., one of many creditors in a composition deed, having filed a bill to carry its trusts into execution, was obliged to make all the parties to the deed, and the several scheduled creditors, who had refused to join as co-ptfs. debts. *Held*, that, although the suit was altogether for the debts' benefit, and the fund had been rendered available by ptf.'s exertions, yet, according to the settled practice of the Court, ptf. was entitled to his costs only

in equal priority with his demand.—*Taylor v. Gorman*, 1 Dr. & Wal. 235, n. (C.)

6. Incumbrancers on a life estate, necessary parties to a suit to sell the inheritance to pay off charges prior to that life estate, are entitled to their costs only against that life estate, not against ptf.s. generally.—*Ennis v. Brady*, 1 Dr. & Wal. 720. (C.)

7. If the mortgagee of lands, subject to an annuity, files a bill to foreclose, and makes the annuitant a party, the bill will be dismissed with costs as to the annuitant, because he is not a necessary party.—*Paynes v. Creagh*, 2 I. E. R. 190. (C.)

8. In a foreclosure suit, the provisional assignee having been made a debt., in consequence of the insolvency of one of the mortgagors, was declared entitled to his costs against the ptf., the latter to have them over against the fund.—*Sproule v. Oats*, 2 I. E. R. 323. (E.E.)

9. In a suit to foreclose a mortgage after the death of the mortgagee, it appeared that the mortgagee had bequeathed the mortgage debt in different portions to several persons. Amongst these, £2000 had been bequeathed to A. and B., and the survivor of them, his executors, &c. The personal representative of the survivor had been made a debt., and £2000 were reported due to him. *Held*, that he was entitled to be paid his costs according to the priority of his demand, notwithstanding that the general rule of the Court in foreclosure suits was, to allow only one set of costs against the inheritance.—*Cane v. Brownrigg and others*, 2 I. E. R. 413. (E.E.)

10. When a bill was filed to foreclose a mortgage vested in trustees for the separate use of a *femme covert*, the husband, having been made a debt., was held entitled to his costs out of the fund.—*Dillon v. M'Carthy*, 3 I. E. R. 192. (E.E.)

11. The value of a settled estate being less than the sum charged thereon for younger children's portions, the inheritor filed a bill against the younger children for a sale of the estate, and, at the final hearing, asked for his costs in priority to their demands. *Held*, that in the absence of any agreement to that effect he was not entitled to them: overruling *Head v. Massey*, 2 Moll. 467.—*Hughes v. Nash*, 3 I. E. R. 495. (E.E.)

12. The costs of incumbrancers upon a fund charged upon an estate are to be borne, not by the estate, but by the fund. — *v. Henry*, 3 I. E. R. 493. (E.E.)

13. *Quere*—Is a mortgagee entitled to the costs of a foreclosure suit, prosecuted by him after a notice from the assignee of the mortgagor, a bankrupt, requiring him to proceed to sell the mortgaged premises under the G. O. in bankruptcy of 1832? *Held*, that the mortgagee was entitled to the costs of the suit, the notice from the assignee not offering to pay

him the costs incurred up to the time of its service on him.—*Bernard v. Sadler*, 4 I. E. R. 61. (E.E.)

1. In 1817 the debt. confessed a judgment; and in 1821 mortgaged his estate as an additional security for the sum due on the judgment. The mortgagee filed a bill, and obtained a decree for a foreclosure and sale, no incumbrances being proved under the decree to account. The purchaser under that decree having objected to the title, on the ground of the existence of judgments prior to the mortgage, the mortgagee called on the judgment creditors, by notice, to prove their demands under the decree; or that he would file a supplemental bill against them, and seek to charge them with the costs thereof. Several creditors proved accordingly. The fund was insufficient for payment of the demands proved. *Held*, that the ptf. was not entitled to the costs of the suit up to the final decree in the priority of his judgment.

*Semble*—That as the conuzor of the judgment was alive, he would have been entitled to the costs of the suit in the priority of his judgment, had the judgment creditors voluntarily come in under the decree, and sought to have the benefit of it.—*Cooke v. Campbell*, 4 I. E. R. 431. (E.E.)

2. A mortgagee, after his mortgage is forfeited, executes several sub-mortgages, and files a bill of foreclosure, making the sub-mortgages debts. *Held*, that he is entitled to the costs of the sub-mortgagee against the estate.—*Smith v. Chichester*, 4 I. E. R. 580; 1 Con. & L. 486; 2 Dr. & War. 393. (C.)

3. The bill in a suit to raise the arrears of a jointure, and to have it decreed well charged upon lands, contained the usual prayer for a sale; but there was no prospect of the annual rents not being sufficient for the payment of all arrears and the accruing gales. *Held*, that the ptf. should pay the costs of making prior creditors, who would have been necessary only in the event of a sale, parties. *Locke v. Darley*, 2 Dr. & War. 256; 1 Con. & L. 406. (C.)

4. An insolvent mortgagor's executor is not entitled to his costs against plaintiff in an ordinary suit for foreclosure and sale.—*Grace v. Lord Mountmorris*, 2 Dr. & War. 432. (C.)

5. The costs of incumbrancers, or their trustees, who are declared entitled to costs, are to be paid out of the fund according to their priorities, in the first instance; and if the fund be deficient, the ptf. may then be required to pay them.—*Hall v. Hill*, 2 Con. & L. 135; 3 Dr. & War. 59; 5 I. E. R. 11. (C.)

6. The provisional assignee of a bankrupt mortgagor is not entitled to his costs against the mortgagee, the ptf. in a foreclosure suit.—*Hughes v. Kelly*, 2 Con. & L. 228; 3 Dr. & War. 482. (C.)

7. At the time of the sale, the lands were subject to a mortgage. The purchaser retained the purchase-money, to pay incumbrances affecting the estate. The mortgagee afterwards filed a bill against the assignee of the vendee, to foreclose and sell. That suit was compromised by the mortgagee going into possession. *Held*, that the mortgagee's costs in that suit were to be paid with his demand out of the estate, and not out of the paid purchase-money.—*Croly v. Callaghan*, 5 I. E. R. 25. (E.E.)

8. After a decree to account in a foreclosure suit instituted by a puisne mortgagee against a prior mortgagee and mortgagor, the prior mortgagee (in whom the legal estate was vested) assigned his mortgage to R., who, upon his marriage, assigned it to the trustees of his settlement. The ptf. filed a supplemental bill against R. and the persons claiming under his settlement. *Held*, that the prior mortgagee was entitled to his costs up to the time of the assignment of the mortgage, but not to the costs of appearing upon the final hearing; and that the debts. to the supplemental bill were entitled to the costs of that suit and to the costs in the original suit, subsequent to the assignment of the mortgage, in the same priority with their demand.

The mortgagor was discharged as an insolvent, and his assignee was made a party to the suit. He died, and a new assignee was appointed, who was made a party, and appeared by the same attorney as the former assignee. *Held*, that the new assignee was entitled to his own costs and those of the former assignee.—*Lahey v. Bell*, 5 I. E. R. 107. (E.E.)

9. In a foreclosure suit, the mortgagor having been discharged under the Insolvent Debtors Act, and the provisional assignee being a debt., the Court refused to order the ptf. to pay and add to his demand the costs of the provisional assignee, as such debt.—*Betham v. Mitchell*, 5 I. E. R. 218. (R.)

10. A mortgagee who, after the mortgagor's bankruptcy, unnecessarily files a bill to foreclose, will not get more costs than he would have been entitled to by proceeding in the bankruptcy matter. *Hogan v. Baird*, 4 Dr. & War. 296. (C.)

11. In a suit instituted before the G. R. of June 1842, ptf. having served, with subpoena to hear judgment, judgment creditors, debts. who were not in possession by receivers, were decreed to pay the costs of their appearing, and not to have them over.

The judgment creditors, if they appeared without subpoena, should bear their own costs.

Such of them as had answered since that Rule, decreed to pay their own costs, unless they had been served with a notice to press, in which case ptf. were decreed to pay them.

Judgment creditors, having receivers, entitled to answer and appear, and to have their costs.—*Bank of Ireland v. O'Malley*, 7 I. E. R. 121. (C.)

1. Costs given against a party who, by his want of caution in settling an estate, without giving notice that it was subject to a prior demand, rendered necessary a suit by the prior incumbrancer to establish his rights.—*Wise v. W.*, 2 Jon. & L. 403. (C.)

2. Mortgagee's solicitor, at the time of the loan, perused the title-deeds, and was paid the costs therefor by the mortgagor. After the decree for sale in the mortgage cause, the same solicitor prepared the abstract of title under the 138th G. O., which, though deducting the title to the time of sale, did not contain any new deeds. The Master having refused to allow the costs of perusing the deeds, the Court refused to direct him to review his taxation.—*Scott v. King*, 7 I. E. R. 483. (R.)

3. Costs of raising a family charge under a power, but not of the suit to raise it, given out of the estate.—*Greene v. G.*, 8 I. E. R. 473; 2 Jon. & L. 529. (C.)

4. Costs rendered necessary by assignments of family charges are not subject to the same rule as in mortgage cases. They must be borne by the charge assigned, and not by the estate.—*Stewart v. Donegal*, 8 I. E. R. 621; 2 Jon. & L. 636. (C.)

5. Costs of a redemption suit against a mortgagee in possession, given him up to answer, and against him for the rest of the suit, when the sum due at the filing of the bill was only £10; the balance afterwards against him; and his conduct vexatious.—*Snagg v. Frith*, 9 I. E. R. 285; 3 Jon. & L. 383. (C.)

6. A person who opened a sale with the assent of the parties, for the purpose of preventing a sacrifice of the property, but, being outbid, was not the purchaser, allowed the costs of opening the sale, on the ground of having benefited the estate.—*Cuffe v. Young*, 9 I. E. R. 475. (R.)

7. In a creditor's suit a puisne incumbrancer, who is a necessary party, and against whom a decree is made, but who, from the suit's frame, cannot have relief under the decree, is not entitled to his costs against ptf.; ptf. to have them over with his demand out of the estate.

The dictum of the M. R. in *Croker v. Copley*, 2 Moll. 471, denied to be law.—*Joyce v. De Moleyns*, 9 I. E. R. 576; 3 Jon. & L. 698. (C.)

8. An overpaid mortgagee, puisne to the ptf., has no right to his costs, though not paid off at the time of putting in his answer.—*Meredyth v. Creed*, 1 I. Jur. 210. (C.)

9. When a prior incumbrancer obtains an order in an Exchequer cause for a receiver, he will not be allowed the costs of a motion for discharging a receiver, appointed by a puisne judgment creditor in this Court, out

of the funds in the receiver's hands.—*Murray v. Sayers*, 2 I. Jur. 154. (R.)

10. A deft. who had been ordered to account for the produce of a policy of insurance, in terms absolutely assigned to him, but held, under the circumstances, to have been assigned by way of mortgage, decreed his costs as in an ordinary redemption suit, and also the costs of proceeding for the amount of the policy.—*Murphy v. Taylor*, 1 I. C. R. 92; 3 I. Jur. 85. (C.)

11. In a suit for an account, foreclosure, and sale, by a ptf. having two incumbrances upon the estate, he is not entitled to all his costs of suit in priority with his elder incumbrance; but shall be decreed his costs of suit in priority with that incumbrance, save so far as they are occasioned by his puisne incumbrance; and the costs so occasioned he shall be decreed to have in priority with the puisne incumbrance.—*Handcock v. H.*, 1 I. C. R. 444. (C.)

12. The legal estate of a mortgage was vested in two trustees, one of whom was out of the jurisdiction. The Court, in order that the mortgage might be reconveyed to the mortgagor, pursuant to a decree in a foreclosure suit, made an order under the Trustee Act that the mortgage should vest in the other trustee solely, and directed the costs of the petition to be costs in the suit.—*Corker v. Ryan*, 3 I. C. R. 562; 6 I. Jur. 238. (R.)

13. A mortgagee in possession brought an action for rent, which proved abortive, because brought in the name of a party who had no legal title to the rent, and against a party who was not legally liable to pay it. A consent was entered into, by which it was agreed that the record should be withdrawn, that each party should abide his own costs, and that the ptf. should not bring any other action for the rent. Held, in a suit to charge the mortgagee with wilful default, that he was not chargeable with the rent, which he had failed to recover, as the consent did not release the rent, and afforded no defence to the recovery of rent at law or equity; but that, as the action had failed by the neglect of the mortgagee, he was not entitled to credit in the account between him and the mortgagor for the costs of the action.—*Burke v. O'Connor*, 4 I. C. R. 418. (R.)

14. A decree made on a bill filed by a judgment creditor, in the lifetime of the conuzor, ordered the ptf., within twelve months, to redeem a prior mortgage of 1838; and that, in default, the bill should stand dismissed, with costs, as against the mortgagee. If the ptf. redeemed, the decree directed a sale to pay incumbrances. The decree was not made up. The ptf. did not redeem the mortgage; but before the twelve months for redemption expired, presented to the I. E. Court a petition to sell the lands. No further proceeding was taken in the Chancery cause. Held, that neither the ptf. nor the mortgagee had a

right to be paid their costs in that cause out of the money obtained for the lands in the I. E. Court.—*In re Ashe*, 5 I. C. R. 305. (P.C.)

1. A mortgagee refused to join in a conveyance of lands purchased by the Poor-law Commissioners, under their powers. *Held*, that this refusal did not disentitle the mortgagor to any part of the costs necessarily incurred by, and payable to him, under the provisions of the Lands Clauses Consolidation Act 1845.—*O'Brien v. The Poor-law Commissioners*, 2 I. Jur. N. S. 97. (R.)

2. D., a party in an administration suit, had a jointure charged on the testator's real estate; and was also interested in the surplus of his real and personal estate. *Held*, that D. was entitled to have in the priority of the jointure only the costs incurred in respect of her jointure, and not the costs incurred in respect of her interest in the surplus.—*Guinness v. Darley*, 6 I. C. R. 21; 2 I. Jur. N. S. 401. (C.A.)

3. A mortgagee in possession must pay the costs of a redemption suit against him, if it is found that, at the time of its institution, a balance was due to the mortgagor.

The mortgagee in possession of a several fishery refused to surrender the premises to the mortgagor until he gave a promissory note and a guarantee for the amount claimed by the mortgagee to be due. In a suit by the mortgagor against the mortgagee for an account, and for damages caused by negligent fishing of the weir, a balance was found to have been due to the mortgagor when possession was given up; but the claim for damages was disallowed. *Held*, that the mortgagee should pay the costs of the suit, but was entitled to the costs of those parts thereof in which he had succeeded.—*O'Neill v. Innes*, 15 I. C. R. 527. (C.)

4. The ptf.'s solicitor in a mortgage suit, being, as the mortgagee's executor, a co-ptf., was only allowed costs out of pocket.—*Macartney v. Dickey*, 16 I. C. R. 409. (R.)

XXX. 10. x.\* *Incumbered Estates Court.* See PRACTICE, LIV. a. LANDED ESTATES COURT.

XXX. 10. y. *Infant: Prochein Ami: Guardian.*

5. The Remembrancer having been appointed guardian to a minor deft., upon process of contempt for want of an appearance, the Court, upon motion of the minor by her mother and testamentary guardian, gave her liberty to answer by her testamentary guardian, "paying the costs, as offered by the deft.'s notice of the 30th January, the costs to be paid within a week after taxation, and the answer to be filed within a week after the payment of such costs." The notice of the 30th Jan. had been served by the mother. The minor's answer was afterwards filed and ac-

cepted, the costs not having been paid. The Court made an order for an attachment against the guardian for non-payment of those costs.—*Brady v. Finnegan*, Jon. & Ca. 426. (E.E.)

6. The infant heir of a mortgagee is entitled to the costs incurred, on the reference under the 1 W. 4, c. 60.—*Earl of Miltown v. Lord Trimleston*, Fl. & K. 338. (R.)

7. The tenant of a minor's estate obtained an order of reference respecting renewal of his lease. The order directed (*inter alia*) that the minor's costs of the reference should be paid by the tenant. On the reference, the minor's guardian insisted that the tenant was not entitled to renew without paying renewal fines. A protracted litigation ensued, which trebled both parties' costs of the reference. It appeared that the tenant was entitled to renew without paying a fine; and that, for several years, he had been paying, in his own wrong, on account of renewal fines, sums amounting to £300. *Held*, that the guardian should execute the renewal without requiring payment of the costs of the reference.—*Campbell v. Bryan*, 2 I. E. R. 54. (R.)

8. A bill was filed to recover the amount of a judgment debt out of the co-nuzor's real and personal estate. The deft., a minor, was the co-nuzor's heiress-at-law. *Held*, that she was not entitled as against ptf. to costs of putting in an answer.—*Downes v. Hogan*, 2 I. E. R. 112. (E.E.)

9. A receiver having applied to the Court for a reference to the Master as to the liability of a lunatic to renew the lease of the land over which the receiver was appointed, was ordered to pay the costs of the enquiry, as he had not previously applied to the committee to make the application to the Court.—*In re Doolan*, 2 Con. & L. 232; 3 Dr. & War. 442. (C.)

10. Wherever costs are awarded to be paid by minors, the necessary meaning of the decree is, that they shall be paid by the person liable by law to pay them; that is, by the next friend, for and on their behalf. The language of the decree must be expounded by the rule of law, which exempts the infants from liability, and casts it on the next friend.—*Purcells v. Woodley*, 5 I. E. R. 380. (R.)

11. The ptf. obtained an order to set aside the appearance of a minor, and that the minor should appear and answer by the officer. The uncle of the minor obtained an order to set aside that order, and that the minor should be at liberty to appear and answer by him as his guardian. *Held*, that he was not bound to pay the costs of the first order, but that they were costs in the cause.—*Wallen v. Barry*, 6 I. E. R. 124. (E.E.)

12. The Court has no power under the 1 W. 4, c. 65, s. 14, to give the landlord the costs of appearing on a petition under the 12th sec.

for liberty to the guardian of an infant to accept of the renewal of a lease.—*In re Leech*, 9 I. E. R. 318; 3 Jon. & L. 189. (C.)

1. Where a puisne incumbrancer is a necessary party, but his demand from the frame of the suit cannot be paid in it, he will not be allowed his costs against the ptf.

*Ellis v. Molloy* (1 Mol. 536) is overruled.—*Joyce v. De Moleyns*, 9 I. E. R. 576; 3 Jon. & L. 698. (C.)

2. When a suit abated by the death of the ptf., a minor suing by his next friend, the order to revive, or that the bill be dismissed, will be made without costs.—*Ross v. R.*, 2 I. Jur. 251. (R.)

3. When a petition on behalf of an infant is presented by a solicitor, a stranger to the infant, even although the Master should find that the petition is proper, and for the benefit of the infant, the Court will not award out of the infant's estate to the petitioner any costs except costs out of pocket.

Such a petition was presented by a solicitor praying investigation into the conduct of a testamentary guardian with respect to the property of an infant. The Court referred the matter of the petition to the Master, who found that the petition was proper, and for the benefit of the infant. Although the Court was not satisfied with the conduct of the guardian, and the circumstances of the case warranted suspicion, yet, as the petitioner had not previously ascertained that none of the relatives or friends of the infant would present such a petition, the Court refused to grant him out of the minor's estate even costs out of pocket.

The Lord Chancellor of Ireland has power under the statute 4 & 5 W. 4, c. 78, s. 7, to appoint a receiver over the estate of a minor, upon petition, and without the filing of a bill for that purpose.—*In re Goode*, 1 I. C. R. 256; 3 I. Jur. 50. (C.)

4. In a minor matter it had been necessary to go into the Master's office to obtain the conversion of a freehold. There was considerable litigation touching the frame of the conveyance.

The Court gave the minors, as against the petitioner, their costs incurred in the proceedings in the matter of the Act.—*In re Boyces Minors*, 3 I. Jur. 53. (R.)

5. The guardian is allowed her costs as costs in the matter.—*Ex parte Coote*, 6 I. Jur. 107. (R.)

6. C. having been found lunatic by inquisition, obtained leave to traverse. The Lord Chancellor directed one of the Masters of the Court to act as committee, and to oppose the traverse, which he did by the Solicitor for Minors and Lunatics. The traverse succeeded. *Held*, that C. was not entitled to have the receiver discharged without providing for the costs of the Solicitor for Minors and Lunatics incurred in his case.—*In re Crossbie*, 11 I. C. R. 432. (C.)

### XXX. 10. y.\* *Injunction.*

7. When a ptf., in obtaining an injunction *ex parte*, has suppressed a material fact, the injunction will be dissolved with costs.—*Hemphill v. McKenna*, 6 I. E. R. 57; 3 Dr. & War. 183; 2 Con. & L. 76. (C.)

8. When at the time of a motion no order is made regarding the costs of it, they follow the costs in the cause, especially in the case of injunction bills.—*Bourne v. Farran*, 6 I. E. R. 659. (E.E.)

9. In a possessory suit for an injunction, the rule that costs of suit are not given does not apply to the costs of the motion to show cause. If the cause is deemed insufficient, the deft. becomes liable to pay the costs of the motion.—*Coppinger v. Carnegie*, 1 I. Jur. 27. (R.)

10. Suits for injunctions to restrain waste, when no answer is filed, and the account sought is waived, should not be brought to a hearing by the petitioner, merely for the purpose of getting his costs of suit.—*Harvey v. Ferguson*, 15 I. C. R. 277. (C.)

11. Suits for injunctions to restrain waste should not be brought to a hearing where no account is sought or the account is waived, if an injunction has been obtained, and the right to continue it is not disputed. If, however, the respondent's conduct forces the case to a hearing, the petitioner will, if successful, be entitled to his costs of suit.

*Semble*—In such suits, when no account is sought, the petitioner should call by notice upon the respondent to state whether he disputes the right to have the injunction continued.—*Dunsany v. Dunne*, 15 I. C. R. 278. (C.)

### XXX. 10. z. *Insufficiency of Answer.*

#### XXX. 10. aa. *Interpleader.*

12. In an interpleader suit, the ptf. if right is entitled to his costs; and any deft. may be compelled to pay them. If the ptf. is wrong he gets no costs, and, on the contrary, may be saddled with costs.

A bill of interpleader may be dismissed with costs, as against some of the parties. Others, who by their notices justified it, will be refused their costs.—*Glynn v. Locke*, 2 Con. & L. 28; 3 Dr. & War. 11; 5 I. E. R. 61. (C.)

13. The ptf. having filed an interpleader bill and brought the money into Court, dismissed the bill with costs by side-bar rule before any of the defts. answered. *Held*, that the ptf. was entitled to draw the money so lodged.

*Quære*—In such case are the defts. entitled to their costs out of the money lodged in Court?—*McKiernan v. Kernan*, 8 I. E. R. 145. (R.)

14. An action of covenant was brought against a trustee, who lodged the amount



claimed in Court, and filed a bill of interpleader, which was dismissed with costs on demurrer. *Held*, that the trustee was entitled to have the money returned without deducting the costs.—*Doyle v. Dumoncel*, 11 I. E. R. 517. (R.)

1. Trustees of policies of assurance filed a bill to ascertain the rights of different claimants of the proceeds of the policies. The Insurance Companies submitted to bring in the amounts due upon the policies which, on account of the conflicting claims, had not been paid. *Held*, that they were bound also to pay interest on the sums assured, but they were allowed their costs.

Some of the respondents had filed a bill in England for the purpose of enforcing their claims to the fund. On their application they were directed to stay proceedings in England, and to have their costs in that suit in the same priority with their demand in this suit.—*French v. R. Ex. Insurance Co.*, 6 I. C. R. 523. (C.)

2. Trustees of policies of assurance filed a bill to ascertain the rights of the different claimants of the proceeds of the policies. The Assurance Companies had been unable to pay the amount due, on account of those conflicting claims, and submitted to bring their accounts in. *Held*, varying the order, 6 I. C. R. 523, that they ought not to be charged with interest.—*French v. Royal Exchange Insurance Company*, 7 I. C. R. 523. (C.A.)

3. A mere letter written to the solicitor of tenants by one of two parties claiming the rent in opposition to each other, saying:—"If your clients pay me the rent now due, I will receive the same, and indemnify them from any further demand thereof," is not a sufficient offer of indemnity to deprive the tenant of his costs of an interpleader suit instituted by him.—*Toohy v. Stoney*, 3 I. Jur. N. S. 429. (R.)

#### XXX. 10. aa.\* *Intervenients*.

4. As a general rule, intervenients do not get their costs; but the Att.-Gen., when he intervenes as a necessary party, will be allowed his costs.—*Daly v. Burke*, 8 I. Jur. N. S. 73. (P.)

#### XXX. 10. bb. *Irregularity of Process*.

5. As cause against an attachment for disobeying an injunction, a deft. showed that the affidavit of service was false. The process-server was convicted of perjury, contrary to the Judge's charge. *Held*, that deft. was entitled to all costs occasioned by the false affidavit, except those of the prosecution.—*Cosgrave v. M'Donnell*, 2 I. E. R. 77, note. (R.)

#### XXX. 10. cc. *Issue at Law*.

6. When a case has been sent to a Court of Law, and this Court gives a decree with costs, including the law costs, and the decree is reversed "with costs of the suit in the Court

below," deft. is entitled as of course to the costs at law.—*Smith v. Clarke*, 5 I. E. R. 423; 3 Dr. & War. 344; 2 Con. & L. 160. (C.)

7. Issues were directed in a foreclosure suit, to try the validity of a release and receipt for a legacy which the Master had found to be not duly executed. The issues were tried twice, but the jury, being unable to agree, were discharged by the Judge. The issues were sent down a third time for trial, when the legatee died. His personal representative declined to proceed with the trial, and allowed the issues to be taken as confessed against him. The Court refused to direct the costs of the issues to be paid out of the legatee's assets; but gave the petitioner his costs, along with his demand in the foreclosure suit.—*Campbell v. Young*, 4 I. C. R. 394. (R.)

#### XXX. 10. cc.\* *Landed Estates Court*. See PRACTICE, LIV. a. LANDED ESTATES COURT.

#### XXX. 10. cc.\*\* *Landlord and Tenant*.

8. A renewal decreed, notwithstanding a delay of four months after service of the notice to renew under the Tenantry Act. The notice, however, had insisted on a term to which the landlord was not entitled; and he, after promising to answer the tenant's enquiries respecting the title, delayed.

The renewal was decreed, however, with costs to be paid by the ptf.—*Moore v. Sayers*, Beat. Rep. 530. (C.)

9. A tenant's litigious conduct in defending an ejectment for non-payment of rent does not disentitle him to relief upon a bill for redemption; nor to the costs of that suit, if he be otherwise entitled to them.—*Neuenham v. Mahon*, 3 I. E. R. 304; Long. & T. 34. (E.E.)

10. The Court has jurisdiction in a redemption suit to make the landlord pay the costs of the suit.—*Malone v. Geraghty*, 5 I. E. R. 549; 3 Dr. War. 239; 2 Con. & L. 235. (C.) —[Affd.: 1 H. L. Cas. 81.]

11. Costs cannot be given to a deft. who sets up a defence that fails; but from the conduct of the tenant in this case, and the bill containing an unproved imputation against the landlord, the specific performance of the covenant (to renew) was decreed without costs.

Where a suit for renewal is rendered necessary by the conduct of the ptf., he will not get his costs, even if he succeed; although, as a general rule, the ptf. who succeeds in a contest for renewal is entitled to his costs.—*Fitzgerald v. O'Connell*, 6 I. E. R. 455; 1 Jon. & L. 134. (C.)

12. When the landlord insists on his right to have liberty to eject, unless all his rent be paid, he will not get the costs of a motion that the receiver pay him so much rent; or for liberty to proceed for non-payment of rent.

But if he waive any of his rights, he will be entitled to the costs.—*Harris v. Shea*, 8 I. E. R. 571. (R.)

1. Practice as to costs on a motion by a landlord for leave to proceed for non-payment of rent.—*Clendinning v. Knox*, 12 I. E. R. 309. (R.)

2. A head landlord cannot obtain costs, incurred in an ejectment, out of a fund in Court standing to the credit of a cause in which his immediate lessee is respondent, if his claims are opposed by an unpaid incumbrancer.—*Haines v. Purcell*, 11 I. Jur. N. S. 250. (R.)

XXX. 10. cc.\*\*\* *Legatee.*

3. A legatee under a will disputed the due execution of a later will, of which the watermark showed that it had been antedated. He was allowed his costs.—*Cowan v. Rankin*, 10 I. Jur. N. S. 38. (P.)

4. A legatee, who is next-of-kin, impeaching as legatee a later will, because of want of capacity or undue influence, and failing, is in general liable to costs.—*Doyle v. Leary*, 10 I. Jur. N. S. 58. (P.)

XXX. 10. dd. *Lunacy.*

5. S. presented a petition alleging C. to be of unsound mind, and praying that a commission, in the nature of a writ *de lunatico inquirendo* might issue. S. was not a relative of C. The petition was opposed by H., C.'s sister. The commission, however, issued, and the carriage of the proceedings was given to H. The jury found that C. was of sound mind. H. presented a second petition. Another commission issued, and C. was declared a lunatic. H. obtained an order for payment of the costs of appearing upon the original petition, and of proceeding under the order made thereon. *Held*, upon an application by S., that he was entitled to the costs of presenting the original petition, and of obtaining the order made thereon.—*In re Clegg*, 2 I. Jur. N. S. 218. (C.)

XXX. 10. ee. *Misconduct; Proceedings, Vexatious, or Unnecessary.*

6. Deft. in a suit for renewal may have so misconducted himself as to be made to pay the costs; but, not having acted dishonestly, he was *held* entitled to the usual terms.—*Wallace v. Patten*, 1 I. E. R. 338. (C.)

7. The bill prayed a sale, and account and payment of prior and contemporaneous incumbrances. A prior *elegit* creditor had put in an answer of unreasonable length. The Court directed that the Remembrancer should, in taxing the costs, have regard to the length of the answer.—*O'Brien v. O'Brien*, Jon. & Ca. 193. (E.E.)

8. In a suit for title composition, all the defts. appeared by the same attorney, and such

of them as were tenants from year to year answered the bill separately at length. The Court, upon motion, permitted the ptf. to dismiss his bill against those defts. upon payment of costs; and directed the officer, in taxing the costs, to disallow the costs of any answer, or part of any answer, which should appear to have been improperly and unnecessarily filed.—*Armstrong v. Bannon*, 2 Jones, 538. (E.E.)

9. If lands have been sold under a decree, and judgment creditors, knowing that there is not any chance of the fund reaching them, necessitate the filing of a bill against them, they will not get their costs in that suit.

*Semble*—They will be compelled to pay the costs occasioned by such vexatious conduct.—*Barrett v. Birmingham*, S. & Sc. 419. (R.)

10. When a transaction, of a nature suspicious in its commencement, can be sustained only by subsequent confirmatory acts, the party so sustaining it must pay has own costs of investigating the circumstances.—*De Montmorency v. Devereux*, 2 Dr. & Wal. 410; 7 Cl. & F. 188; West, 64.—[*Affg.* 1 Dr. & Wal. 119. (C.)]

11. If the solicitor, upon whom the subpoena to hear judgment is served, refuses to endorse an admission of the service, he must pay the costs which that refusal necessitates.—*Ross v. Wood*, 2 Dr. & Wal. 490. (C.)

12. When, consequent upon the defts.' refusal to execute the conveyance to the purchaser under the decree, it becomes necessary to apply that the Master may execute in their names, the estate is not to bear the costs of such application.

The defts. whose improper refusal to execute made necessary the application, must pay the costs.—*Clarke v. De Burgh*, 2 I. E. R. 19. (R.)

13. A. filed a bill praying relief which he might have obtained by petition. *Held*, that he should be allowed only those costs which he would have been entitled to had he proceeded by petition.—*Tyrell v. Hassard*, Fl. & K. 625. (R.)

14. When a matter is within ptf.'s knowledge, and great expense ensues from his having stated it incorrectly, ptf. must pay all the costs occasioned thereby.—*Field v. Lord Donoughmore*, 1 Dr. & War. 227; 2 Dr. & Wal. 630. (C.)

15. Costs were given to the ptf. in this case, in which, under other circumstances, the deft. would be entitled to costs, because of the misconduct of the latter in the progress of the suit.—*Scott v. Roose*, 3 I. E. R. 170; Long. & T. 54. (E.E.)

16. When, in a redemption cause, the conduct of the landlord has been oppressive and vexatious, he will be made to pay the costs from after the filing of the bill.

There is no inflexible rule that the landlord in all redemption cases is to have his costs. Generally the landlord is entitled to his costs, but the rule has its exceptions.

The costs, of the suit, from the filing of the bill and the lodging of the money in Court, were given in a redemption suit to the tenants; the defence relied on by the landlord being unfounded, and his conduct inequitable and oppressive.—*Newenham v. Mahon*, 3 I. E. R. 304; Long. & T. 34. (E.E.)

1. It is discretionary with the Commissioner to give any costs or charges to a summoned party suspected of having bankrupt's property, or supposed to be indebted to the bankrupt.—*In re O'Connor*, 3 I. E. R. 363-64. (C.)

2. A party in possession under a title derived under a tenant for life, and equitable incumbrancer, having set up (amongst others) the Statute of Limitations, as a defence against a devisee claiming the reversion, was decreed to pay so much of the costs of the cause as was incurred by that defence, and to abide his own costs of the remainder of the suit up to the hearing.—*Incorporated Society for Protestant Schools v. Richards*, 4 I. E. R. 177; 1 Dr. & War. 258; 1 Con. & L. 58. (C.)

3. Decree for redemption without costs, the landlord having, within the six months, refused a tender of the rent and costs of the ejectment.—*Fitzgerald v. Hussey*, 3 I. E. R. 319. (E.E.)

4. As a general rule, it is improper to introduce into counsel's briefs both the original and amended bills.—*Higgins v. Bateman*, 2 Dr. & War. 70. (C.)

5. When an order is moved for which might and ought to have been procured to be made as part of another order obtained on a previous motion, the party will not get his costs of the second motion, although he succeed.—*Darley v. Nicholson*, 2 Dr. & War. 86. (C.)

6. This Court adheres to the principles laid down in *Newenham v. Mahon* (3 I. E. R. 304). At the same time it must be recollected that the general rule is, that the landlord having acquired the legal estate by legal proceedings, and in due course of law, and acting fairly and properly, shall be indemnified against the costs of any proceedings taken by the tenant to recover the property. That is the general rule in redemption and renewal suits; the contrary is an exception to the rules, and one which the Court will adopt in any case calling for it: for it would be monstrous to hold that the landlord might in all events rely upon his legal possession, and, no matter how illegal or false, or untenable his defence and possession, he should nevertheless be entitled to the costs of the suit.—*Reade v. De Montmorency*, 5 I. E. R. 48. (E.E.)

7. If through carelessness, or by design, an unfounded claim is put forward, it is undoubtedly reasonable that the costs which it

occasions shall be borne by the person making it, and that he shall not be permitted to proceed further against the defts., until he has paid the costs which he has improperly obliged them to incur.—*Hughes v. Maitland*, 5 I. E. R. 169. (R.)

8. In general the landlord is entitled to his costs in a redemption suit; but if the conduct of the landlord has rendered the bill necessary, he may be made to pay the costs of all parties.—*Malone v. Geraghty*, 2 Con. & L. 242; 3 Dr. & War. 273; 5 I. E. R. 549. (C.)

9. Costs cannot be given to a deft. who sets up a defence that fails: but from the conduct of the tenant in this case, and the bill containing an unproved imputation against the landlord, the specific performance of the covenant (to renew) was decreed without costs.

When a suit for renewal is rendered necessary by the conduct of the ptf., he will not get his costs even if he succeed; although, as a general rule, the ptf. who succeeds in a contest for renewal is entitled to his costs.—*Fitzgerald v. O'Connell*, 6 I. E. R. 455; 1 Jon. & L. 134. (C.)

10. Defts. (trustees) who have severally filed similar demurrers, instead of joining in one demurrer, not allowed the costs of the demurrers, although successful.—*Cooke v. Lord Courtown*, 6 I. E. R. 279. (R.)

11. The costs of the suit incurred previous to a recent period, refused to a plaintiff who succeeded, on the ground of the *laches* with which the case was conducted.—*Reilly v. Fitzgerald*, 6 I. E. R. 335, 353. (R.)

12. A mortgagee, who, after the mortgagor's bankruptcy, unnecessarily files a bill to foreclose, will not get more costs than he would have been entitled to by proceeding in the bankruptcy matter.—*Hogan v. Baird*, 4 Dr. & War. 296. (C.)

13. *Held*, that under the circumstances, neither ptf. nor the assignee was entitled to the costs of appearing on a receiver's motion to attach a tenant.—*Colthurst v. C.*, 7 I. E. R. 305. (E.E.)

14. Costs given to a trustee up to the decree to account only, when his account had been much reduced in the office.—*Fozier v. Andrews*, 7 I. E. R. 595; 2 Jon. & L. 199. (C.)

15. The costs of unnecessarily re-docketing judgments are not to be allowed.—*Macken v. Newcomen*, 7 I. E. R. 114; 2 Jon. & L. 16. (C.)

16. A party unnecessarily serving notices in a cause shall pay the costs occasioned thereby.—*Hogan v. M'Namara*, 2 Jon. & L. 242. (C.)

17. A. lodged money of B.'s at a bank; took a deposit receipt in the name of B.; and afterwards lodged a small sum additional, and took a deposit receipt for the whole, by B.'s authority, in the name of B.'s daughter,

X., stating it was a provision for her. After B.'s death, A. refused to give the deposit receipt to X., and set up a claim to the money as B.'s administrator. The bank refusing to pay X. without the receipt, X. and A. brought actions against it. *Held*, that the effect of the dealing was conclusively to constitute the bank the debtor of X. only, and that they could not sustain an interpleader suit. A bill of interpleader cannot be sustained, if the claim of one deft. is not at least colourable.—*Cochrane v. O'Brien*, 8 I. E. R. 241; 2 Jon. & L. 380. (C.)

1. A judgment creditor's bill was filed in 1829. The answers were filed in 1830; but no further steps were taken until 1843, when leave to file an original bill, in the nature of a bill of revivor, was obtained under the 58th Rule, the ptf. having accounted for the delay between 1830 and 1839. The Court gave him no more costs than he would have been entitled to if the original bill had been filed in 1843, but gave him interest.—*Fairtlough v. Ackland*, 9 I. E. R. 251. (C.)

2. Costs of a redemption suit against a mortgagee in possession, given to him up to answer, and against him for the rest of the suit, when the sum due at the filing of the bill was only £10, and the balance afterwards was against him; and his conduct had been vexatious.—*Snagg v. Frith*, 9 I. E. R. 285; 3 Jon. & L. 383. (C.)

3. When a cause is set down for a dismiss, the deft. settling it down is alone entitled to costs, and any other defts. appearing will not get costs.—*Furcell v. P.*, 11 I. E. R. 516. (C.)

4. A demand being assigned, for which a suit is being prosecuted, if the assignee file a new bill, the pendency of the former suit is no defence or objection, at least unless pleaded; but if both causes be brought on, the Court will prevent the double costs.—*O'Brien v. Villiers*, 12 I. E. R. 21. (C.)

5. While a case was pending in the H. L., the deft. in a similar case made an offer to the ptf. to be bound by the decision of the House in the pending case. The ptf. took no notice of the offer, but compelled deft. to proceed with his defence. Judgment was given against deft., who appealed to this House, and prosecuted the appeal to a hearing after an adverse decision in the previously pending case. Judgment being given against him in his own case, he was ordered to pay respondent's costs.—*Farrell v. Gleeson*, 11 Cl. & F. 702.

6. A creditor's suit to administer real and personal estate of a deceased testator was in the list for hearing at the time of the institution of a suit by a legatee, who could have obtained substantial relief in the creditor's suit, in which, shortly after, a decree to account was pronounced. Subsequently, on the petition of a creditor, the greater part of the real estate of the testator was ordered by the I. E. Court to be sold. This Court, being of opinion that the legatee's suit was oppressively and wantonly instituted, refused, with costs, a

motion under the 12 & 13 Vic., c. 77, s. 42, on behalf of the legatee to stay his own suit; and ordered that, if he did not file a replication within a short specified period, his bill should stand dismissed, as against one of the principal defts., with costs, including the costs of a contemporaneous motion made on her behalf, for its dismissal for want of prosecution.

The construction of the 12 & 13 Vic., c. 77, s. 42, adhered to, as laid down in *Bernard v. Bond* (1 I. C. R. 198), in reference to staying proceedings in this Court, when lands, the subject of litigation here, have been ordered by the I. E. Court to be sold.—*Moneypenny v. Gibbings*, 1 I. C. R. 201. (C.)

7. A Ry. Co., instead of obtaining the finding of a jury respecting the amount of compensation due to the owner of land required for the railway, acting on some oral consent by the owner's solicitor, took possession, and commenced the works. Their answer, to a bill filed to restrain them by injunction, was verified by their solicitor; relied on the consent; and detailed conversations between the solicitors. A replying affidavit, filed by the ptf.'s solicitor, denied that consent was given. On motion for the injunction—*Held*, that the deft.'s solicitor having, though unnecessarily, filed an answering affidavit, the ptf.'s solicitor was entitled to reply, and that his replying affidavit might be used; but no costs of either should be allowed on taxation.—*Hare v. C. & B. Ry. Co.*, 3 I. Jur. 1. (C.)

8. A. made in his bill charges affecting the character of the deft., to answer which the deft. was compelled to make a lengthy answer, and to examine a witness *de bene esse*. A., after answer, amended her bill by striking out the charges, thereby rendering useless the proceedings taken by the deft. relative to them. *Held*, that the deft. was entitled to the costs of them. That the Court would entertain an application for them at the hearing, there being a notice served by the deft. that he would then apply for them.—*Courtenay v. C.*, 3 I. Jur. 161. (C.)

9. Costs refused when the bill was drawn at unnecessary length.—*Fitzgibbon v. Blake*, 3 I. C. R. 328. (C.)

XXX. 10. ff. *Parties improperly joined, or served with Notice of Motion, &c.*

10. A party served with a notice of motion, though not interested in the subject matter of the motion, is nevertheless entitled to the costs of appearing.—*Tabuteau v. Warburton*, 4 Dr. & War. 267. (C.)

11. Construction of the rule as to judgment creditors. In a suit instituted before the G. Rule of June 1842, the ptf. having served judgment creditors, defts. not in possession by receivers, with subpoena to hear judgment, were decreed to pay the costs of their appearing, and not to have them over.

If they appeared without subpoena they should bear their own costs.

Such of the judgment creditors as had answered since that rule, decreed to pay their own costs unless they had been served with a notice to press, in which case the ptf. were decreed to pay them.

Judgment creditors, having receivers, entitled to answer and appear, and to have their costs.—*The Governor, &c., of the Bank of Ireland v. O'Malley*, 7 I. E. R. 121. (C.)

1. When some of several persons have been made ptf. without their authority, their names will be struck out of the suit, upon motion and before the hearing. If the defts. shall be awarded costs, they will be ordered them against the solicitor filing the bill, he to have them over against the ptf. who employed him.—*Beddy v. Smith*, 8 I. E. R. 667. (R.)

2. A party unnecessarily serving notices in a cause shall pay the costs occasioned thereby.—*Hogan v. M'Namara*, 2 Jon. & L. 242. (C.)

3. In a partition suit each party bears his own costs of suit—that is to say, the costs up to the first hearing. The costs of issuing, executing, and confirming the commission, including the costs of the second hearing and of the mutual conveyances, are borne by the parties in the proportion of their interests.

After obtaining the first decree, and the partial execution of the writ of partition and commission of perambulation in the original suit, it became necessary to file a supplemental bill. *Held*, that the costs of the supplemental suit should follow the same rule as the costs of the original suit; and that each party should bear his own costs up to the first hearing of the supplemental suit.

The costs of suit of a bond creditor of one undivided share borne by the debtor, his counsel so agreeing, the Court doubting whether they should not be borne by the ptf.

The owner of an undivided share made leases of undivided portions of his share. Both lessor and lessees were made defts. to a partition suit, but no commissioners were nominated on behalf of the lessees, nor did they take any part in the subsequent proceedings. *Held*, that they ought not to contribute to the costs of the commission.

That these lessees were not entitled to their costs of suit as against the lessor.

*Cornish v. Gest* (2 Cox, 27) observed upon.—*Herbert v. Hedges*, 10 I. E. R. 479. (E.E.)

4. A receiver who had passed his final account and paid in the balance found against him, and who had been acting for thirty years, discharged without paying the costs of his removal, or of the appointment of a new receiver.—*Cox v. M'Namara*, 11 I. E. R. 356. (R.)

### XXX. 10. ff.\* Partition.

5. One tenant in common leased his undivided share, subject to partition being made. The lessee was made a party, to a bill for a

partition. *Held*, that he was not entitled to his costs as against his lessor.

*Cornish v. Gest* (2 Cox, 27) observed upon.—*Herbert v. Eyre*, 2 Jon. 803. (E.E.)

6. A moiety of an estate was devised, subject to legacies, to A. for life, remainder to his first and other sons in tail. *Held*, that the tenant for life, tenant in tail, and legatees, were to bear their own costs of a partition suit; and that the tenant for life had no equity to call on the tenant in tail to contribute to the costs of the suit.—*Greer v. Mercer*, 4 I. E. R. 705. (E.E.)

7. Costs of a partition suit must be borne by the parties according to the interests allotted to them respectively.—*M'Bride v. Malcolmson*, 2 Dr. & Wal. 700. (C.)

8. In a partition suit each party bears his own costs of suit—that is to say, the costs up to the first hearing. The costs of issuing, executing, and confirming the commission, including the costs of the second hearing, and of the mutual conveyances, are borne by the parties in the proportion of their interests.

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That those lessees were not entitled, as against the lessor, to their costs of suit.—*Herbert v. Hedges*, 10 I. E. R. 479. (E.E.)

9. Commissioners of perambulation applied that the ptf. should pay their fees and expenses, the fees being at the rate of £3. 3s. per day for each commissioner.

No precedent of a similar application could be found.

The Court required the ptf. to state what was the proper sum, in his opinion; and would then refer it to the Master to enquire what would be the proper amount; the defeated party to pay the costs of the reference.—[The case was compromised.]—*Browne v. Coots*, 2 I. Jur. 99. (R.)

10. In partition suits, the costs of issuing and executing the commission, and the final decree and hearing, should be borne by the

parties in proportion to their respective interests.

The several parties respectively abide their own costs of all subsequent proceedings.

The costs of mutual deeds of partition, and of having them settled by the Master, are subsequent costs, and are to be borne by the parties respectively.

The fact of one of the parties being a minor does not vary the rule.

The ptf. will not be allowed the costs of a deed of disclaimer by the trustees of a deft. who were necessary, but had not been made, parties to the suit, nor the costs of a case to counsel advising such deed.—*Balfé v. Redington*, 2 I. C. R. 324. (R.)

1. An order was made in a partition suit, in December 1856, to bind persons, not parties under the 32nd G. O. of 1851. The order was not entered in the final decree, which directed that the parties should respectively bear their own costs up to and including the first hearing of the cause in June 1856, and that the parties should respectively bear and pay the costs of issuing, executing, and confirming the commission, including the costs of the final hearing, rateably and in proportion to the value of the estates allotted to them. *Held*, that the petitioners were not entitled to a rateable proportion of the costs of the order of Dec. 1856.—*O'Gorman v. Pratt*, 9 I. C. R. 343. (R.)

2. The respondent in a partition suit alleging that the petitioner was not seized of any portion of the lands, resisted the petitioner's claim. Considerable expense was thus imposed on the petitioner; but was entirely incurred before, and at the first hearing, at which a decree for partition was made, and further directions and costs reserved. At the hearing on the return to the writ of partition and further directions—*Held*, that the petitioner was not entitled to be paid by the respondent any portion of his costs up to and including the first hearing.—*Knox v. Mayo*, 11 I. C. R. 265. (C.)

3. When a petition is filed to sell an undivided moiety of any land, which is afterwards partitioned by order of the Court, the lien, given by the partition order on the unsold portion for its proportion of the partition costs, is a charge bearing interest at the rate of £5 per cent. per annum from the order's date.—*Fox v. Wybrants*, 6 I. Jur. N. S. 165. (L.E.C.)

4. The final decree in a partition suit directed that the several parties should bear their own costs, incurred up to and including the first hearing; and that the costs incurred after the first decree, including copies of deeds, &c., be borne rateably, and in the following proportions:—One-third by petitioner; one-third by respondent, B.; and one-third by the respondents, C., V., and D.; and that D. should be allowed his costs out of the third part of the lands and funds coming to C. and V., who were trustees of the will of D.'s father. It was referred to a Taxing Master to tax

the costs. He refused to tax the costs of C. and V., because they had not been specifically by name given costs by the above decree; and that to do so would therefore be inconsistent with the practice in partition suits. *Held*, that C. and V. were entitled under the decree to their costs properly and necessarily incurred after the first hearing, and including the final hearing.

In partition suits, the costs, up to and including the first hearing, are borne by the parties to the suit respectively; and the costs of all parties when properly and necessarily incurred after the first hearing, and up to and including the second hearing, should be taxed, and their total amount borne rateably by the parties according to their respective interests.

The practice as to costs in partition suits investigated and determined.—*Leslie v. Duggannon*, 12 I. C. R. 205. (R.)

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5. Upon partnership enquiries, *bona fide* on both sides, it is fair that there should be no costs on either side. In this case there was some negotiation for an arbitration; and had the case been clear that the ptf. had wantonly refused to arbitrate, and had got no more by the decree of the Court than was offered to him out of Court, he might have had to pay the expenses of the suit.—*Hutchinson v. Smith*, 5 I. E. R. 123. (E.E.)

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6. *Quære*—If costs can be given against a pauper ptf., or how he can be punished when his bill is dismissed?—*Flattery v. Anderson*, 12 I. E. R. 219. (C.)

7. When a party sues successfully *in forma pauperis*, he is entitled to *dives* costs against the deft.; and the solicitor may have his costs taxed as *dives* costs, though there are no special directions in the decree, and though the fund produced by the sale decreed is insufficient to pay the ptf.'s demand, without costs.—*Woodroffe v. Murphy*, 6 I. Jur. 1. (R.)

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8. By consent of ptf. and deft., a commission was issued to M. to examine witnesses residing more than thirty miles from Dublin. Under it the ptf. examined on the direct, and the deft. merely cross-examined. On a motion by M. against the deft., for one-half of his fees and expenses as commissioner—*Held*, that he was to be considered as having undertaken, and been appointed to the office, on the joint retainer of the parties, and his motion was granted with costs. The question, who is immediately liable to pay the commissioner, has nothing to do with the question as to the costs in the cause to be decided at the hearing.—*Millner v. Joseph*, 5 I. E. R. 214. (R.)

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The Court required the ptf. to state what was the proper sum, in his opinion; and would then refer it to the Master to enquire what would be the proper amount; the defeated party to pay the costs of the reference.—[The case was compromised.]—*Broune v. Coote*, 2 I. Jur. 99. (R.)

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1. An order was made in a partition suit, in December 1856, to bind persons, not parties under the 32nd G. O. of 1851. The order was not entered in the final decree, which directed that the parties should respectively bear their own costs up to and including the first hearing of the cause in June 1856, and that the parties should respectively bear and pay the costs of issuing, executing, and confirming the commission, including the costs of the final hearing, rateably and in proportion to the value of the estates allotted to them. *Held*, that the petitioners were not entitled to a rateable proportion of the costs of the order of Dec. 1856.—*O'Gorman v. Pratt*, 9 I. C. R. 343. (R.)

2. The respondent in a partition suit alleging that the petitioner was not seized of any portion of the lands, resisted the petitioner's claim. Considerable expense was thus imposed on the petitioner; but was entirely incurred before, and at the first hearing, at which a decree for partition was made, and further directions and costs reserved. At the hearing on the return to the writ of partition and further directions—*Held*, that the petitioner was not entitled to be paid by the respondent any portion of his costs up to and including the first hearing.—*Knox v. Mayo*, 11 I. C. R. 265. (C.)

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### XXX. 10. gg. Pauper.

6. *Quære*—If costs can be given against a pauper ptf., or how he can be punished when his bill is dismissed?—*Flattery v. Anderdon*, 12 I. E. R. 219. (C.)

7. When a party sues successfully *in forma pauperis*, he is entitled to *dives* costs against the deft.; and the solicitor may have his costs taxed as *dives* costs, though there are no special directions in the decree, and though the fund produced by the sale decreed is insufficient to pay the ptf.'s demand, without costs.—*Woodroffe v. Murphy*, 6 I. Jur. 1. (R.)

### XXX. 10. hh. Perpetuating Testimony: Commission to Examine.

8. By consent of ptf. and deft., a commission was issued to M. to examine witnesses residing more than thirty miles from Dublin. Under it the ptf. examined on the direct, and the deft. merely cross-examined. On a motion by M. against the deft., for one-half of his fees and expenses as commissioner—*Held*, that he was to be considered as having undertaken, and been appointed to the office, on the joint retainer of the parties, and his motion was granted with costs. The question, who is immediately liable to pay the commissioner, has nothing to do with the question as to the costs in the cause to be decided at the hearing.—*Millner v. Joseph*, 5 I. E. R. 214. (R.)

9. Where a commission examiner is appointed on consent, the consenting parties



must equally bear the costs of the commission, though only one of them has, under it, examined on the direct.—*Stafford v. S.*, 5 I. E. R. 215, *note*. (R.)

1. The deft. assented to the appointment of the person nominated commission examiner by the ptf. He cross-examined one of the ptf.'s witnesses, but did not examine any witness on the direct. *Held*, that he was bound to pay the costs and expenses incurred by reason of his cross-examination—viz., for the attendance of the commissioner during the time occupied by the cross-examination, and for engrossing the depositions to the cross interrogatories; but not to contribute to the commissioner's travelling expenses.

Where the other party examines on the direct, he must bear his proportion of the commissioner's travelling expenses; but where he merely cross-examines the witness of the party suing out the commission, he ought only to pay the costs necessarily incident to his cross-examination.—*Rogers v. Aylmer*, 5 I. E. R. 586. (E.E.)

2. One party in a cause, who sues out a commission to examine witnesses without the concurrence of the other, is bound to pay the entire expense of the commission examiner, unless the latter has examined on the direct, in which case he is bound to pay the commissioner for the examination and cross-examination of his own witnesses.—*Lord Lucan v. O'Malley*, 8 I. E. R. 712; 2 Jon. & L. 681. (C.)

3. The costs of a commission to examine witnesses out of the jurisdiction, are, in the first instance, costs in the cause, but remain subject to the future order of the Court.—*Potts v. Batty*, 6 I. Jur. N. S. 46. (P.)

#### XXX. 10. hh.\* *Probate*.

[See also PRACTICE XXX, 10. c., ADMINISTRATION SUITS.]

4. The executor of an administrator, who died in England, proved his will in Ireland, in order to take out administration *de bonis non* to the intestate, but did not take it out. *Held*, that the costs of the probate were not chargeable against the intestate's estate.—*Lady Langford v. Mahony*, 5 I. E. R. 569; 4 Dr. & War. 81; 2 Con. & L. 317. (C.)

#### XXX. 10. ii. *Costs of Proving Debts before Master*.

[See also PRACTICE, MASTER.]

5. A mortgagee's infant heir is entitled to the costs incurred on the reference under 1 W. 4. c. 60.—*Earl of Miltown v. Lord Trimleston*, Fl. & K. 338. (R.)

6. The Court will not, under the 1 & 2 Vic., c. 58, order the Poor-law Commissioners to pay costs relating to the re-purchase of lands

to be settled to uses the same as those to which the sold lands were subject.—*In re Lord Mountsandsford*, Fl. & K. 368. (R.)

#### XXX. 10. ii.\* *Railway Company*.

7. The costs of preparing and verifying the execution of a power of attorney from parties residing in Jersey, to draw out of Court purchase-money lodged under the provisions of a Railway Act, are chargeable against the Company as costs incident to the drawing out of the money.—*In re Godley*, 10 I. E. R. 222. (R.)

8. An application to draw out of Court a sum lodged there by a railway company could have been avoided had the company, on bringing in the money, obtained a continuing order to pay it out. The company were held liable for the costs of the motion.—*Ex parte Cremen v. Gt. S. & W. Ry. Co.*, 4 I. Jur. 182. (R.)

9. Under the Lands Cl. Consol. Act, 1845, 8 & 9 Vic., c. 18, s. 80, Ry. Cos. are liable to the cost of orders obtained by successive tenants for life for payment to them of the dividends accruing on stock purchased with the price of land taken by them, and by them paid into Court; but not to any costs incurred consequent on the order.—*Ex parte Gordon v. Belfast & Co. Down Ry. Co.*, 11 I. Jur. N. S. 1. (R.)

#### XXX. 10. jj. *Receiver*.

10. The receiver over a derivative or other leasehold estate should pay the head rent regularly. If the landlord is obliged to apply for leave to proceed, the Court will make the receiver, if he had funds to pay the rent, pay the costs of the application; or otherwise give the landlord his costs of his application against the funds in the causes.

*Semble*—In such a case the landlord might proceed for his rent without asking the Court's leave.—*Walsh v. W.*, 1 I. E. R. 209. (R.)

11. When a receiver, appointed under the 5 & 6 W. 4, c. 55, has been extended to the matter of a second petition under the same statute, in which second petition the judgment is prior to that of the first petitioner, the first petitioner is entitled to the entire rents received before the extension; and also to be paid out of the rents to be subsequently received, and in priority to the demand of the petitioner in the second matter, the costs of appointing the receiver. But the costs of orders and references, obtained by the petitioner in the first matter for his own benefit, are to be paid in equal priority with the residue of his demand.—*Keough v. Waring, Jo. & Car.* 189. (E.E.)

12. When a receiver has been appointed under the 5 & 6 W. 4, c. 55, but not extended to any other matter, the Court will not, at petitioner's instance, make the order for him merely to pay petitioner the costs of his ap-

pointment, unless the petitioner takes the order at his own expense.—*Anon.*, 3 I. E. R. 504. (E.E.)

1. A receiver bringing an ejectment under the order of the Court is entitled to all the costs, as between attorney and client, of that proceeding.—*Fitzgerald v. F.*, 5 I. E. R. 525. (E.E.)

2. A receiver, by leave of the Court, brought an ejectment. The deft. filed a bill in equity to restrain the proceedings in the ejectment action. To that suit the receiver took defence without having obtained the leave of the Court. *Held*, that he was not entitled to the costs of defending the suit without leave.—*Conyers v. Crosbie*, 6 I. E. R. 657. (E.E.)

3. When an ignorant person has been induced by the misrepresentations of the ptf. to consent to act as receiver, and been appointed; but afterwards, on discovering the nature of the office, refuses to enter into the recognizance, the Court will not make him pay the costs of his removal and the new order of reference.—*Hunter v. Pring*, 8 I. E. R. 102. (R.)

4. A receiver, not having passed his account, was attached, but subsequently discharged, and a new receiver appointed. *Held*, that the first receiver's sureties were liable, under the recognizance, to the costs of the attachment, and to all costs of discharging the defaulting receiver, and appointing the new one.—*Maunsell v. Egan*, 8 I. E. R. 372. (R.)—[*Affd.*: 9 I. E. R. 288. (C.)]

5. Costs of letting refused to a receiver, with costs.—*Payne v. Lamb*, 8 I. E. R. 517. (E.E.)

6. The sureties for a receiver are liable under the recognizance for the costs of an attachment against the receiver for not passing his account, and for all costs incurred in discharging him and appointing a new receiver.—*Maunsell v. Egan*, 9 I. E. R. 283; 3 Jon. & L. 251. (C.)

7. A receiver's sureties are not liable beyond the amount of the recognizance. The sureties having paid the amount of the recognizance into Court—*Held*, that they were not liable to the costs of removing the receiver who was in default, and of appointing a new receiver, nor to the costs of a *sci. fa.* against themselves or their principal.—*Watters v. W.*, 11 I. E. R. 335. (R.)

8. In a mortgage matter a petition for an attachment was presented by a receiver, and a conditional order granted. The receiver presented a second petition, to make the conditional order absolute. The costs of this petition were not allowed, it being unnecessary.—*Delacherois v. Wrison*, 2 I. Jur. 67. (R.)

9. A receiver having no funds, is not entitled to the costs of appearing on a motion by the head landlord for liberty to bring an ejectment.—*Adams v. Horne*, 2 I. Jur. 122. (R.)

10. A receiver who has acted meritoriously, and is no longer, from ill health, capable of discharging his duties, will be discharged without being compelled to pay the costs of his removal.—*Constable v. C.*, 2 I. Jur. 141. (R.)

11. The ptf. in a stayed suit, who has paid the costs of a deft. according to the rule in *Loflie v. Forbes* (2 I. E. R. 443), is not entitled to them out of the funds in the receiver's hands, unless the estate is clearly sufficient to pay them according to their priority.

In *Loflie v. Forbes* there was a fund sufficient to pay all the creditors.—*O'Keeffe v. Holmes*, 13 I. E. R. 116. (R.)

12. The petitioner is entitled to be paid the costs of the appointment of a receiver out of a fund realised by him, in priority to the landlord's claim for rent.—*Read v. Corcoran*, 1 I. C. R. 235. (R.)

13. A receiver is not entitled to the costs of taking out the order appointing him, it being the duty of the party at whose instance the receiver is appointed to do so.

Nor will he be allowed the costs of his solicitor attending the passing of a former receiver's account, unless the Master certifies that such attendance was proper.

Nor the costs of notice and service thereof on the sheriff, requiring him to pay rent due, before levying an execution on the goods of a tenant.

He will be allowed the costs of one draft and copy of a notice to quit, by way of precedent only, and not the costs of preparing a notice to quit served on the tenants, unless under special circumstances.

The costs of an attested copy of a memorial of a lease, and of a clerk to prove the same at the trial of an ejectment, will be allowed, on taxation, to the receiver, if necessarily incurred.—*Woodroffe v. Greene*, 2 I. C. R. 330. (R.)

14. A receiver over the landlord's interest is entitled to have the costs of obtaining leave to proceed at law against a tenant over whose interest there is also a receiver, taxed as against the fund in Court.—*Thompson v. Magill*, 4 I. Jur. 90. (R.)

15. The costs of the appointment of a receiver on a judgment on a receiver's recognizance under the 4 & 5 W. 4, c. 55, and 3 & 4 Vic., c. 105, are chargeable beyond the penalty of the recognizance against the receiver, and *Semble*—against his securities, those costs not being costs at the Petty-bag side of the Court.—*The Queen v. Dillon*, 3 I. C. R. 564. (R.)—[*Affd.*: 4 I. C. R. 545. (C.)]

16. A tenant held premises under the Court on a six months' lease, ending in March 1850, at £45 for rent. When applied to by the receiver at the end of the term, she refused possession; and, in May 1852, when the rent was demanded, by letter, denied tenancy except for six months. She still continued in possession, and in March 1855 the receiver's

clerk filed for her a proposal for the premises at £50 per annum; which proposal was sent in, but there was no new letting. In Jan. 1853, the receiver distrained for two and a-half years' rent, at £90 per annum, and the tenant replevied. On application of the receiver, the proceedings were directed to be stayed, and a reference was given to the Master to fix what rent should be paid from the end of the six months, and to allow credit thereout for the damages by distress, and for the costs at law. Each party was directed to abide his own costs of this motion; the order to be without prejudice to the liability of the receiver for his neglect in not having let the lands in 1850.—*Barron v. O'Brien*, 6 I. Jur. 250. (R.)

1. A receiver having neglected to lodge his balance pursuant to the Master's order, an attachment was issued against him, directed to the sheriff, who made a return of *non est inventus*. It was afterwards renewed and a similar return made. It was then directed to the coroner, who made an improper return. An attachment was then issued against the coroner, which was also renewed from time to time. On taxation, the Master refused to allow the ptf. the costs of those proceedings which he had taken against the receiver and against the coroner. The Court refused, in the first instance, to allow those costs out of the estate, as it did not appear that the receiver or his sureties were insolvent, but directed the recognizance to be put in suit, and the motion to stand over.

The payment of the amount for which the attachment was issued against the receiver would not discharge the contempt, but he would still be liable to the costs of the proceedings against him, and if he could be identified with the coroner, perhaps also for the costs of the proceedings against the coroner.—*Erskine v. Baker*, 7 I. Jur. 25. (R.)

2. The report of the Master in a cause had found that it would be for the benefit of the estate to take proceedings against certain tenants, and the receiver had proceeded by attachment, on which a return of *non est inventus* was made by the sheriff. The receiver was entitled to his costs of such proceedings.—*Kelly v. K.*, 7 I. Jur. 161. (R.)

3. C. having been found lunatic, by inquisition, obtained leave to traverse. The Lord Chancellor directed one of the Masters of the Court to act as committee, and to oppose the traverse. The Master did so by the Solicitor for Minors and Lunatics. The traverse succeeded. *Held*, that C., was not entitled to have the receiver discharged, without providing for the costs of the Solicitor for Minors and Lunatics.—*In re Crosbie*, 11 I. C. R. 432. (C.)

#### XXX. 10. kk. Review.

[See also PLEADING, II. 6.]

#### 4. Costs of a bill of review and reversal

given to the ptf., who succeeded in the suit.—*Talbot v. Minnett*, 6 I. E. R. 83. (E.E.)

5. The notice of a motion to review the taxation of costs should specify the items of costs objected to.

"Late of Montague-street," is an insufficient description of residence.—*Mowles v. Murray*, 3 I. Jur. 375. (C.)

#### XXX. 10. ll. Separate Costs.

6. If defts. in a suit for renewal, file separate answers when their defence is identical, the Court will not make the usual decree giving them their costs, but will disallow the costs of the separate proceedings.—*Hamilton v. Patten*, 1 I. E. R. 341. (C.)

7. When, apparently to accumulate costs, several similar answers of vexatious length were filed on behalf of a number of formal defts., who appeared to have acted on an understanding with ptf., and under the same solicitor's directions; on the principal deft.'s motion, that proceedings be stayed, &c., it was referred to the Master to ascertain the amount due to ptf., and to tax their costs of proceeding against the principal deft. only, but not the costs of proceeding against the others. It was further ordered that the principal deft. should pay, &c., he so undertaking, within ten days after the report; that the cause should meantime be stayed; and that ptf. should not be allowed their costs of appearing on this motion.—*Bateman v. B.*, 2 I. E. R. 296. (R.)

8. Trustees in the same interest will be allowed the costs of separate answers, if the Master finds that the circumstances justified them in so answering.—*Dudgeon v. Corley*, 4 Dr. & War. 158; 2 Con. & L. 422. (C.)

9. Defts. (trustees) severally filed similar demurrers, instead of joining in one demurrer. *Held*, that they, though successful, should not be allowed the costs of the demurrers.—*Cooke v. Lord Courtown*, 6 I. E. R. 279. (R.)

10. The separate appointees of portions of an entire charge (and not those claiming partial or sub-interests in portions of it) are entitled to separate costs as defts. in a suit relating to the estate charged.—*Hoops v. Lord Kingston*, 11 I. E. R. 471. (C.)

#### XXX. 10. mm. Solicitor, personally, to pay.

11. If the ptf.'s attorney wilfully in the bill describe the ptf. as resident within the jurisdiction, when, in fact, he is resident out of the jurisdiction, he will be ordered to pay the costs of the motion to stay the proceedings, until security for costs be given.—*Knox v. O'Brien*, 3 I. E. R. 62. (E.E.)

12. When, in a minor matter, upon a reference to the Master to ascertain what lien the solicitor of the father of the minor had upon

the several documents in his possession, for costs incurred in the lifetime of the father, the costs claimed were reduced, upon taxation, by more than one-sixth—*Held*, that the solicitor should pay his own costs of taxation, as well as those incurred by the guardians of the minor in reducing the amount of the costs claimed.

The solicitor must pay the costs of taxation when more than a sixth has been taken off the bill, although there has been no undertaking to pay, bringing the case within the 7 G. 2, c. 14; the Court having and exercising an inherent jurisdiction on the subject.—*In re Lawlers*, 3 I. E. R. 102; Fl. & K. 73. (R.)

1. When, under an order referring it to the Master to tax bills of costs furnished by the solicitor, in pursuance of the statute, and staying an action brought by him at law for the recovery of the same, the client undertaking to pay what should be found due on taxation, and more than one-sixth had been struck off each bill—*Held*, that the solicitor should pay his own and the client's costs of taxation.

A solicitor furnished his bill to his client, and, after the expiration of the month allowed by the statute, commenced an action for the amount, the client having taken no step in the meantime. Afterwards, upon the client's petition, the action was stayed, and the costs were referred for taxation, the client undertaking to pay whatever should be the sum certified as due. Upon the taxation, more than one-sixth having been taken off, the Court ordered that the solicitor's costs of taxation should be disallowed; and, also, that the client's costs of taxation, and of the application upon the return of the report, should be deducted from the amount of taxed costs.—*Power v. Nagle*, 3 I. E. R. 105; Fl. & K. 78. (R.)

2. A ptf.'s solicitor *held* personally liable to the costs of a reference to the Master to enquire and report whether a purchaser was entitled to any, and what compensation, by reason of a misdescription in the rental, caused by his neglect, in not examining the leases lodged in the Master's office.—*Taylor v. Gorman*, Fl. & K. 567; 4 I. E. R. 550. (R.)

3. If the solicitor, upon whom has been served the subpoena to hear judgment, refuses to endorse on the original an admission of service thereof, he will be ordered to pay the costs rendered necessary by his refusal.—*Ross v. Wood*, 2 Dr. & Wal. 490. (C.)

4. Ptf.'s solicitor ordered to pay the costs of the day, in consequence of his non-attendance in Court when the cause was called on.—*Courtney v. Stock*, 2 Dr. & War. 251; 1 Con. & L. 366. (C.)

5. An attorney, who had received a sum of money on account of costs, contended that a balance was still due, and threatened to file a bill for its recovery. Upon a reference obtained by the client, on a petition praying,

among other things, that the sum received by the attorney should be ascertained, and his costs taxed as between party and party; although the client was wrong as to the principle of taxation, and also in praying repayment of the entire amount received by the attorney, and not merely of the balance overpaid, yet—*Held*, that the attorney should pay all the costs of the reference and other proceedings in the matter, except the costs of so much of the petition and answering affidavit as were incidental to the principle of taxation.—*Armstrong v. Pollock*, 6 I. E. R. 663. (E.E.)

6. When there was a decree with costs in this Court, which was subsequently reversed by the Lords, who directed that the bill below should be dismissed with costs; but before the appeal the ptf.'s solicitor had compelled the deft. to pay the costs below, upon receiving the ptf.'s receipt therefor; and the ptf. had directed his solicitor to retain those costs in his possession to defend the appeal—*Held*, that the deft. could not, upon the decree of the Lords, compel the solicitor of ptf. to refund the costs so paid.—*Smith v. Clarke*, 2 Con. & L. 160; 3 Dr. & War. 344. (C.)

7. The costs of a suit to set aside a deed for fraud will not be given against a solicitor, who was a party to the fraud, and is a party to the suit in respect of other liabilities, unless the bill prays them against him.—*Roddy v. Williams*, 3 Jon. & L. 1. (C.)

8. A conditional order to appoint a receiver under the Sheriffs Act having been obtained in the Court of Exchequer, the solicitor for another judgment creditor, who had knowledge of the Exchequer order, presented a petition for a receiver to the Lord Chancellor, suppressing the fact of the Exchequer order. The Court dismissed the petition, and directed that the solicitor should not have the costs of the petition against his client.—*Daly v. D.*, 9 I. E. R. 461. (R.)

9. The Court directed a solicitor to attend the taxation of his costs. As the taxation could not proceed in consequence of his non-attendance, he was made to pay the costs of the motion.—*In re Kelly*, 1 I. Jur. 329. (R.)

10. It is the duty of solicitors not to take office copies unauthenticated.

A copy of depositions proved very incorrect, but had been taken and paid for before it was compared or attested, the solicitor was ordered to pay the costs of the day.—*Morgan v. Roe*, 12 I. E. R. 21. (C.)

11. By consent, made a rule of Court, defts. undertook to pay costs to two ptf.s, one of whom died before payment. The suit having abated, a motion for an attachment for non-payment of those costs was refused; the personal representative of the deceased ptf. not being before the Court. The solicitor, having made the application without consent of the surviving plaintiff, was directed to pay the costs of the motion.—*Maher v. Loughnane*, 2 I. Jur. 58. (R.)

1. If a married woman, having separate property, petition under the 12 & 13 Vic., c. 77, s. 38, as a *femme sole*, her attorney will be personally responsible for the costs of the proceedings.—*In re Knox*, 2 I. Jur. 147. (I. E.C.)

2. A petition for sale, presented by one who has sought the benefit of the Acts for the Relief of Ins. Debtors in England, will be dismissed with costs, to be paid personally by the solicitor presenting it, when the facts connected with the insolvency are suppressed from the petition, although the petitioner has not been finally discharged under those Acts.—*In re Nesbitt*, 2 I. Jur. 252. (I.E.C.)

3. When, in a suit against a minor, the omission, by the petitioner's solicitor, to name a guardian, precludes the petitioner from naming one under the Ch. Reg. Act (*Ir.*) 1850, s. 21, and a motion for that purpose is thereby necessitated, the petitioner's solicitor should be charged with the costs of that motion.—*O'Dell v. Massy*, 1 I. Jur. N. S. 272. (R.)

4. A solicitor, who receives the proceeds of an insolvent estate, and undertakes to administer it, will be treated, not merely as solicitor, but as if he had been actually appointed assignee; and will be directed to pay, personally, the costs of creditors who bring the matter before the Court.—*In re Connery*, 5 I. Jur. N. S. 23. (B.)

5. The owner's solicitor, not having the carriage of the proceedings, without the Court's leave, filed an objection impeaching leases, and served notice of a motion to allow the objection, and to set aside the leases. The objection was overruled on the merits, and the owners were unable to pay the tenants' costs. The proceeding being clearly contrary to the practice of the Court, the solicitor was held personally liable for the costs.

The solicitor having the carriage of the proceedings is the only person who can take any active steps towards the sale in a matter, unless the Court in any particular matter directs otherwise.—*In re Frewen's Assignees*, 7 I. Jur. N. S. 88. (L.E.C.)

6. If solicitors file pleadings in the Probate Court in cases within the jurisdiction of the Q. Sessions, and without having informed their clients of such jurisdiction, and without their express directions to proceed thus, no costs will be allowed them, either out of the estate or against their own clients.—*Hennessy v. H.*, 7 I. Jur. N. S. 390. (P.)

XXX. 10. nn. *Specific Performance; between Vendor and Vendee, and other Persons; in Sales Judicial; Searches, &c.*

7. A discharged purchaser is not entitled, as against a bidder opening the sale, to the costs of investigating the title, when he pro-

ceeded to do so before the order to confirm the sale was made absolute.—*Digby v. Brown*, 1 I. E. R. 377. (R.)

8. In consequence of deft.'s refusal to execute the conveyance to the purchaser under the decree, it became necessary to apply that the Master might execute in their names. Held, that the estate should not bear the costs of that application, but that they should be borne by the defts., whose improper refusal necessitated them.—*Clarke v. De Burgh*, 2 I. E. R. 19. (R.)

9. Under a decree to sell lands, a trustee for the inheritor was declared purchaser. There was a report of bad title. Held, that the trustee was entitled to his costs out of the fund in Court, it appearing that the inheritor was ignorant of his own title; that he never had the means of knowing it; and that he acted *bona fide*.—*Kirby v. O'Shee*, 1 Jon. 164. (E.E.)

10. A purchaser, discharged because of bad title, is entitled to the costs of counsel's opinion on it, and of preparing a case for counsel.—*Barton v. Downes*, 4 I. E. R. 607; Fl. & K. 633. (R.)

11. In the case of purchases from a bankrupt's assignees, the rule respecting the costs of investigating the title resembles that which governs sales under decrees of Courts of Equity.—*Re Page*, 1 Dr. & Wal. 31. (C.)

12. Under the words, "and to make such other order in the premises as to the Court shall seem just and reasonable" (6 G. 4, c. 193, s. 29), the Court will give the costs of attending the inquisition to ascertain the value of the lands required for the company's purposes.—*In re Ulster Canal Co.*, Fl. & K. 16, note. (R.)

13. Under the words "reasonable costs, charges, and expenses," in the 2 & 3 Vic., c. 61, s. 29, the Court will award all costs necessarily incurred by parties in obtaining payment out of Court of the purchase money of the lands required for the purposes of the commission, or of having it invested upon trusts similar to those to which those lands were subject.—*In re Commrs. of the Shannon*, 3 I. E. R. 355; Fl. & K. 13. (R.)

14. A party, who obtained possession of estates by conveyance from a tenant for life and equitable incumbrancer, devised the estates as his own. Part was sold in a suit to administer his estates. In a subsequent suit by one claiming the estates as devisee of the former owner, the purchaser was directed to pay his own costs.—*Incorporated Society for Protestant Schools v. Richards*, 4 I. E. R. 177; 1 Dr. & War. 258; 1 Con. & L. 58. (C.)

15. A purchaser, who, having lodged only one-fourth of his purchase money, was discharged upon a report of bad title—Held,

entitled to his costs incurred in investigating the title, but not to interest on the one-fourth. —*Feeley v. Kilkenny*, Fl. & K. 456. (R.)

1. A purchaser, discharged upon a re-sale under an order opening the biddings, is not entitled, against the ptf. or his solicitor, to the costs which he may have incurred in investigating the title, there not having been any reference to the Master to report as to title. —*Sullivan v. Bayley*, Fl. & K. 460. (R.)

2. A purchaser under the decree took several objections to the title. Some objections he failed to sustain, but succeeded in others. He was *held* entitled to the costs properly and necessarily incurred in investigating the title, the costs occasioned by the unsustained objections having been first deducted. —*Brown v. Lynch*, 4 I. E. R. 59. (E.E.)

3. The rules respecting the costs of the surrender or assignment of a trust term, when, upon the sale of an estate, it appears that such term is outstanding, are the following:—First, if the term is to be simply surrendered and merged, this must be done at the expense of the vendor; for this is in fact no more than making out the title which the vendor is bound to establish. Again, if the term be so circumstanced that, although the trusts have been fulfilled, it has never been assigned; in that case, the purchaser is entitled to have it assigned to attend the inheritance; and this assignment must be at the expense of the vendor. But there is a third case, and here the rule is different; if the term has already been assigned to attend the inheritance, and the purchaser requires it to be further assigned to a trustee nominated by himself, he must be at the expense of such further assignment. —*Keatings v. K.*, 6 I. E. R. 48. (R.)

4. Under the 5 & 6 Vic., c. 62, the Commissioners of Woods and Forests are bound to pay the costs of a reference to ascertain parties' rights to the purchase money of premises bought under the Act, as expenses incidental to the purchase. —*In re Commrs. of W. & F.*, 7 I. E. R. 487. (R.)

5. One who opened a sale with the parties' assent to prevent the property being sacrificed, but, being outbid, was not the purchaser, allowed costs of opening the sale, because he had benefited the estate. —*Cuffe v. Young*, 9 I. E. R. 475. (R.)

6. In the rental under which the lands were sold a part was thus described:—"Term for which demised; under an article of agreement for lease for four lives, bearing date 1804, and one year." The sale took place in Jan. 1845. On the 9th of April the purchaser's solicitor received a copy of the article, and then first discovered that the agreement was for a lease to commence after the expiration of a then subsisting lease which did not expire until 1843. On the 24th of Oct. he lodged objections to the title, and subsequently swore that he was misled by the

statement in the rental. *Held*, affirming the report, that the mis-statement was ground for discharging the purchaser, not for compensation. That the delay in lodging the objection disentitled the purchaser to his costs. —*Martin v. Cotter*, 9 I. E. R. 44. (R.)—[*Affd.*: 9 I. E. R. 351; 3 Jon. & L. 496. (C.)]

7. Specific execution of a written agreement for a lease decreed at the suit of the tenant, with several additions contemporaneously agreed on by parol, set up by the answer, but omitted in the bill, the ptf. paying the costs of the suit.—*Warren v. Thunder*, 9 I. E. R. 371. (C.)

8. Several objections to title were taken by a purchaser. Some were allowed; others disallowed. On motion to discharge the purchaser—*Held*, that the costs of the successful should be set off against those of the unsuccessful objections.—*Ruskell v. Church*, 1 I. Jur. 250. (R.)

9. When a suit has been stayed, the Court will not direct that the ptf. pay only the costs of such defts. as cannot prove.—*Fawcett v. Biggs*; *Loflie v. Forbes*; *Hare v. Forbes*, 1 I. Jur. 352. (R.)

10. When the abstract of title to a petition stated a jointure to be secured by a trust term, the contrary being the fact, and the petition stated that a greater sum was due for the arrears of the jointure than was really so, the petitioner was declared disentitled to costs as against the fund.—*In re Purcell*, 2 I. Jur. 100. (I.E.C.)

11. A purchaser under a decree objected to the title; but did not appear on the summons to consider the objections. A report of good title was made. He took several objections; they were overruled. Reference to enquire whether he had been put into possession of all the lands. Report—that he was entitled to £60 compensation, which he moved should be allocated to him, with costs of the motion and reference.

Cross-motion: that he should pay ptf.'s costs of the reference on which his objections had been overruled.

The Master certified that there were no grounds to justify those objections.

Order: that the compensation be allocated to the purchaser; but that he should pay the ptf.'s costs.

The Court declared that the 4 & 5 W. 4, c. 78, s. 12, gave the Masters jurisdiction to decide such questions of costs.—*Beddy v. Smith*, 2 I. Jur. 266. (R.)

12. D. contracted for the sale of lands, but died before the execution of the conveyance, having by will, antecedent to that contract, devised all his real estate to trustees (who took the legal estate) upon trust for A. for life; remainder to B. for life; remainder to C., an infant, in tail. A suit to complete the contract having been rendered necessary by reason of the infancy of B., the Court decreed

specific performance, with costs of the suit.—*Heard v. Cuthbert*, 1 I. C. R. 369. (C.)

1. In proceeding under the 138th G. Rule of 1843, the practice is to require common, and not negative, searches, to be taken out for the purpose of being laid before counsel, with the abstract of title, before it is laid before, and approved of by the Master. Costs of negative searches for that purpose will be disallowed on taxation. The ptf.'s solicitor will not in the first instance, i. e., prior to the sale, be allowed to charge for copies of deeds, &c., appearing in the abstract.—*Hutton v. Foster*, 2 I. C. R. 440. (R.)

2. A discharged purchaser is *prima facie* entitled to all the costs incurred by him in investigating the title. The Court therefore refused to give a special direction to the Taxing Master to disallow costs which had been incurred in consequence of the purchaser not objecting earlier to the title.—*Weir v. Chamley*, 2 I. C. R. 566. (R.)

3. A decree declared the ptf. and others, specialty and simple contract creditors, entitled to a charge on lands. There was an appeal to the House of Lords, which was defended by the ptf. at his own expense. The decree was affirmed, without costs; but before the appeal was decided, a final decree was pronounced, directing a sale, and giving the ptf. his costs in priority with his demand. *Held*, that he was not entitled to the costs of defending the appeal, as costs in the cause; but, that as the other creditors had an interest and had derived a benefit from the defence of the appeal, they were bound to contribute to the costs out of the funds reported to them, rateably, in proportion to the amount of their respective demands.—*Hamilton v. Syngé*, 4 I. C. R. 182; 7 I. Jur. 121. (R.)—[Affirmed by the Lord Chancellor, on appeal, 4 I. C. R. 551.]

4. A purchaser, discharged because of the misrepresentation in the rental of the value of the property, was given his costs; but was refused interest, only one-fourth of the price having been lodged.—*Porter v. Vesey*, 6 I. Jur. N. S. 48. (R.)

### XXX. 10. nn.\* Trustees.

[See *supra*, XXX. 10. t.]

5. The rule, prohibiting a trustee, who is a solicitor, from charging costs against his c. q. t. considered. Securities, containing such charges, set aside, when the trust deed did not clearly authorise them, notwithstanding letters recognising the right to charge them, and a petition for taxation presented by the c. q. t., the letters having been written, and the securities given under influence, and the securities being improvident.

The securities were set aside as against a purchaser for value (with notice), from the solicitor.—*Gomley v. Wood*, 9 I. E. R. 418; 3 Jon. & L. 678. (C.)

6. A devised real estate in trust for her husband for his life, and directed the trustees

to sell and convey the property absolutely to him for a named sum, applicable to the purposes of her will, provided that he declared, within one year after her death, that he accepted the proposal.

*Semble*—The right of pre-emption to him was a gift. The trustees, therefore, were not bound to make out title to him, nor were they entitled to receive, out of A.'s assets and to the prejudice of the persons entitled to the residue, the costs of making out title.

Solicitors having been employed by the trustees to make out the title, the costs were allowed on taxation against the trustees, personally, under the Solicitors Act (12 & 13 Vic., c. 53), ss. 3, 4.—*In re Davison & Torrens*, 17 I. C. R. 7. (R.)

### XXX. 10. oo. Witness.

[Under the Ct. of Ch. Reg. (Ir.) Act 1850; Gen. Orders of May 1857, 11, 12, 13, 14, 15: Gam. Ch. Or.—See also 30 & 31 Vic., c. 44. s. 93.]

7. A party examining, by means of an interpreter, a witness ignorant of the English language, must bear the expense of the interpreter's services on the cross, as well as the direct examination.—*Plunkett v. Williams*, 6 I. E. R. 80. (R.)

8. A medical man is obliged to attend without compensation to prove the execution of deed.—*Kelly v. Jackson*, 2 I. Jur. 181. (R.)

9. When a commission to examine witnesses issues at the instance of one party to a suit, the other not concurring, the issuing party must pay all the commissioner's expenses, even though the other party cross-examines his witnesses. If, however, he examines on the direct, he must pay the commissioner for the examination and cross-examination of his own witnesses.—*Earl of Lucan v. O'Malley*, 8 I. E. R. 712; 2 Jon. & L. 681. (C.)

### XXX. 10. pp. In Cases not before specified.

10. A cause will not be heard for costs alone.—*Blackwood v. Gregg*, H. & J. 310. (E.E.)

11. Costs of ptf., and of several parties to the cause, having been ordered to be paid out of the fund, and a puisne creditor, not a party, but whose demand had been decreed to be paid, having obtained leave to attend the taxation of the costs,—*Held*, that he was entitled to the costs of reading over the bills of costs of the several parties to the cause.—*Phillips v. Page*, H. & Jon. 819. (E.E.)

12. A supplemental bill was filed merely to bring before the Court a tenant in tail who had come into being since the decree in the original cause was pronounced. All the defts. therein appeared again at the hearing of the supplemental suit, in consequence of a notice served by ptf. *Held*, that therefore they were entitled to their costs of the hearing against ptf., who should have them over.—*Wallace v. Blake*, 1 Dr. & Wal. 378. (C.)

1. If lands have been sold under a decree, and judgment creditors, knowing that the fund cannot reach them, necessitate the filing of a supplemental bill against them, they will not get their costs in that suit.

*Semble*—They will be compelled to pay the costs occasioned by their vexatious conduct.—*Barrett v. Birmingham*, 1 I. E. R. 417; S. & Sc. 419. (R.)

2. A judgment creditor filed a bill against three persons, as devisees of lands liable to his debt. *Held*, that one deft. who, before bill filed, had paid his portion of the debt, was entitled to his costs as against his co-defts., whose default necessitated the suit.—*Hales v. Kirby*, 1 I. E. R. 116. (E.E.)

3. B., having been arrested under a *ne exeat regno*, which was afterwards discharged for irregularity, commenced an action for false imprisonment against C., at whose instance the writ had issued. On C.'s application the Court restrained the legal proceedings, and refused to give B. any compensation; but gave him costs of the motion, since the restraining order should have been made part of the order setting aside the writ.—*Darley v. Nicholson*, 2 Dr. & War. 86; 1 Con. & L. 207. (C.)

4. A plaintiff's solicitor held personally liable to the costs of a reference to the Master to enquire and report whether a purchaser was entitled to any and what compensation by reason of a misdescription in the rental, caused by his neglect in not examining the tenants' leases lodged in the Master's office.—*Taylor v. Gorman*, Fl. & K. 567. (R.)

5. Under the 201st G. O. the Master has jurisdiction to tax mere conveyancing costs between solicitor and client.—*In re Smith's Trustees*, Fl. & K. 627. (R.)

6. A moiety of an estate was devised, subject to legacies, to A. for life; remainder to his first and other sons in tail. *Held*, that the tenant for life and the legatees were to bear their own costs of a partition suit; and that the tenant for life had no equity to call on the tenant in tail to contribute to the costs of the suit.—*Greer v. Mercer*, 4 I. E. R. 705. (E.E.)

7. The Court will not review a Master's taxation of costs, unless he has erred in principle.—*Darley v. Nicholson*, 1 Con. & L. 391. (C.)

8. The trustees in this case were allowed their costs out of the fund.

The Court refused to direct the costs of the relators to be taxed as between solicitor and client.

Form of decree in such a case.—*The Att-Gen. v. Drummond*, 3 Dr. & War. 162. (C.)  
[The case is reported in 1 Dr. & War. 353. (C.); *Affid.*, 2 H. L. Cas. 837.]

9. When, at the time of a motion, no order is made regarding the costs of it, they follow

the costs in the cause, especially in the case of injunction bills.—*Bourne v. Farran*, 6 I. E. R. 659. (E.E.)

10. After a decree against defts. with costs to be paid by them, one of the defts., who was liable to part of the costs solely, and to part jointly with other defts., died, the decree having been then fully performed in all respects, except the payment of the costs, which were untaxed. A bill of revivor having been filed against the personal representative of the deceased deft. for payment of the costs—*Held*, upon plea, that the suit could not be revived for the costs alone.—*Bowyer v. Beamish*, 7 I. E. R. 7. (R.)—[*Affid.*: 8 I. E. R. 63; 2 Jon. & L. 228. (C.)]

11. A decree having been pronounced to pay the ptf's. a sum and costs, the costs do not bear interest under the 3 & 4 Vic., c. 105, s. 27, from the date of the decree, but from the date of the certificate of their taxation.—*Lidwell v. L.*, 7 I. E. R. 91. (R.)

12. On motion for payment out of Court of part of a party's demand, the costs of the application refused.—*Massy v. O'Dell*, 8 I. E. R. 509. (E.E.)

13. As a general rule, there can be no revivor for untaxed costs, whether the abatement is occasioned by the death of the party who is to pay the costs, or by the death of the party who is to receive them.

That rule is not affected by the 3 & 4 Vic., c. 105, s. 27.

Cases of *Morgan v. Scudamore*, 2 Ves. jun. 313; 3 Ves. 195; and *Barry v. Stawell*, 3 I. E. R. 18, 146, considered and commented on.—*Bowyer v. Beamish*, 8 I. E. R. 63; 2 Jon. & L. 228. (C.)

14. When the bill prays an injunction or receiver, the defts. who are interested in resisting the motion are entitled to costs of two briefs on filing their answers. Ptf. is not entitled to the costs of briefs unless he has moved, or served a *b. f.* notice of motion, or unless a deft. did some act after the briefs were *b. f.* made, which rendered notice of motion unnecessary.

The bill prayed an injunction. On the answer coming in, the solicitor prepared two briefs for the injunction motion. Before they were given out, or notice of motion served, the suit was compromised. *Held*, that ptf. was not entitled against deft. to costs of the briefs.—*Broadbent v. Hughes*, 10 I. E. R. 65. (R.)

15. The costs of a suit in the nature of an ejectment bill to recover devised property on a construction of a will, though doubtful, are not within the rule in administration suits, that they come out of the estate.—*Johnson v. Brady*, 11 I. E. R. 386. (C.)

16. A notice party entered a special appearance (19th G. O. 1843), and in consequence obtained a priority she would not have otherwise had. *Held*, that she was entitled to her costs at the hearing as a deft.—*Callaghan v. C.*, 1 I. Jur. 360. (C.)



1. In a suit between claimants under a will, and a deed inconsistent therewith, executed by the testator, the costs are not to be paid out of the assets, on the ground that the testator created the difficulty, but are subject to the ordinary rule in adverse suits.

Costs given against a trustee under the trust deed which was held revoked, when he had also a beneficial interest under it, and insisted that it was valid.—*Irwin v. Rogers*, 12 I. E. R. 159. (C.)

2. Practice respecting costs on a motion by the landlord for leave to proceed for non-payment of rent.—*Clendinning v. Knox*, 12 I. E. R. 809. (R.)

3. Where the ptf. in a stayed suit is liable to pay a deft. costs, he is bound to pay them though no funds for the purpose have been realised.—*Tangney v. Holmes*, 13 I. E. R. 114. (R.)

4. Ptf. in a stayed suit, who has paid a deft.'s costs according to the rule in *Lufrie v. Forbes*, 2 I. E. R. 443, is not entitled to them out of the funds in the receiver's hands unless the estate clearly suffices to pay them according to their priority. In *Lufrie v. Forbes*, the fund sufficed to pay all the creditors.—*O'Keeffe v. Holmes*, 13 I. E. R. 116. (R.)

5. In Jan. 1846, proceedings were stayed by consent order in a cause wherein were two ptf.s., a trustee and c. g. t.; and ptf.'s costs were directed to be taxed and ascertained, defts. undertaking to pay them. They were not taxed until after the principal deft.'s (c. g. t.) death in Dec. 1848. On motion to compel defts. to pay the costs thus taxed—*Held*, that it should be refused with costs.—[*Barry v. Stawell*, 3 I. E. R. 18, 146; Fl. & K. 1, considered.] *Upton v. M'Garry*, 13 I. E. R. 164. (C.)

6. The ptf. in a stayed suit, who is liable to pay a deft. costs, is bound to pay them though no funds for that purpose have been realised.—*Tangney v. Holmes*, 13 I. E. R. 207. (R.)

7. A deft. who by answer sets up a breach of covenant by the lessee as a defence to a bill for renewal, and fails to prove it, must pay the costs occasioned by that defence.—*Vance v. Runfurley*, 1 I. C. R. 321. (C.)

8. A. bequeathed £20,000, in trust, for the building and endowment of a college for clerical students connected with the General Assembly of Irish Presbyterians; to be built where the trustees should decide, and to be under such rules, &c., as they should determine, subject to the advice and directions of the Assembly. The suit was to administer A.'s assets, and to carry into execution the trusts of her will. *Held*, that the costs incurred by the trustees in the settlement of a scheme for the due application of the £20,000, were to be borne by that bequest, and not by the general residuary fund.

The General Assembly (who were not parties to the cause) presented a petition for leave to

intervene in the office, as if they had been joined, and that their costs of doing so might be allowed to them out of the £20,000. The order made on the petition merely provided that they should be at liberty to intervene if they thought fit; and reserved until the final hearing all questions as to any claim for costs by them. Under this order they proceeded before the Master. *Held* (at the final hearing), that they were not entitled to their costs as against any fund, since they were not parties to the cause so as to be liable to costs; and the order permitting them to intervene did not provide for their costs, as prayed by the petition.—*Dill v. Brown*, 3 I. C. R. 127; 4 I. Jur. 355. (C.)

9. Costs refused when a bill was drawn at unnecessary length.—*FitzGibbon v. Blake*, 3 I. C. R. 328. (C.)

10. As a general rule, the costs of an attendance on a third party, to borrow a necessary document, are not allowed. If expense is thereby saved, the Taxing Master may, at his discretion, allow such costs.—*Abbott v. Geraghty*, 7 I. Jur. 373. (R.)

11. When, in a petition matter under the Lands Clauses Consolidation Act, a party seeks the costs given by its 82nd sec., the order made should specify those costs; it is not sufficient that it states generally that the party is entitled to the costs properly payable under the provisions of that Act.—*Macrory v. The Belfast Commissioners of Customs*, 4 I. Jur. N. S. 41. (R.)

12. *Semble*—When newly acquired evidence supports the deft.'s case, the Court will not, after verdict, take it into consideration in deciding the question of costs.—*Crozier v. Philpott*, 5 I. Jur. N. S. 292. (P.)

13. The costs of proving a will in the common form are always paid out of the residue, and should not be charged on a legatee.—*Nugent v. N.*, 8 I. Jur. N. S. 52. (P.)

14. Costs given to a respondent in a decree for renewal of a lease, under the circumstances of the case.—*Colclough v. Smith*, 14 I. C. R. 127. (R.)

### XXX.\* Country Cause. See PRACTICE, ANSWER.

### XXXI. Court: Practice in, generally.

15. When a case involves a clear principle decided by the H. L., that decision must be followed by this and every other inferior Court.—*French v. Macale*, 4 I. E. R. 568; 2 Dr. & War. 269; 1 Con. & L. 459. (C.)

16. Ptf.'s counsel, moving pursuant to the general allocation report, ought not to hold a brief on behalf of a third person whose claims are inconsistent with the reported rights of a creditor, though ptf. may not be in any man-

ner interested in the question.—*Day v. Ponsonby*, 5 I. E. R. 24. (E.E.)

1. Practice respecting the order of hearing counsel.—*Taylor v. T.*, 2 Con. & L. 422. (C.)

2. Counsel for the trustee of property for a wife's separate use, who appears by counsel, cannot be heard.—*Crawford v. O'Sullivan*, 2 Con. & L. 410. (C.)

3. Deft., objecting for want of parties, is entitled to begin.—*Gahway v. Graydon*, 7 I. E. R. 368; 1 Jon. & L. 526. (C.)

4. When a party is heard on an objection for want of parties, the objecting party begins.—*Prim v. McKenny*, 9 I. E. R. 115. (C.)

5. Counsel for an incumbrancer whose charge is stated in the bill, but not proved in the cause, will not be heard against ptf.'s rights.—*Dundas v. Blake*, 11 I. E. R. 138. (C.)

6. On an appeal, against an order allowing a demurrer, counsel for a ptf. begins.—*M'Namara v. Blake*, 12 I. E. R. 362. (C.)—[Following: *Young v. Wilton*, 10 I. E. R. 265. (C.)]

#### XXXII. CREDITOR'S SUIT. See PLEADING PARTIES.—PRACTICE, COSTS.—PRACTICE, DECREE.

1. *In general.*
2. *Its Effect.*
3. *Costs, Expenses, and Charges.*
4. *Distribution of Assets in.*

##### XXXII. 1. *Creditor's Suit in general.*

7. Interest beyond the penalty of a judgment was claimed in a creditor's suit; because the conuzor had assigned his property in trust to pay scheduled creditors, of whom the conuzee was one; because there had been, before the arrears reached the penalty, a decree to account under which the creditor might have been prevented suing at law: because interest might be recovered at law in an action of debt on the judgment. But, the claim was disallowed.—*Elliott v. Tynite*, Beat. Rep. 478. (C.)

8. At a sale under a decree in a creditor's suit, the lands are set up subject to the leases (if any) made *pendente lite*. If the produce proves insufficient to pay the debts, the lands will then be sold discharged of those leases.—*Nuna v. Mahon*, Hayes, 71. (E.E.)

9. A simple contract creditor who institutes an administration suit of personality, and seeks to have his costs as against judgment and specialty creditors, who may come in under the decree, should make a case for it by his bill, and show that a suit was necessary to duly administer the assets, and pay his debts; or else that, by his exertions, he has made available a fund which would otherwise have been lost.—*Drake v. Forde*, 3 I. E. R. 56. (E.E.)

10. A creditor coming in under a decree cannot rely upon a will as creating a trust in his favour, unless it has been put sufficiently in issue by the pleadings in the cause; or by the charge or discharge in the office.

If the frame and prayer be essentially those of a creditor's bill, the omission of the usual introductory statement, that it is filed on behalf of the ptf. and the other creditors who should come in and contribute, &c., is immaterial, such averment being matter of form merely.—*O'Kelly v. Bodkin*, 2 I. E. R. 361. (E.E.)

11. A creditor who, after final decree in a creditor's suit, applies for leave to file a charge under the decree to account, should state by affidavit that he had no notice of the pendency of the suit; or, if he had, should account for not having filed his charge at the proper time, under the decree.

After final decree in a creditor's suit, the Court will not permit a person having a judgment affecting part of the estate decreed to be sold, to file a charge on foot of it under the decree to account, unless it appears necessary for the object of the suit that an account should be taken on foot of that judgment; or the suit is so constituted that the same relief may be given in it as in an original suit instituted by the applicant. After final decree, A. applied for leave to prove a judgment affecting part of the lands decreed to be sold under that portion of the interlocutory decree which directed an account to be taken of all charges and incumbrances affecting the real and freehold estates of the deceased. It did not appear necessary for the purpose of the suit that those lands should be sold, and the personal representative of the conuzor was not a party to the suit. The Court refused the application.—*O'Kelly v. Bodkin*, 3 I. E. R. 506. (E.E.)

12. When the heir-at-law was an infant, the Court, in a suit by a simple contract creditor of the ancestor, to protect the infant's interests, abstained from giving the usual directions for a sale, until the cause came back for further directions. Such is not the usual or regular course of the Court.—*Lynch v. Joyce*, 3 Dr. & War. 349. (C.)

13. Hearing for further directions. The premises, upon which the former decree had declared the ptf.'s demand to be well charged, had, in the interval, become greatly dilapidated. Liberty to apply had been reserved to all parties. Upon the deft. declining to undertake to put the premises into repair, a decree for an immediate sale was pronounced. See 3 Dr. & War. 446.—*Simpson v. O'Sullivan*, Dr. Rep. temp. Sugden. 89. (C.)

14. The decree declared the ptf.'s demand a charge upon lands, and gave liberty to all parties to apply, as occasion might require. Subsequently, the Court upon motion directed a sale.—*Watson v. Pim*, Dr. Rep., temp. Sugden, 90. (C.)

15. A renewable freehold was settled on R. in quasi tail; remainder (in default of R.'s

issue) to W., his next brother. R., having confessed a judgment, died without issue, and without opening the estate. W. was his heir. *A sci. fa.*, to revive the judgment against the heir and terretenants, having issued, W., summoned simply as heir, allowed judgment to go. Then the judgment creditor presented a petition for a receiver. W. showed as cause that he was in by title paramount, not as R.'s heir. The M. R. refused to entertain the question of title, because W. should have pleaded specially to the *sci. fa.*, and because, on that petition, the Court could not look behind the judgment in *sci. fa.*, whereby the petitioner appeared clearly to be entitled to sue out an *elegit*, and extend the lands.—*Fletcher v. Steele*, 6 I. E. R. 376. (R.)

1. The Court will not marshal assets for payment of a simple contract debt out of real estate, when the bill has not been filed on behalf of all the creditors of the deceased.

Liberty to amend the bill at the hearing, by including all the creditors, refused.—*Connolly v. M'Dermot*, 3 Jon. & L. 260. (C.)

2. In a creditor's suit it appeared that the debts, the persons beneficially entitled to the property subject to the debts, were also entitled to the second charge thereon. At their instance, the Court referred it to enquire whether it would benefit any creditor that the property should be sold or conveyed to debts in satisfaction of their debt; and that, if the Master found that the property was not in value nearly equal to the debt due to debts, and that it would not be for the creditors' interest to sell it, then, on debt's paying ptf. (the first creditor) the sum reported due to him, with costs, all parties should convey the property to debts.—*Lynch v. Kelly*, 9 I. E. R. 342; 3 Jon. & L. 628. (C.)

3. After the report and final decree in the cause, the Court will permit, at the instance of the party having the carriage of the cause, judgment creditors concurring in the sale to come in and prove their demands, with liberty to surcharge and falsify the accounts already taken in the cause; this course being for the advantage of all parties, and to save the expense and delay of a supplemental suit.—*Clarke v. Jessop*, 10 I. E. R. 40. (R.)

4. Form of enquiry in an incumbrancer's suit, when the deeds are in possession of a solicitor, a debt., who claims a lien for costs, which lien is disputed.—*Walcott v. Graves*, 11 I. E. R. 396. (C.)

5. On consent, a case, wherein the testator's creditor propounded a litigated will, was sent to the Sessions.

*Quare*—Can a creditor be allowed, except upon consent, to propound and litigate a will?—*Devlin v. M'Carthy*, 8 I. Jur. N. S. 159. (P.)

## XXXII. 2. Effect of.

ADMINISTRATION OF ASSETS. See Court of Ch. Reg. Ireland Act 1850, 13 & 14 Vic., c. 89.

6. Several puisne judgment creditors were made parties by supplemental bill, in order that their demands might be bound by decree. The bill stated that one of them was out of the jurisdiction, and that his residence could not be ascertained. At the hearing it appeared that he had been served with process. *Held*, that no decree against him should be made; but that his presence at the hearing was unnecessary, since the several debts stood in distinct rights, so that a decree as to one would not affect the others' rights.—*Barrett v. Birmingham*, 1 I. E. R. 417; S. & Sc. 419. (R.)

7. In a creditor's suit, one debt., a creditor, allowed the bill to be taken as confessed against him, and did not file a charge, under the decree to account, in the Master's office. *Held*, that he was bound by the final decree's declaration respecting priorities.—*Murtagh v. Tisdall*, 3 I. E. R. 85; Fl. & K. 20. (R.)

8. After final decree in a creditor's suit, the Court will not allow a person having a judgment affecting part of the estate decreed to be sold to file a charge on foot thereof under the decree to account, unless it appears necessary for the suit's object that an account should be taken on foot of that judgment; or the suit is constituted so that the same relief may be given therein as in an original suit instituted by the applicant. After final decree, a party applied for leave to prove such a judgment under that part of the interlocutory decree which directed an account to be taken of all charges and incumbrances affecting the real and freehold estates of the deceased. It did not appear to be necessary for attaining the suit's object, that those lands should be sold. The conuzor's personal representative was not a party to the suit. *Held*, that the application should be refused.—*O'Kelly v. Bodkin*, 3 I. E. R. 596. (E.E.)

9. After decree to account in an administration suit, the Court will not restrain a creditor from proceeding in a suit instituted by himself, unless the executor has, in his answer, or in some other manner, given an account of the assets, and brought the amount into Court.—*Hoops v. Earl of Kingston*, Fl. & K. 246. (R.)

10. The 15th and 23rd G. O. of March 1843 have a prospective, not a retrospective operation. Their meaning is to bind, by the future adjudication of rights in the cause, a party who, having been duly served with the prescribed notice, has had the option of becoming a debt., or having notice of the proceedings, with the right of interfering, if necessary, to protect his interests. After decree in a mortgage cause, judgment creditors were, by supplemental bill, made parties in the mode prescribed by the 15th G. O. of March 1843.

Being served with the notice under that order, some of them entered special appearances, the others did not appear. The Court refused the ptf.'s motion for an order binding them by the proceedings in the original cause; holding that they could not be bound by those proceedings otherwise than by a decree in the supplemental cause.—*O'Brien v. Creagh*, 6 I. E. R. 129. (R.)

1. The Court refused to stay a mortgagee's suit after decree in another creditor's suit in which ptf. was a puisne judgment creditor, who filed his bill within a year of the entry of his judgment, and whose right to a sale of the estate depended on setting aside a settlement, puisne to the mortgage, under which no tenant in tail was in esse.—*Foster v. Ker*, 12 I. E. R. 51. (C.)

2. Ptf. in a creditor's suit, having got a decree, may move to stay other causes instituted for the same purpose.—*O'Keeffe v. Holmes*, 13 I. E. R. 111. (R.)

3. As long as a fund applicable to the payments of debts remains in Court, a creditor may obtain an order to prove his demand, though a final decree has been made in the cause.

Leave given to a creditor to prove after final decree, under circumstances of great neglect on his part.—*Graves v. Davies*, 15 I. C. R. 204. (R.)

### XXXII. 3. Costs, Expenses, and Charges.

4. Ptf. in a creditor's suit is entitled, in priority to the demands of the other creditors, to costs incurred *bona fide*, for all parties' benefit, and with their assent in making out title to the premises decreed to be sold.

*Semble*—He is entitled to his costs, in the cause in equal priority with his demand; but, if his exertions realise a fund for all the creditors' benefit, he is entitled to his costs as the first charge on that fund.—*Maquire v. Dundass*, 1 I. E. R. 25; Jon. & C. 2. (E.E.)

5. By this Court's settled practice, ptf. in a creditor's suit is entitled to costs only according to the priority of his demand.

Rent paid by ptf. to the head landlord of the premises mentioned in the pleadings, in order to preserve them from eviction, is the first charge on the produce of their sale.—*Gray v. Crawford*, 1 I. E. R. 274; Jon. & C. 174. (E.E.)

6. In a creditor's suit, after final decree, J. obtained its carriage, and was ordered to proceed to sell without delay. *Held*, that he was entitled in priority to the costs of making out title, though the funds realised did not reach his demand.—*Kelly v. K.*, 1 I. E. R. 317. (R.)

7. When a bill is taken *pro confesso* the Court hears the pleadings, and pronounces the decree. It appearing that the suit had been necessitated by deft.'s unreasonable refusal to

comply with a plainly equitable request, the Court decreed that they should pay the costs of the suit.

Respecting the form of notice that may be served in such a case on a puisne judgment creditor, before filing the bill against him, see 1 I. E. R. 418, n.—*Barrett v. Birmingham*, 1 I. E. R. 417; S. & Sc. 419. (R.)

8. A deft. made a party as an *elect* creditor in possession, and answering the bill *seriatim* and at length, is disentitled to the costs of such an answer.

The final hearing is not the proper occasion on which to make that objection.—*O'Brien v. O'B.*, Jon. & C. 193. (E.E.)

9. On distributing funds in a creditor's suit, there not being any specific incumbrancer, the several defts. and creditors were directed to pay ptf. their proportions of the difference of the costs between party and party, and attorney and client, in proportion to their demands, though the bill did not pray, nor did the decree direct that they should be so paid.—*Bracken v. Drought*, 2 Jones, 114. (E.E.)

10. Costs of the suit given to the ptf., a simple contract creditor, in priority to the demands of judgment and specialty creditors; the suit being necessary, and having been properly conducted.—*Jameson v. Farrer*, 3 I. E. R. 346. (E.E.)

11. A judgment creditor's executors filed a bill to raise the amount of the judgment. A decree to account was pronounced. On taking the account it was found that ptf. had been overpaid. *Held*, that ptf. were not entitled to costs of the suit, and that they must pay all the costs of taking the account.

That the Court had jurisdiction to order ptf. to bring in the sum overpaid to them.—*Graves v. Wright*, 2 Dr. & War. 77; 1 Con. & L. 267. (C.)

12. When a legatee is admittedly entitled to a certain fund under a will, but claims a sum larger than that to which his title is admitted, and threatens to sue for payment, the executors are entitled to retain the fund to which his title is admitted, to meet the costs of the suit.—*Ridge v. Newton*, 4 I. E. R. 389; 2 Dr. & War. 239; 1 Con. & L. 381. (C.)

13. Judgment creditors made notice parties, who put in an answer relying on a point which might have dismissed the bill, but who afterwards availed themselves of the decree, and proved their demands under it—*Held*, entitled only to such costs as they would have had without answering.—*Vincent v. Going*, 7 I. E. R. 463; 1 Jon. & L. 697. (C.)

14. A creditor instituted a suit against the real and personal representatives of a principal debtor, and against one of the sureties; but omitted the other surety. A decree to account was pronounced.

The creditor afterwards filed a supplemental bill against the representatives of the other

surety. Inasmuch, however, as they derived no benefit from the proceedings in the original suit; and as the creditor might have framed his original suit so as to have had in it the relief sought by the supplemental bill—*Held*, that, as against the representatives of the second surety, the ptf. was not entitled to costs of the original suit.—*Cuffe v. Young*, 2 Jon. & L. 17. (C.)

1. In a judgment creditor's suit, answers were filed in 1830. No further step was taken until 1843, when he obtained leave to file an original bill in the nature of a bill of revivor, the delay having been accounted for. The Court gave the ptf. no more costs than he would have been entitled to if the original bill had been filed in 1843, but gave him interest. *Fairtlough v. Ackland*, 9 I. E. R. 251. (C.)

2. The practice of giving priority to costs of resisting claims in creditors' suits observed on.—*Carroll v. Darcy*, 10 I. E. R. 321. (C.)

#### XXXII. 4. Distribution of Assets in.

3. In a creditor's suit the Court will not direct the personal representative how to act with reference to the debtor's outstanding personalty.—*Jameson v. Farrer*, 2 Jones, 634. (E.E.)

4. B., by bond and several judgment of 1807, became surety for S., who, in 1814, by bond, became B.'s surety for nearly the same amount. A judgment creditor of 1816 instituted a suit to administer B.'s assets. In 1822 were pronounced decrees for an account and sale. In 1821, S. was obliged to pay the debt for which he had been B.'s surety. He procured the creditors of 1807 to prove their debts under the decree. *Held*, that they were entitled to be paid the sum reported due to them, but must assign their judgment against S. to a trustee for B.'s creditors.—*Peoples v. Stewart*, Hayes, 90. (E.E.)

5. Under a decree to account a creditor filed a charge on foot of a judgment. The charge was disallowed because barred by the Statute of Limitations. The creditor then issued a *sci. fa.* against the inheritor, the conuzor's heir. The fund being deficient, no defence was taken. The judgment was revived. The creditor then applied for leave to file a charge, and obtain a report at her own expense. *Held*, that she might do so; but the officer was directed, when considering the question of the Statute of Limitations, not to act on the judgment of revivor so far as regarded the rights of other creditors who had proved under the decree.—*Brown v. Lynch*, Jon. & Ca. 195. (E.E.)

6. A judgment creditor, having obtained in the Court of Ch. a decree to sell lands sold under a prior decree in the Exch., was allowed to file a charge under the decree to account in the Exch. on foot of his demand, as decreed in Ch. The Remembrancer and Registrar were directed to amend the report

and final decree by inserting his demand, when proved.—*Pidgeon v. D'Alton*, Jon. & Ca. 276. (E.E.)

7. Testator, by will in 1805, gave R. an annuity of £300, and by a subsequent will in 1812, revoking the former, gave her an annuity of £600. The will of 1805 was admitted to be valid. The will of 1812 being impeached, a suit was instituted to establish it. *Held*, that the annuitant, although in any event entitled to £300 per annum, was not entitled to an order that the receiver in the cause should pay her £300 a year out of the rents.

It is not the course of the Court to pay annuities charged upon incumbered property pending the litigation.—*D'Alton v. Lord Trimleston*, 2 Dr. & War. 531. (C.)

8. When a second incumbrancer's demand would exhaust the whole fund in a creditor's suit, the Court refused to allow him to pay the first incumbrance, and take a conveyance without the expense of a sale; but, on consent, referred it to the Master to ascertain the value of the debt and of the estate, and directed that, if it would not be beneficial to have a sale, the conveyance should be made as asked.—*Lynch v. Kelly*, 9 I. E. R. 342; 3 Jon. & L. 628. (C.)

9. When a judgment creditor has obtained a charging order on funds reported to a creditor in a cause, the Court, unless there is a controversy touching the right to the fund charged, will, without bill, direct that it shall be paid to the petitioner.—*Fulton v. Farrant*; *Blake v. French*, 1 I. Jur. 66. (R.)

10. In a judgment creditor's suit there was a final decree for a sale of a chattel interest; and, if necessary, of real estate of the deceased debtor, to pay the sum due on the judgment, and the costs. After enrolment of the decree, the ptf. applied that the real estate might be sold in the first instance. That application being unopposed, and it appearing that the value of the chattel interest bore a small proportion to the sum due to ptf. under the decree, and that there should be much delay and expense in making out title to it, the Court ordered that the real estate should be sold in the first instance; and reserved the right of the debt. (entitled to the real estate subject to the judgment) to compensation, out of the chattel interest, for any injury he might sustain by reason of the sale of the real estate.—*Wilton v. Ferguson*, 6 I. E. R. 33. (R.)

#### XXXIII. CROSS BILL AND CAUSE. See PRACTICE, ANSWER — PRACTICE, COSTS. [See 30 & 31 Vic., c. 44, s. 72.]

[See also PLEADING, II. 9.]

11. A debt. In a cross cause to discover evidence cannot resist a discovery of matter touching which he might himself have enforced a discovery in the original suit.—*O'Connor v. Malone*, S. & Sc. 516. (R.)—[See s. c., *ibid*, 551. (R.)]

1. Ptf. in a foreclosure suit insisted by amended bill that he should be charged for the premises (into possession whereof he had entered) according to an agreement made by him with deft. after bill filed. Deft. insisted by his answer that that agreement had been obtained by duress. *Held*, that it could not be impeached without a cross-bill.—*O'Boy v. Warner, Hayes*, 571. (E.E.)

2. When an answer sets up the defence, that the original grant, respecting which ptf. has come into Court, ought not to have been executed, he will not generally be allowed to impeach the grant in that manner; but must file a cross-bill. In this case, a cross-bill was deemed unnecessary.—*Ker v. Lord Dungannon*, 4 I. E. R. 343; 1 Dr. & War. 509; 1 Con. & L. 335. (C.)

3. A cross-bill is a defence to the original suit. If its object be to obtain relief in a matter which does not affect ptf.'s right in the original suit to the relief prayed for, it will, as against ptf., be dismissed, with costs.

*Semble*—It will be dismissed as against all parties to it.

In a foreclosure suit, a prayer that the surplus produce of the sale of the mortgaged premises might, after paying the mortgage, be invested on the trusts of a voluntary settlement, does not authorise the assignee of a settlor, an insolvent, a party to the suit, to file a cross-bill impeaching that settlement as void against creditors.—*Manders v. M.*, 4 I. E. R. 434. (E.E.)

4. In a suit by the purchaser of a charge upon an estate to enforce his right, it is not competent to the deft. (owner of the estate) to attempt to reduce the claim because ptf., being incompetent to buy the charge, is entitled only to the amount actually paid for it by him. For that purpose deft. must file a cross-bill.—*Carter v. Palmer*, 8 Cl. & F. 657; 11 Bli. N. S. 397.—[See 1 I. E. R. 289; 1 Dr. & Wal. 722.]

5. To enforce a deft.'s equity by impeaching securities, a cross-bill is necessary, according to the English practice.

*Semble*—In Ireland, it may be done by answer.—*Carter v. Palmer*, 8 Cl. & F. 668, *note*.

6. When there are a cause and a cross-cause, and the decree in the cause only is appealed from, the cross-cause is not in any respect before the H. L.—*Callaghan v. C.*, 8 Cl. & F. 374.

7. The omission in the prayer of a bill, that it may be taken as a cross-bill, is not material; nor a test to try the question whether it be a cross-bill or not, when the pleading is substantially that of a cross-bill.

If a bill have the properties of a cross-bill, though not professing to be such, it should not be filed without the affidavit and certificate required by the 60th G. O.—*Mahony v. M.*, 7 I. E. R. 629. (C.)

8. A demurrer for want of equity will lie to a cross-bill.—*Kirwan v. Gorman*, 9 I. E. R. 154. (R.)

9. When matter of defence arises subsequently to a decree in a cause which afterwards becomes abated, it may be pleaded to the bill of revivor. It is not necessary to file a cross-bill to get the advantage of it.—*Daly v. Kirwan*, 10 I. E. R. 312. (R.)

10. By marriage settlement the lands of A. were settled on B. for life, with power of appointment amongst the children of the marriage. By deed, purporting to exercise the power, R., one of the children, was given a rentcharge, which was immediately afterwards assigned to the ptf. Bill filed to raise the rentcharge. Answer; that the assignment was invalid, as the consideration went to the father alone, and R. received no benefit. In order properly to raise the question touching the validity of the deed, a cross-bill is necessary.—*Kane v. Delany*, 2 I. Jur. 165. (R.)

CURSITOR. See PRACTICE, OFFICERS OF COURT.

DE BENE ESSE. See PRACTICE, EVIDENCE.

#### XXXIV. DECREE. See INTEREST PECUNIARY; VI.—PRACTICE, COSTS — PRACTICE, HEARING.

[30 & 31 Vic., c. 44, ss. 64, 66, 68, 85, 124–126, 145, 147, 150, 154, 155: G. O. (1867), 91–185, 168, 172, 203–206, 208–210, 212, 213, 232, 233, 244, 249, 259, 260, 271.]

1. *In general; extent of Relief given by.*
  - a. *Generally.*
  - b. *Relief given at the Hearing, though not prayed for.*
  - c. *What Parties must be before the Court.*
2. *Frame and Construction of Decree.*
  - a. *In general.*
  - b. *On what Evidence made.*
3. *Decree's Effect.*
  - a. *Generally.*
  - b. *On Summary Order.*
4. *To Account.*
5. *To Administer and Distribute Effects.*
6. *To Foreclose, or Redeem Mortgages.*
7. *Whom a Decree Binds.*
  - a. *Generally.*
  - b. *Infants.*
8. *Obtaining Decree generally.*
9. *Obtaining Decree by Fraud.*
10. *Obtaining Decree by Consent.*
11. *Obtaining Decree pro confesso, or by Default.*
12. *Service of Decree.*
13. *Adding to, Altering, Rectifying, and Varying Decree, or Minutes of Decree.*
14. *Entry, Drawing up, and Enrolment of Decrees.*
15. *Of Suspending, Prosecuting, Enforcing, and Carrying into Execution Decrees.*
  - a. *Enforcing, Prosecuting, and Carrying into Execution.*
  - b. *Suspending, and Staying Execution.*

16. *Impeaching, Discharging, and Reversing Decrees.*  
 17. *Lost Decrees.*

XXXIV. 1. a. *Generally of Decrees, and the Relief given thereby.*

1. At the hearing, an incumbrancer set up a claim to priority inconsistent with the Master's finding. *Held*, that though if the right claimed would necessarily follow from the facts found by the report, the Court would act upon it without any exception having been taken, it would not do so if the right would have been liable to be encountered before the Master by evidence, if claimed before him.—*Brownlow v. Earl of Meath*, 2 I. E. R. 383; 2 Dr. & Wal. 674. (C.)

2. A decree, not being a personal one, is not within Sir Richard Bolton's 26th Rule; and a bill of review and reversal may be filed without the decree being first performed.—*Kelly v. Lennon*, Fl. & K. 90. (R.)

3. When by a decree all proper parties are directed to execute; and some, who are within the jurisdiction, refuse to do so, the Court will not, in the first instance, direct the Master to execute under the 4 & 5 W. 4, c. 78; but will issue an attachment against them.

But when such defts. reside out of the jurisdiction, the Court will, in the first instance, direct an execution under the statute.—*Usher v. Scanlan*, Fl. & K. 243; 3 I. E. R. 474. (R.)

4. The minutes of a decree cannot be made use of (on motions) in this Court: the decree itself must be produced.—*Hall v. Hill*, Fl. & K. 619. (R.)

5. The deft. not appearing at the hearing, the ptf. is to take such decree as he can abide by.—*Meskill v. Dunworth*, 4 I. E. R. 681. (E.E.)

6. When the heir-at-law was an infant, the Court, in a suit by a simple contract creditor of the ancestor, in order to protect the infant's interest, abstained from giving the usual direction for a sale until the cause came back for further directions. This was contrary to the established practice.

When a co-deft. has been examined as a witness, there may, he consenting, be a general decree against him.—*Lynch v. Joyce*, 3 Dr. & War. 349. (C.)

7. Upon a sale of lands under a decree in a cause wherein judgment creditors, prior to the ptf., had not been made parties to the original suit, and a supplemental bill had been filed making them parties, but no decree had been obtained in the supplemental suit; the Remembrancer was ordered to execute the deed of sale, upon the consent of the parties in the supplemental suit.—*O'Kelly v. Bodkin*, 7 I. E. R. 338. (E.E.)

8. A judgment creditor's bill, to have the benefit of a renewal to A., and to set aside

a sub-lease to B., who sold to deft., H., stated circumstances of express notice to A. and B. The bill was taken as confessed against them. H. denied notice, which was not proved. *Held*, that there could not be a decree against him.—*Kelly v. Magee*, 11 I. E. R. 383. (C.)

9. A decree to pay costs is joint and several, when made against several. There must be contribution between the parties.—*Archbp. of Dublin v. Lord Trimleston*, 13 I. E. R. 98. (R.)

10. A judgment of the H. L. is conclusive, and cannot be reversed or corrected, except by an Act of Parliament.—*Tommey v. White*, 3 H. L. Cas. 49.

11. The Court will not order a receiver to pay the several parties appointing and extending him according to the priorities generally.

The proper course is to prepare an affidavit and a schedule, setting out the priorities of the parties, and then to move for an order to pay according to the priorities therein stated.—*Wilson v. Hoare*, 6 I. Jur. 174. (R.)

12. Decree declaring the right of the petitioner under a deed which had remained in the grantor's possession, and had been destroyed by him, and granting an injunction to restrain his co-heirs from taking proceedings against the petitioner to recover the lands, they not resisting the decree, and making no claim to the lands.

*Quere*—Whether such a decree would have been made *in invitum*?

Construction of the 20th G. O. of May 1857.—*Esmonde v. E.*, 9 I. C. R. 263. (R.)

XXXIV. 1. b. *Relief given at the Hearing, though not prayed for.*

[See also, PLEADING, II. 2. c.]

13. When a ptf. claims the full amount of securities, and deft. alleging an equity against part, offers to pay the residue only, a decree, giving ptf. the option to accept the offer or have his bill dismissed, is irregular, since it does not declare whether ptf. is entitled to the whole sum, or only to part.

The proper course would be to make a decree giving effect to the securities to the extent of the whole sum due on foot of them, but without prejudice to deft.'s right to file a cross-bill to assert his equity.—*Carter v. Palmer*, 8 Cl. & F. 668, *note*.—[See 1 I. E. R. 289; 1 Dr. & Wal. 722. (C.)]

14. When a bill is filed to raise the amount of a legacy given to a child of the testator, interest for maintenance will be decreed (if the case be a proper one therefor) although it is not specifically prayed for.—*Russell v. Dickson*, 1 Con. & L. 284; 2 Dr. & War. 133; 4 I. E. R. 339. (C.)

15. A petition having been filed before the period for redemption arrived, the prayer for redemption of the mortgage could not be

sustained.—*Staunton v. Donohoe*, 4 I. C. R. 554; 7 I. Jur. 37. (C.)

1. It is a sufficient compliance with the 6th G. O. of 1851, to name the respondent in the petition with the description of "respondent," and to refer to him in the prayer as "the said respondent."—*Nowlan v. Evans*, 5 I. C. R. 356. (C.)

2. On the authority of *Lindsay v. Lynch* (2 Sch. & Lef. 1), a petition should be dismissed which prays for relief in the alternative under two inconsistent agreements. The Court gave leave to amend the petition by abandoning the relief prayed by the original petition. *Power v. College of Physicians*, 7 I. C. R. 104. (C.)

3. After an absolute order for the sale of lands in the I. E. Court, a petition was presented in the Court of Chancery, praying a sale of the same lands, and in the meantime a receiver. *Held*, that the receiver was ancillary only to the sale, and that the prayer for the sale being bad under 12 & 13 Vic., c. 77, s. 42, the petition must be amended by praying the receiver only; and this without prejudice to any question as to costs incurred in the Master's office on the petition before amendment.—*O'Beirne v. Reade*, 1 I. Jur. N. S. 403. (R.)

#### XXXIV. 1. c. *What parties must be before the Court.*

[See also PLEADING V., PARTIES TO THE SUIT.]

4. C., tenant for life of lands charged with a sum of money by a decree, was directed to pay the sum due, or in default that the lands would be sold after the decree. C. died. Bill by the assignee of the decree to carry same into execution. *Held*, on demurrer, that the personal representative of C. was not a necessary party, as the direction in the decree did not render C. personally liable.—*Rowland v. M'Donnell*, 2 I. Jur. 107. (R.)

5. An appeal from a decree for ptf. was argued in the H. L., but, before judgment, ptf. died. Deft., the appellant, revived the cause against ptf.'s executors. The H. L. reversed the decree, and dismissed the bill "with costs of the suit in the Court below." *Held*, that the decree made on this order in the Court below should have been in the same words; but it, containing additional words, which gave costs payable by the executors, was varied on a re-hearing.

When a party dies after argument, but before judgment, the decree should be made *nunc pro tunc*, as if pronounced at the date of the argument. A revivor is not necessary.—*Eyre v. Hollier*, 12 I. E. R. 607. (C.)

#### XXXIV. 2. *Form and Construction of Decree.* a. *In general.*

b. *On what Evidence made.*

#### XXXIV. 2. a. *Form & Construction of Decrees generally.*

[See G. O. (1867) 98, *et seq.*]

6. The decree to account ought to state the period from which the account is to be taken. *Semble*—*Cummins v. Adams*, 2 I. E. R. 393. (E.E.)

7. In pursuance of an order that ptf. "should give security by recognizance in the sum of £827, being the sum stated in" deft.'s answer "to be due for rent," a recognizance, reciting the order, was entered into. By mistake it was conditioned to pay such sum as should be decreed for *mesne rates*. To enable the defts. to put it in suit against the sureties, the Court ordered ptf. to pay the sum of £827, *as and for the mesne rates of the lands mentioned in the pleadings*.—*O'Leary v. Purcell*, 3 I. E. R. 329; Fl. & K. 126. (R.)

8. In remitting a cause for enquiry on a main question, the H. L. will, to save expense and delay, direct enquiries on other questions consequential on the probable finding on the main question.—*Jackson v. J.*, 7 Cl. & F., 977; West, 755.

9. Matter not printed in the papers cannot be made the subject of an argument before the H. L.; which, when remitting a cause to the Court below to carry its directions into effect, will, if necessary, declare not merely the principle of its order, but state those directions fully on its face.—*M'Cann v. O'Ferrall*, 8 Cl. & F. 30; West, 593.

10. A decree, declaring that all the shareholders in a company are bound to pay what may be found due to ptf., does not make them personally liable.—*Vigors v. Pike*, 8 Cl. & F. 562.—[See 2 Dr. & Wal. 1. (C.)]

11. Deft. not appearing at the hearing, ptf. is to take such decree as he can abide by.—*Meskill v. Dunworth*, 4 I. E. R. 681. (E.E.)

12. Form of decree on bill of revivor and supplement in a suit for partition, where, after the former decree, some of the parties interested in the estate die, and devise their interest therein; and when, after proceedings taken under the former commission, but before its return, some of the commissioners of perambulation die.—*Herbert v. Beerhaven*, 5 I. E. R. 23. (E.E.)

13. Form of a decree to account in a judgment creditor's suit, under the 3 & 4 Vic., c. 105, s. 22, to sell the conuzor's lands in his lifetime.—*O'Brien v. Fitzgerald*, 5 I. E. R. 593. (E.E.)

14. Form of decree in an information praying the establishment of a charity according to the true construction of the deed creating it, and the parties' intent.—*The Att.-Gen. v. Drummond*, 3 Dr. & War. 162; 2 Con. & L. 98. (C.)



1. Before the New Rules, when a decree of this Court was reversed by the H. of L., and the cause sent back to this Court, and a further decree pronounced, the party, in making up that decree, had a right to embody all the former decrees in it.—*Bourne v. Farran*, 6 I. E. R. 659. (E.E.)

2. Upon the death of a respondent, a receiver over whose lands has been extended to the matters of several judgment creditors' petitions, the proper order under the 5 & 6 W. 4, c. 55, s. 32, is, to continue the proceedings in all the matters.—*Brady v. Fitzgibbon*, 7 I. E. R. 1. (R.)

3. K. devised a fee-simple estate to his eldest son F. in tail male, with a power to charge £200 each for his daughters; remainder to W., his second son, in tail male; and left legacies of £100 each to his ten younger children, but did not charge them on the estate. On the marriage of F., a portion of his lady's fortune was applied in discharge of those legacies. F. died without issue male, but leaving two daughters, who entered into possession, claiming under a prior will, which made F. tenant in fee. W. brought an ejectment. There was a reference to arbitration, a bill and cross-bill, and a decree in 1816 establishing the latter will; and declaring that whatever the Master should find had been paid by F. in exoneration of the estate should be charged on it. This decree was not enrolled. In 1820, the Master found that sums had been advanced by F. in payment of the legacies to his brothers, and in exoneration of the lands, and among others a sum of £100 paid to W., as one of the younger children. There was a final decree in 1831, which confirmed the report, and ordered a sale to pay the sums. In 1840, a bill was filed to reverse the proceedings in the cause, and the decrees of 1816 and 1831. *Held*, that, as the decrees did not declare the legacies a charge on the lands, and as it did not appear on what the Master's report was founded, there was no error apparent on the face of the record; and that as to W.'s £100, the decree was right.—*Kelly v. Lennon*, 7 I. E. R. 98; 1 Jon. & L. 305. (C.)

4. Form of decree directing the transfer of Neapolitan stock.—*Roche v. R.*, 7 I. E. R. 436. (C.)—[See Jon. & L. 561. (C.)]

5. By marriage settlement, lands of the husband were, by mistake, and contrary to the parties' intention, settled upon the issue of the marriage.

Form of decree to rectify the settlement; the contingent limitations to the unborn issue being incapable of destruction.—*Hamill v. White*, 2 Jon. & L. 695. (C.)

6. The decree declared the ptf. entitled to a sum for principal and interest on a judgment, with interest on the principal until paid. *Held*, that he was entitled to interest beyond the penalty, the decree not containing, as

it should, a direction to limit the interest to the penalty.—*Wilson v. Poe*, 9 I. E. R. 114; 2 Jon. & L. 765. (C.)—[Affg. 8 I. E. R. 139. (R.)]

7. The bill stated that the executors and others answered the bill filed in 1808, but the devisees of the real estate "stood out process of contempt, and thereupon a decree on sequestration was obtained against them." The nature of the decree was not stated. After that decree, C., the party against whom it had been obtained, died. A bill of revivor, and three amended bills were filed against W., who derived under C., but the suit was not brought to a hearing against any of the defts. who answered. By the practice of the Court, an absolute decree on sequestration could not, pending the former suit, be obtained against a party until the suit had been heard against the answering defts. *Held*, that the statement in the bill that "there was a decree on sequestration" must therefore be taken to mean a conditional decree; that it fell to the ground by C.'s death, and the subsequent proceedings against W.; and that that statement did not preclude W., who demurred to the present bill, from relying on the Statute of Limitations.

That the conditional decree did not prevent the operation of the 81st G. O.; and that, by its operation, the suit of 1808 was dismissed before the present suit was instituted.

That the statement "that there had been a decree on sequestration," without stating what that decree was, which might have consisted with the relief now prayed, was vague and uncertain, even though considered to mean an absolute decree.

That the defence of the former Statute of Limitations (8 G. 1, c. 4) might have been relied on by demurrer to the bill of 1808; and that, that statute having been repealed, and there not being anything on the bill's face to show that the judgment of 1781 was not barred when the bill of 1808 was filed, ptf. could not derive any benefit from the suit.—*Young v. Wilton*, 10 I. E. R. 10. (R.)—[Affd., 10 I. E. R. 265. (C.)]

8. A declaration in a decree that a bond should be paid, with interest from the 21st August 1828—*Held*, insufficient to exclude the general rule that the interest shall not exceed the penalty.—*Purcell v. Blennerhassett*, 10 I. E. R. 470. (C.)

9. Form of decree in a suit by a puisne creditor for redemption and sale.

Form of order on a petition of a first incumbrancer under the Act.—*Ex p. Hutton*, 11 I. E. R. 160. (R.)

10. Form of decree to remove a trustee who may still be entitled to a control as to the objects of the charity.—*Commissioners of Ch. Donations v. Archbold*, 11 I. E. R. 187. (C.) [Reversed: 2 H. L. Cas. 440.]

11. Form of a decree setting aside a sale at suit of an incumbrancer on the estate sold, on an equity existing between him and the purchaser.—*Atkins v. Delmege*, 12 I. E. R. 1. (C.)

1. Lands were subject, by settlement, to £800, secured by a term of 100 years, and by a subsequent will to £4200, secured by another term of 99 years, as portions for younger children, of whom the ptf. H. and A. were two. The will, after prior limitations, devised the lands, subject to the two terms, to A. for life; remainder to his first and other sons in tail. A. being in possession, a bill was filed to raise the two sums. A minor tenant in tail, born afterwards, was made a party to it by supplemental bill. The Master reported interest accrued on the two charges during the possession of A. The final decree confirmed the report, and declared the sums reported charges on the terms: and, in default of payment, directed the Master to sell the lands comprised in those terms, to pay the demands decreed charges thereon. The lands were sold for the residue of the two terms. On exceptions to the Master's report of good title—*Held*, that, as the minor tenant in tail was a party to the cause, the decree was not erroneous, though it directed a sale to pay interest accrued during the possession of A.; nor because it omitted to set off the interest which A. ought to have paid against his share of the portion, and a sum which was reported to A. charged on other lands directed to be sold by the decree. But the Court directed the Master to allocate to the minor, out of the sum reported to A., the amount of interest which he was liable to pay.

That, although the two charges affected the terms separately, and were not distinguished in the report or decree, as it was clearly for the benefit of the minor that the terms should be sold together, the title was not objectionable on that ground.

That, as the minor's estate was puisne to the terms, the omission to give him a day to show cause would not affect the purchaser.—*Edgeworth v. E.*, 12 I. E. R. 81. (R.)

2. An appeal from a decree for the ptf. was argued in *Dom. Proc.* Before judgment the ptf. died. The cause was revived against his executors by the deft., the appellant. The Lords reversed the decree, and dismissed the bill "with costs of the suit in the Court below." *Held*, that the decree made on this order in the Court below should be couched in the same words. It was varied on re-hearing, because to it had been added words giving costs payable by the executors.

When a party dies after argument of a cause, and before judgment, the decree should be made *nunc pro tunc*, as if pronounced at the date of the argument; no revivor is necessary.—*Eyre v. Hollier*, 12 I. E. R. 607. (C.)

3. Where, upon a cause petition, under the Court of Ch. Reg. Act, presented by a legatee, and containing a charge that the respondent, the executor, has assets in his hands sufficient for the payment of all the debts and legacies of the testator, an order of reference has been made under the 15th sec. of the Act, of which order the executor has been served with notice, but has not appeared in the Master's office, a personal decree may be pronounced against

the executor. The effect of such a decree will be to prevent another legatee from filing a charge under the order of reference, and will thus render necessary the presentation of a petition by him in order to enforce his demand.—*O'Brien v. Westropp*, 1 I. C. R. 371. (C.)

4. When a sole petitioner dies, the matter cannot be revived by suggestion under the 29th sec. of the Ch. Reg. Act. An order must be obtained, authorising the petitioner to file a petition in the nature of a petition of revivor.

Form of order in such case.—*Wray v. Pol-lard*, 2 I. C. R. 78. (R.)

5. A cause petition, properly falling within the operation of the Ch. Reg. Act, s. 15, had been set down and heard as an ordinary cause petition. The Court refused at the final hearing (not having been called on before to do so) to make any order as to the extra costs occasioned by the petitioner's not having availed himself of the provisions of that section, the question not having been raised at the original hearing of the petition.

Form of decree made when, pending the proceedings in this Court, an order for sale of the lands of the respondent was made in the I. E. Court.—*Eyre v. Little*, 4 I. C. R. 604; 1 I. Jur. N. S. 6. (C.)

6. The word "insolvent," in a decree or deed, is to be construed in the ordinary sense of a person who is unable to pay his debts; not in the technical sense of one discharged as an insolvent debtor.—*Caulfield v. Maguire*, 5 I. C. R. 78. (R.)

7. H., a judgment creditor, made a deft. in a suit, permitted a report and decree to be made in 1828, which omitted all mention of his claims. In 1855, he obtained an order permitting him to file a charge and obtain at his own expense a separate report in respect to his claims; but reserving to the persons who had proved in the cause a right to rely on the decree against his claims. The Master found that his incumbrance was subject to the rights and priorities established by the decree of 1828. *Held*, that, on the true construction of the order of 1855, the Master was right in so finding.

*Quere*—Whether the order of 1855 was right in permitting H. to file a charge in respect of a claim omitted in a decree to which he was a party?—*Knox v. Waters*, 5 I. C. R. 430. (C.)

8. Two suits were instituted, one in the Court of Ch. in England, and the other in the Court of Ch. in Ireland, to administer a testator's assets. The former suit was by the executor who resided in England, the latter by residuary legatees who were not served with a copy of the English bill. The usual order of reference under the 15th sec. of the Ch. Reg. Act was made in the Irish suit on the 19th Dec. 1856. The executor entered an appearance on the 26th of Jan. 1857. He obtained a decree to account in the English

suit on the 7th of March 1857. An order in the Irish suit, on the 18th April 1857, directed the petition to stand as a charge; and the executor to file a discharge setting forth accounts. That order was amended on the 7th Dec. 1857 by directing an account of debts and legacies. The executor filed a supplemental bill in England to bind the petitioners in the Irish suit by the proceedings in the original suit; and on the 8th March 1858, the Master in the Irish suit, by order, restrained the executor from proceeding with the supplemental suit in England. On appeal from the last order—*Held*, following *Stokes v. Coltsman*, 1 I. C. R. 44, that the order of the 19th Dec. 1856 was a decree to account, this Court being bound by that decision.

That the Court of Ch. in Ireland had jurisdiction to restrain the executor from proceeding with the English suit.

That the executor, being resident in England, had a right to a protection from the Court of Ch. there, against the demands of creditors, which the order of the Court of Ch. in Ireland could not give him.

The Court therefore varied the order of the 8th March 1858, and made an order restraining the executor from proceeding in the English suit without the leave of the M. R. in England.

*Semble*—The order of the 18th of April 1857 was not a decree to account.—*Parnell v. P.*, 7 I. C. R. 322; 8 I. Jur. N. S. 382. (R.)

1. Terms of decree for partition of a joint right of water.—*Hamilton v. Fawcett*, 9 I. C. R. 397. (R.)

2. Terms of order in minor matter.—*In re Powerscourt*, 9 I. C. R., *App.* 1. (C.)

#### XXXIV. 2. b. On what Evidence made.

3. In a suit by children to enforce payment of their portions, the ptf.'s legitimacy was questioned by the next tenant for life, a deft. *Held*, that a marriage *de facto* having been once established, the party impeaching the marriage must then show that it was illegal or void; and that, sufficient evidence of a marriage *de facto* having been given, the Court was competent to decide the question of marriage for the purposes of the suit, without directing an issue.—*Piers v. Tuite*, 1 Dr. & Wal. 279. (C.)

4. When a deft., by answer, insisted that he was a purchaser for value, and without notice, proof of payment of the purchase-money is an essential part of the defence. If at the hearing, deft. fails to prove this, the Court will not allow the cause to stand over to enable him to supply that defect.—*Molony v. Kernan*, 2 Dr. & War. 31. (C.)

5. A mistake in a deed, proved by parol evidence corroborating written evidence, may be rectified.

*Semble*—Otherwise, when the whole evidence is parol, and deft. denies that the mistake exists.

The mistake must be proved to the Court's clear satisfaction.

Proof of a mistake on the parties' part, on one side only of a contract, will not suffice to justify altering the parties' rights under the contract, though it may suffice to rescind the contract altogether.

Deft.'s account of the transaction is to receive great attention. He is entitled to an enquiry touching the existence and nature of all documents bearing upon the question, and sworn to exist, though not produced.—*Mortimer v. Shortall*, 2 Dr. & War. 363; 1 Con. & L. 417. (C.)

6. A ptf. claimed as heir male of R., stating in his bill that he was R.'s eldest son, born after R.'s marriage with ptf.'s mother, and specifically naming a date for the marriage. *Held*, that though a marriage of that date proved by depositions would disprove ptf.'s title, and marriage of a different date establishing his legitimacy was proved by the same witnesses at the trial of the issue, those were not sufficient grounds for dismissing the bill without further investigation; it appearing that, on both occasions, the witnesses deposed correctly to the main facts, but misapprehended the dates.—*Malone v. M.*, 8 Cl. & F. 179; West, 637; 3 I. E. R. 536. — [Affirming *Malone v. O'Connor*, 2 Dr. & Wal. 491. (C.)]

#### XXXIV. 3. Effect of Decrees.

- a. Generally.
- b. On Summary Order.

##### XXXIV. 3. a. General Effect of Decrees.

7. *Quare*—Can a motion to stay the ptf.'s proceedings until he gives security for costs be sustained after a decree to account has been pronounced?—*Murphy v. Archdall*, S. & Sc. 630. (R.)

8. The suit having abated by ptf.'s death, it is too late for deft. to file a demurrer to a bill of revivor, after he has ruled the new ptf. to argue exceptions to his answer to the original bill, and has contested a motion for a receiver.—*Cathcart v. Hewson*, Hayes, 447. (E.E.)

9. Deft. having been arrested under a *ne exeat*, the Court will, at his instance, after a final decree, issue an attachment against him for non-payment of the sum decreed, in order that he may get relief under the Insolvent Acts. The attachment order will not be made until the final decree has been made up.—*Comms. Ch. D. & B. v. Harris*, Hayes & J. 211. (E.E.)

10. A decree in a suit instituted against an executor by a simple contract creditor of the testator, to pay his own debt merely, directing the executor to pay out of testator's assets, does not give any priority over outstanding specialty creditors of whose debts the executor has notice. Such a decree is analogous to a judgment at law of assets *quando acciderint*.—*Sandford v. Seymour*, 3 I. E. R. 212. (C.)

1. It is contrary to the Exchequer practice to appoint a receiver after a final decree.

*Seemle*—The Chancery practice is different.—*Barber v. Roe*, 4 I. E. R. 692; Long & T. 662. (E.E.)

2. From the authorities it manifestly appears that Lord Eldon, upon great consideration, has laid down the rule, that so far is it from being a matter *ex debito justitiæ*, to let in a party to answer after a decree on sequestration, that it is a matter of the greatest difficulty: for the decree is obtained under the sanction of the legislature; and if a ptf. obtains a decree under the sanction of an Act of Parliament, which authorises the bill to be taken *pro confesso*, he has legislative authority to say that his right is established, and that he is not to be deprived of that benefit unless under very peculiar circumstances.—*McCartney v. O'Neil*, 5 I. E. R. 160. (E.E.)

3. When a creditor had several grounds of priority, and at the hearing waived all priority, and a declaration to that effect was inserted in the decree, he will not be permitted to say that he meant to waive only a particular ground of priority, the decree being conclusive until reversed on rehearing or appeal.

*Seemle*—That decrees are to be construed according to their words, and not according to the alleged intention of the parties.—*Drought v. Jones*, 2 Con. & L. 378; 4 Dr. & War. 174. (C.)

4. Administration was granted by the sentence of the Ecclesiastical Court to A., as only next-of-kin of the intestate, in a suit in which B. also claimed to be the only next-of-kin. That sentence was affirmed by the Court of Delegates. B. filed a bill impeaching the pedigree of A., and to establish his own. This Court would not grant an injunction until answer, to prevent the administrator possessing himself of the assets, he being, by the decree of the Ecclesiastical Court, legally and equitably entitled thereto.—*Maher v. Gorman*, 6 I. E. R. 304. (R.)

5. By his answer, a deft. insisted that a former tenant in tail had paid off legacies, which he alleged were charges on the real estate out of the specified fund; and that the sums so paid off were still charges on the real estate. The interlocutory decree referred it to the Master, to take an account of the sums advanced on foot of the specified fund, in exoneration of the lands, and whatever should appear to be so advanced was thereby declared to be a charge on the lands. *Held*, that this amounted to a declaration, that the legacies were a charge on the lands.—*Kelly v. Lennon*, 1 Jon. & L. 305; 7 I. E. R. 98. (C.)

6. A suit was instituted in 1797 to administer real and personal assets. X., a creditor, filed in 1804 a bill to establish an unliquidated demand by specialty against the realty, and in 1822 obtained a decree and a judgment ascertaining his demand. There were various

proceedings in the suit of 1797, in which demands similar to X.'s were recognised as binding the estates; and there was a sale in 1816. To protect the purchaser, a portion of the proceeds was invested till X.'s suit should be determined. X. died in 1822. Administration to him was obtained in 1841, in which year the administrator came in under an advertisement for creditors in the first suit to prove X.'s demand against the fund invested. *Held*, that the principle of *Sterndale v. Hankinson*, 1 Sim. 393; 3 Russ. 130, applied, and that the demand was not barred by the Statute of Limitations.—*Birmingham v. Burke*, 9 I. E. R. 86; 2 Jon. & L. 699. (C.)

7. A decree on sequestration is only a conditional decree, and will not prevent the operation of the Statute of Limitations or of the 81st G. O.—*Young v. Wilton*, 10 I. E. R. 265. (C.)—[Affg. 10 I. E. R. 10. (R.)]

8. A declaration in a decree that a bond should be paid with interest from the 21st of August 1828—*Held*, insufficient to exclude the general rule, that the interest should not exceed the penalty.—*Purcell v. Blennerhassett*, 10 I. E. R. 470. (C.)

9. Although a suit be totally abated by a sole ptf. assigning away his interest or becoming insolvent, it is capable of being continued so as to allow the benefit of it under this doctrine to creditors proving charges under a decree made in a suit seeking the continuance and benefit of the abated suit. When the original ptf. made an assignment by deed for the benefit of creditors, one trust of which was to continue the abated suit; and original bills in the nature of bills of revivor and supplement were filed by the trustees and *c. q. t.* of this deed, stating it, and praying the benefit of the abated suit; the receiver appointed in which was continued; a decree made and entitled in the new suits only, without referring to the abated one, but reciting among the evidence the proceedings in it—*Held*, such a decree as entitled creditors proving charges under it to the benefit of the abated suit for this purpose.—*Bennett v. Bernard*, 10 I. E. R. 584. (C.)

10. A former decree dismissing a bill, if not enrolled and pleaded, does not absolutely bar another suit for the same demand. If it is relied on by the answer, and appears not to have been a dismissal on the merits, it is no defence.—*Joly v. Swift*, 11 I. E. R. 410. (C.)

11. After the report and final decree the Court will not, at the ptf.'s instance, grant judgment creditors liberty to come in and prove their demands, with permission to object to the accounts and proceedings already had, unless all the creditors consent.—*Hort v. Bloomfield*, 1 I. Jur. 68. (E.E.)

12. After a decree to account in a suit for the administration of assets, a judgment creditor of the testator, having notice of the decree, sued out a *sci. fa.* against the execu-

tor; obtained judgment by default; and issued a *fi. fa. de bonis testatoris*. The Court, on the application of the executor, restrained the creditor from proceeding on the *fi. fa.*, and gave the costs of the motion against him.—*Belmore v. B.*, 12 I. E. R. 493. (R.)

1. A creditor who has brought an action at law against an administrator, and has notice of a decree for the administration of the assets, is not in general entitled to his costs of appearing on a motion to enjoin him from proceeding with the action.

A civil-bill decree against an administrator, being in the nature of a judgment *de bonis propriis*; the Court, though it will enjoin a creditor from enforcing such a decree against the assets, when there has been a decree to administer them, will not restrain him from enforcing it against the administrator personally.

*Semble*—A decree to administer assets is a defence to a civil-bill against the administrator, if prior to the hearing of the civil-bill. *Secus*—If subsequent to the hearing, but prior to an appeal to the Judge of Assize.—*Powell v. P.*, 12 I. E. R. 501. (R.)

2. A decree against several for payment of costs is joint and several; and a receiver may be appointed over the lands of one of them under the 3 & 4 Vic., c. 105, without making the others parties to the petition. The costs given by such a decree are in the nature of a debt; therefore there must be contribution between the parties liable.—*Archbishop of Dublin v. Lord Trimleston*, 13 I. E. R. 98; 1 I. Jur. 49. (R.)

3. The ptf. in a creditor's cause, who has got a decree, may move to stay other causes for the same purpose.—*O'Keefe v. Holmes*, 13 I. E. R. 111. (R.)

4. A civil-bill decree binds the deft.'s goods from the delivery of the warrant to special bailiffs, not from the delivery of the decree to the sheriff (unless it be delivered to him to be executed), or his signature of the warrant.—*Delacour v. Freeman*, 1 I. C. R. 612. (R.)—[*See s. c.*, 2 I. C. R. 633. (R.)]

5. B., wife of A., claimed lands, as devisee under a will, which the decree in a suit instituted by the heir against A. and B. declared to be null and void. The decree further directed an account of all sums received by A. and B., or either of them, on account of the lands; and ordered the defts. to pay the sum to be found due on taking such account. A. died before the Master's report was made up. The suit was revived against his personal representative. The Master found the sum received by A. and B. *Held*, that B. was personally responsible for the entire amount by the Master's report found to be due.

A decree, directing a husband and wife to pay a sum of money in respect of the rents and profits of lands received by the wife, or by the husband, in her right, may be enforced against the wife after the husband's death.—

*Rossborough v. Boyse*, 3 I. C. R. 629. (C.)—[Reversing the Rolls decision: *ibid*, 540.]

6. A decree in a suit to administer the trusts of a will is, if unobjected to and unreviewed, decisive of the testator's seizure in fee of the devised lands.—*Spread v. Morgan*, 5 I. Jur. N. S. 45. (C.A.)

7. A decree dismissing a bill for want of ptf.'s appearance at the hearing does not bar another suit for the same demand.—*Phibbs v. O'Donel*, 8 I. Jur. N. S. 226. (C.)

8. In a suit by the representative of B., to be recouped out of the personal estates, for payment of incumbrances—*Held*, that the inheritor, who was a party and made a similar claim, could not have credit for the sums overpaid to B., by way of maintenance, against the petitioner.

Decrees of the Court, though erroneous, are binding, until set aside on re-hearing, or in a suit for the purpose.—*Clanmorris v. C.*, 14 I. C. R. 420. (R.)

9. So long as a fund, applicable to the payment of debts, remains in Court a creditor may obtain an order to prove his demand, though a final decree has been made in the cause.

Leave given to a creditor to prove after final decree, under circumstances of great neglect on his part.—*Graves v. Davies*, 15 I. C. R. 204. (R.)

10. By a decree to account made by the Court of Equity Exchequer in 1786, in a suit in which the inheritance was represented by the first tenant in tail, a sum was declared to be a charge on lands. The tenant in tail afterwards died without issue. The next tenant in tail in remainder was made a party by a bill of revivor; and there was a report of the sum due, and a final decree for a sale in 1793. In a suit to raise the charge by sale of the lands. *Held*, that the decree to account gave a good title to a charge on the lands, though there was error in the subsequent proceedings, the suit being continued by bill of revivor only.—*Bolton v. Fairtlough*, 15 I. C. R. 229. (R.)

#### XXXIV. 3. b. *Effect of Decree on Summary Order under the Ct. of Ch. Reg. (Ir.) Act 1850.*

[Such decree or order stays all proceedings against the executor or administrator, 13 & 14 Vic., c. 89, s. 22.]

11. When a cause petition under the Ch. Reg. Act, s. 15, presented by a legatee, and charging that the respondent, the executor, has assets in his hands sufficient to pay all the debts and legacies of the testator, has been referred to the Master; and the executor having been served with notice of the order has not appeared in the Master's office, a personal decree may be pronounced against him. Its effect will be to prevent another

legatee filing a charge under the order of reference; and to necessitate the presentation of a petition by him in order to enforce his demand.—*O'Brien v. Westropp*, 1 I. C. R. 371; 3 I. Jur. 367. (C.)

1. The summary order on petitions presented as within the Ch. Reg. Act, s. 15, merely decides that the subject matter of the suit is within that sec.—*Graham v. M'Dermot*, 3 I. C. R. 488. (C.)

#### XXXIV. 4. Decree to Account.

2. *Quere*—Can a motion, to stay the ptf.'s proceedings until he gives security for costs, be sustained after a decree to account has been pronounced?—*Murphy v. Archdall*, S. & Sc. 630. (R.)

3. A judgment creditor filed against the conuzor and a prior mortgagee a bill praying liberty to redeem the mortgage, and for a sale of the mortgaged premises. *Held*, that the Court would not direct an account of the incumbrances, prior to the judgment, which affected those premises.—*Crofts v. Poe*, 1 Jon. 540. (E.E.)

4. Under a decree to take an account of A.'s assets, and to administer them, a demand for unliquidated damages may be proved and reported. The preferable mode of ascertaining its amount is by an issue directed for that purpose; but those damages may be ascertained by the officer by examining witnesses on interrogatories.—*England v. Donnellan*, Jon. & C. 270. (E.E.)

5. A judgment creditor filed a bill against the conuzor's heir and assignee (the conuzor having been discharged as an insolvent shortly before his death), and against an *elegit* creditor of his, who had been many years in possession. *Held*, that ptf. was only entitled to an account for wilful default against the *elegit* creditor from the time of filing the bill.—*M'Donnell v. Walshe*, 2 Dr. & War. 252; 1 Con. & L. 388. (C.)

6. Though the general rule is, that when, in a foreclosure suit, the tenant for life is a party, and the accounts are fairly taken, those accounts bind remaindermen, who can only be permitted to surcharge and falsify, yet, since all the decrees in this case were upon sequestration, and the accounts had been taken in the absence of every person interested in having them fairly taken, and since doubts were thrown upon the case, touching the existence of any debt, the remainderman was entitled to have a general account directed.—*Wrixon v. Vize*, 4 I. E. R. 463; 2 Dr. & War. 192; 1 Con. & L. 298. (C.) —[*Affid.*: 5 I. E. R. 173; 3 Dr. & War. 104; 2 Con. & L. 138. (C.)]

7. An *elegit* creditor in possession must account as for wilful default, upon the debtor's application.—*O'Brien v. Mahon*, 2 Dr. & War. 306; 1 Con. & L. 390, *note*. (C.)

8. Ptf. is not entitled, as of course, to a decree for an account when deft. does not appear; but must make out his case.—*Hayes v. Brierley*, 3 Dr. & War. 274; 2 Con. & L. 153. (C.)

9. The operation of a decree to account is not to determine a suit, but rather to keep it alive, and continue it.—*Higgins v. Shaw*, 2 Dr. & War. 357; 1 Con. & L. 400. (C.)

10. When a stated and settled account is set up by the answer, but not proved at the hearing, the proper decree is to enquire, whether such account exists, and if it does, to give the deft. the benefit thereof, leaving the ptf. to surcharge and falsify.—*Fitzpatrick v. Mahony*, 1 Jon. & L. 89. (C.)

11. A creditor on foot of a joint and several bond of B. and N. (having entered judgment against B. only) proved under a decree to account in a suit against the assets of B. He was also a party to the report under a decree to account in a supplemental suit affecting the assets of N.; but did not prove under it. The Court restrained the creditor from proceeding at law against the administrator of N.—*Cuffe v. Young*, 8 I. E. R. 37. (R.)—[*See* 9 I. E. R. 475. (R.); 2 Jon. & L. 17. (C.)]

12. The execution of a lost mortgage-deed was admitted by the answer in a foreclosure suit, but the deft. swore that certain payments were endorsed upon the deed. The memorial, executed by the mortgagor, and a counterpart in his possession were offered in evidence; but a sufficient search for the original was not proved. *Held*, that there should be a decree to account, with an enquiry respecting the original deed and the endorsement.—*Coulson v. Williams*, 9 I. E. R. 287. (C.)

13. Under the decree to account in a suit instituted by A., a creditor on the inheritance, B., having a puisne charge on a 500 years' term, proved it; it was reported. The decree directed the inheritance to be sold to pay A. and the other creditors. A.'s representatives, who were ultimately settled with, instituted supplemental suits; but no sale was had. B.'s representatives filed a bill praying the benefit of the former decree, and to have the term sold. A.'s representatives were made notice parties. *Held*, that since B. was not entitled to a decree such as was made in A.'s suit, it could not be carried out for the ptf., nor be cut down so as to be limited to the term, at least in the absence of A.'s representatives, who might still have rights under it.—*M'Namara v. Blake*, 11 I. E. R. 455. (C.)

14. In a decree for an account of old standing against an executor, a direction was inserted, allowing him to discharge himself by affidavit for items, though exceeding 40s.—*Dooner v. D.*, 12 I. E. R. 580. (C.)

15. A decree to account was made in a suit in which the first tenant in tail, who represented the inheritance, was before the Court. He died without issue. The next tenant in

tail was made party by a bill of revivor. A sum was reported due, and a sale was decreed. In a suit to raise the charge by a sale of the lands—*Held*, that the decree to account gave a good title to the charge on the lands, although in the subsequent proceedings the suit was erroneously continued by a bill of revivor only.—*Faircloth v. Bolton*, 10 I. Jur. N. S. 201. (C.A.)

1. If the decree in the original suit merely directs a common account against an agent, a decree charging him with what he might, without wilful default have received, cannot be made in a supplemental suit.—*Connor v. Reeves*, 16 I. C. R. 398. (R.)

#### XXXIV. 5. Decree to Administer, and Distribute Assets.

[Under the 13 & 14 Vic., c. 89, it stays all proceedings against executors and administrators.]

2. Demurrer allowed to be set down for argument when, through ptf.'s solicitor's ignorance of G. R. 19, it had not been set down within the time limited thereby.—*Jefferys v. Goodwin*, 3 I. E. R. 99; Fl. & K. 70. (R.)

3. A creditor who proves his demand under an administration decree will not, upon the final hearing, be heard to ask costs incurred in the office in reducing ptf.'s demand, the report not having made any special case for that purpose.—*Loughny v. Dillon*, 3 I. E. R. 55. (E.E.)

4. Under a decree to account in a judgment creditor's suit, the Master found that the assets consisted of real estates, and of an irrecoverable mortgage. Under the final decree the real estates were sold. The produce was distributed amongst the judgment creditors according to their priority. The funds reached the three first creditors; several remained unpaid. The sum secured by the mortgage was subsequently recovered. *Held*, that it should be distributed rateably amongst the unpaid judgment creditors.—*Averell v. Wade*, Fl. & K. 325; 3 I. E. R. 446. (R.)

5. In an administration suit of real and personal estate, an account of rents, &c., received since the death is not ever directed at the original hearing.

Such an account is directed only when, upon the cause coming back, its necessity appears.—*Schomberg v. Humphrey*, 1 Dr. & War. 411. (C.)

6. Ptf.s in a creditor's suit had been overpaid. *Held*, that the Court had jurisdiction to order them to bring that overplus into Court.—*Graves v. Wright*, 2 Dr. & War. 77; 1 Con. & L. 267. (C.)

7. A civil-bill decree against an administrator is in the nature of a judgment *de bonis propriis*.

When a decree to administer the assets has been pronounced, the Court will not enjoin a

creditor from enforcing a civil-bill decree against the administrator personally, but will restrain him from enforcing it against the assets.

*Semble*—A decree to administer assets, if pronounced before the civil-bill is heard, affords a defence to a civil-bill against the administrator.

*Secus*—If the decree be pronounced after the hearing of the civil-bill, but before an appeal therefrom.—*Powell v. P.*, 12 I. E. R. 501. (R.)

8. The general rule is, that though there be a decree to administer assets, a creditor of the testator or intestate will not be restrained by injunction from proceeding at law to make the personal representative liable *de bonis propriis*. But when a legatee, who has proved in the Master's office, under the decree, brings an action at law against the executor, for the legacy, the Court will enjoin him, though the judgment in the action should be *de bonis propriis*; because the Court, by its decree, has taken upon itself to decide upon the question of assets, without which the ptf. at law cannot recover, and will not permit that question to be tried at law.

To make an executor liable at law for a legacy *de bonis propriis*, there must be an express promise in writing, and assets, or some other consideration.

*Semble*—On a plaint for a legacy against the deft. as executor, and not averring that the deft. promised in writing to pay the legacy, the judgment should be *de bonis testatoris*.—*Molynaux v. Scott*, 3 I. C. R. 291. (R.)

9. The Masters have power, in cases referred to them under the Ch. Reg. Act, s. 15, to order, in administration suits, that a personal representative shall file a discharge, setting forth an account of the assets; and to grant an attachment against him if he disobeys the order. The practice in this respect certified by the five Masters.—*Glenny v. Woolsey*, 4 I. C. R. 615. (R.)

#### XXXIV. 6. Decree to Foreclose, or Redeem Mortgages.

10. Whether a decree in a foreclosure cause against an infant deft. entitled to the equity of redemption, should give him a day to show cause? *Quere*.—*Jones v. Ham*, 3 I. E. R. 65.

11. When by the decree in a foreclosure suit, a day was given to an infant deft. to show cause against it—*Held*, that the Court still had jurisdiction to direct an immediate conveyance under 1 W. 4, c. 47, s. 11.—*Flood v. Sutton*, Fl. & K. 179; 3 I. E. R. 340. (R.)

12. In 1817, deft. confessed a judgment. In 1821 he mortgaged his estate as an additional security for the judgment debt. The mortgagee filed a bill, and obtained a decree to foreclose and sell; no incumbrances being proved under the decree to account. The

purchaser objected to the title because judgments prior to the mortgage existed. The mortgagee, by notice, required the judgment creditors to prove their demands under the decree, or that he would file a supplemental bill against them, and seek to charge them with the costs. Several creditors proved. The fund was insufficient to pay their demands. *Held*, that ptf. was not entitled to costs up to the final decree in the priority of his judgment.

*Semle*—Since the conuzor was alive, he would have been entitled to costs in the priority of his judgment, had the judgment creditors come in voluntarily under the decree, and sought to have its benefit.—*Cooke v. Campbell*, 4 I. E. R. 431. (E.E.)

1. The G. O. of 22nd June 1841, is not to have the effect of involving ptf. in the account of the sums due on incumbrances puiene to their demands.—*Davis v. Rowan*, 3 Dr. & War. 478; 2 Con. & L. 154. (C.)

2. A decree of foreclosure and sale against the mortgagor, and against an infant entitled, under a settlement of the equity of redemption, to the first equitable estate tail in remainder, must give the infant a day to show cause.—*Clibborn v. Forstall*, 5 I. E. R. 581. (R.)

3. When a decree is made to foreclose and sell real estate of which the equity of redemption is vested in an infant, it is not necessary to give the infant a day to show cause.—*Clinton v. Bernard*, 6 I. E. R. 355. (C.)

4. In a decree for a sale in a mortgage cause, an infant owner of the equity of redemption is not entitled to a day to show cause.—*Hutton v. Mayne*, 9 I. E. R. 343; 3 Jon. & L. 586. (C.)

5. In taking accounts against mortgagees in possession, it is the settled practice to make half-yearly rests, and not to charge against the mortgagee interest on payments, exceeding the interest due to him, received at any intermediate periods, no matter how frequently the payments are made.—*Graham v. Walker*, 11 I. E. R. 415. (C.)

#### XXXIV. 7. Whom Decrees Bind.

- a. Generally.
- b. Infants.

#### XXXIV. 7. a. Whom Decrees Bind generally.

6. By decree in a suit to raise charges created by will, the legal estate in which was vested in an adult trustee for minors, they were directed to be sold. The trustee and the c. g. trusts were parties to the suit, and the latter were given a day to show cause.—*Kirby v. O'Hea*, 2 Jon. 635. (E.E.)

7. In 1808 T., by deed defectively registered, granted F. an annuity. In T. Term 1822, N. obtained a judgment against T. In M. Term 1822, D. obtained a judgment against T., who, in 1826, mortgaged to C., and in 1827 granted

an annuity to W. by deeds duly registered. In 1831, J., entitled to one moiety of F.'s annuity, filed his bill. To it W., C., and D., but not N., were parties. J.'s cause was heard in 1838, on an order to take the bill as confessed against D.'s executors, and upon pleadings and proofs as to the other defts.; and there was had a decree to account admitting the priorities of C. and W. over the demand of J. On the 11th Nov. 1839 the Master's report under this decree found that D. had not filed a charge on foot of his judgment, and that, since the judgment was pronounced, J. had purchased C.'s mortgage, and W.'s annuity, but had not made any claim on foot thereof. On the 26th Nov. 1839 a final decree was had in J.'s cause. *Held*, that it concluded D.'s executors, they having allowed a decree *pro confesso* to be taken against them, and not having filed a charge under the decree to account in that cause.—*Murtagh v. Tisdall*, 3 I. E. R. 85; Fl. & K. 20. (R.)

8. A creditor who has proved his charge under the decree is as much bound by it as if he was a party to the suit.—*Usher v. Scanlan*, Fl. & K. 243; 3 I. E. R. 474. (R.)

9. The time for filing a bill of review is regulated by analogy to the time limited by the 6 G. 1, c. 6, for bringing a writ of error, i. e., twenty years after the judgment, and five years after the disability, if any, of the ptf. in error, has been removed.—*Kelly v. Lennon*, 1 Jon. & L. 305; 7 I. E. R. 98. (C.)

10. A deft. who allows the bill to be taken as confessed against him, by so doing admits the statements therein to be true, and is as much bound by the decree as if the facts stated in the bill had been proved against him.—*Massey v. Batwell*, 4 Dr. & War. 65. (R.)

11. When a Court of Equity directs an issue in a cause wherein there are many parties, and selects some to conduct the trial, giving all leave to attend, the result binds all.—*Malone v. M.*, 8 Cl. & F. 179; West, 637; 3 I. E. R. 536; 2 Dr. & Wal. 491.

12. If one deft.'s answer puts forward a case wholly destructive of ptf.'s title, and that case is established, the Court will give it effect, not merely as between ptf. and that deft.; it shall enure to the other defts.' benefit, though their answers did not make it.—*Wilson v. Bell*, 5 I. E. R. 501. (E.E.)

13. Four tenants in common being entitled under a deed to the first estate tail in X., were before the Court in a suit instituted to establish a will, devising Y., the validity of which depended on the deed. In a cross-cause impeaching the deed only two of them were made parties. Both causes having been heard together, a decree was made by compromise setting aside the deed as to X., and directing a reconveyance by all proper parties. A person, who would have been entitled to a prior estate tail under the deed, was then born. Afterwards was executed the conveyance, in which the four tenants in common joined.



*Held*, that the inheritance having been imperfectly represented in the cross-cause, a good title, derived through the decree, could not be made.—*Pasley v. Lord Clamorris*, 7 I. E. R. 442. (C.)

1. When lands (subject to a charge, to raise which the suit has been instituted), are set by the inheritor *pendente lite*, the Court will consider the lands as in his possession; and, under an order to let the lands in his possession, will permit them to be let discharged of the leases.—*Kenny v. Jessop*, 7 I. E. R. 494. (R.)

2. The owner of an equitable interest in lands decreed to be sold assigned that interest after decree. The assignee is bound by the decree and proceedings, and should not be made a party to a supplemental bill.—*Osborne v. Casey*, 7 I. E. R. 636. (R.)

3. In a suit to raise a charge affecting the inheritance, the tenant in tail consented to an interlocutory order of reference to take the accounts prayed; and died, after the report, but before objections taken to it by him had been disposed of. *Held*, that the proceedings under the consent order bound the issue in tail; but that he was entitled to be placed in the position which the tenant in tail occupied at his death. He was allowed to argue the objections.—*Creagh v. C.*, 3 Jon. & L. 485. (C.)

4. A. devised lands on trust for B. (a minor) and his sons, in strict settlement, giving B. a power of charging the lands with £5000 for younger children, "to be raised by sale or mortgage of a competent part of said lands, or out of the rents and profits." A. then bequeathed legacies, amounting in all to £12,000, to his grand-daughters, and directed that his executors "should place these legacies in some of the most eligible public funds," and accumulate such portion of the annual interest of them as was not required for the maintenance, &c., of the legatees. He then, after giving some small legacies, declared that if his assets, not thereby specifically disposed of, should prove insufficient to pay his debts and legacies, "it was his will that such deficiency should be made good by his trustees, out of the annual rents arising out of his estates; which he thereby desired that his trustees might receive and apply until such deficiency should be made good thereby; allowing, however, to his grandson B. so much as the said trustees should deem expedient and fitting for his education and maintenance;" but if it should happen that there should be a surplus of his personal estate after payment of his debts and legacies, &c., he bequeathed such surplus among his several grandchildren above mentioned. The personal estate proved insufficient for the purposes contemplated. On A.'s death, B. and the other grandchildren were made wards of Court. One of the executors acted as guardian. In the accounts and dealings in the matter of the minors the legacies were treated as charged on the *corpus* of the estate, and B. paid interest on them until he died, leaving a son who refused to pay these charges.

*Held*, that only so much of the legacies as the personality was inadequate to pay was charged on the real estate; that the charge was only on so much of the rents of the real estate in the years immediately following A.'s death as would have made up the deficiency; and that B.'s son was not bound by the dealings in the minor matter.

It is desirable that questions of construction should be settled in the first instance, before the Master proceeds to take the accounts of an estate.—*Scott v. Clements*, 8 I. C. R. 1; Dr. Rep. temp. Napier, 91. (C.)

5. A. devised all his estate in a chattel leasehold interest in lands, and "all other my property and worldly estate whatever," upon trust, in the first place, to preserve the chattel interest by payment of head rent and renewal fines. He then bequeathed pecuniary legacies, and among others, £100 to the trustee: "and as to, for, and concerning all the residue of my interest in my said lands, and as to, for, and concerning the residue. Similarly of my other personal estate and effects, subject to the hereinbefore trusts. I hereby give, bequeath and devise all such residue of my interest in the said lands, as also all such the residue of my personal estate and effects, in trust, for my eldest son." He then charged the lands, and the residue of his personal estate, with sums for younger children. A. then declared that, if he died leaving no son, but leaving an eldest or only daughter, then he devised all his interest in the lands, and all the residue of his personal estate, in trust for such daughter, with remainders over; and directed "that all the intermediate rents and profits of my said lands, as well as of the residue of my said other personal estate and effects, which shall accrue, arise, or be made out of both said funds;" subject only to the provision made for A.'s wife by their marriage settlement, and to his debts and funeral expenses, "and to the several legacies hereinbefore enumerated," should go to the trustee. In 1846 the Master, by a report, afterwards confirmed by decree in Ch., found that the legacies were not charged upon A.'s interest in the lands. *Held*, that, upon the true construction of the will, the legacies were not charged upon the lands. That the legatees were bound by the Master's report.

The Judges of the L. E. Court are bound by a final decree of the Court of Ch.—*In re Lamauze*, 11 I. C. R. 19; 5 I. Jur. N. S. 30. (C.A.)

6. R., in 1776, upon his marriage, settled his real estate to the use of himself for life, remainder to trustees for 300 years, remainder to the first and other sons of R., successively in tail male, remainder to the first and other daughters of the marriage, successively in tail male, remainder to R.'s right heirs. The trusts of the term were to raise £3000 for the portion or portions of the daughter or daughters, and younger son or sons of the marriage, if more than one daughter or younger son, to be payable among such daughters or younger son, as R. should appoint; in default, equally;

but if only one daughter or younger son, who should not, at the time of the decease of R., be his eldest son, to raise a sum not exceeding £2000, as provision for such only daughter or younger son, as R. should appoint.

R. had issue two daughters only, M. and E.; and died in 1785. On the marriage of M. in 1802, the lands were put in settlement, giving estates tail to the first and other sons of M., remainder to the first and other daughters in tail.

In 1814, a bill was filed against M., her husband, and T. her eldest son, an infant, to raise charges affecting the settled lands. T. died, leaving H., the eldest daughter of M., the first tenant in tail of the settled lands, against whom the suit was revived.

In 1818, a report was made, finding that the estates were charged, under the settlement of 1776, with £3000 for E. In the same year, a decree was made, declaring that sum well charged on the lands, and directing a sale of the fee for payment of the charges. This decree did not reserve a day to show cause, though H. was an infant. The guardian *ad litem* of H. had an interest adverse to hers; interest on the £3000 was paid by M., down to her death; and, after her death, by the respondent W., down to 1858.

In 1860, a petition was presented by E. against W., a son of M., born after the decree of 1818, and the first tenant in tail under the settlement of 1802. This petition stated the decree of 1818, but did not rely on it as an estoppel, nor pray to have it carried into execution.

*Held*, that the word "daughter," in the settlement of 1776, meant "daughter not entitled to the estate." That the decree of 1818 was wrong in substance and form.

That W. was not, in the form of suit adopted, bound by this decree.

That he was not bound by the acquiescence evidenced by the payment of interest; and that only £2000 ought to be raised.—*Stirum v. Richards*, 12 I. C. R. 323; 7 I. Jur. N. S. 69. (C.A.)

1. G. was a joint and several simple contract creditor of H. and W. A suit was instituted to administer the real and personal estate of H., and W., in which suit G. proved his demand. In Jan. 1857, the Master reported that, the parties interested so desiring, he had not taken an account of the personal estate of H., and inserted G.'s claim only in the schedule of the debts of W.

In Feb. 1857 the cause was heard; the report confirmed; and the decree made accordingly. In Jan. 1862, G. filed a petition, in the nature of a bill of review, to vary this decree.

*Held*, that the Court of Appeal had jurisdiction to entertain this petition; that G., not being a party to the original suit, but having merely come in to prove his debt, was not bound by the consent of the parties interested; and that he had not lost the right to vary this decree by his delay.—*Walsh v. W.*, 18 I. C. R. 496. (C.A.)

#### XXXIV. 7. b. *Infants.*

2. The Court will not, on motion, amend the minutes of a decree by striking out the day given to minor defts. to show cause.

*Quære*—Whether the old practice of giving that day is affected by the 11 G. 4, and 1 W. 4, c. 47?—*Esmonde v. Cooke*, 1 Dr. & Wal. 250. (C.)

3. Even after enrolment of a decree, the Court will, on application by a minor deft. who attained age after that enrolment, re-hear the cause respecting a particular matter appearing on the Master's report.—*Jackson v. Walsh*, 1 Dr. & Wal. 255. (C.)

4. Ptf. charged that B., named a deft., was out of the jurisdiction, but omitted to pray process against him on his coming within it. Nevertheless—*Held*, that ptf. was entitled to costs of a supplemental suit instituted to compel him to join as a conveying party in the deed to the purchaser under the decree.—*Oldham v. Wilkins*, 1 Dr. & Wal. 717. (C.)

5. An order directing an issue "with the consent of all parties in the cause," is erroneous so far as it purports to be made with the consent of an infant party.

*Quære*—If the infant consented, is he bound? But if the order for the issue was a right one to be made, if the infant had not consented, it is immaterial whether he ought to be bound by the consent or not; especially since he was relieved from its effect by being allowed, on coming of age, to make a new defence.

*Quære*—Is it clear, on the authorities, that an infant deft., in such a case, is entitled, after attaining age, to put in a new answer, and make a new defence?—*Malone v. M.*, 3 I. E. R. 536; 8 Cl. & F. 179; West, 637; 2 Dr. & Wal. 491, 536.

6. *Seem*—The Court will not, on motion, amend a decree, by inserting, for a minor deft., a day to show cause.—*Tilson v. Lawder*, 2 Dr. & War. 285; 1 Con. & L. 392. (C.)

7. On motion, the Court refused to amend a decree by striking out the day to show cause, given to a minor deft., the first tenant in tail of the sold lands.—*Mahon v. Dawson*, 2 Dr. & War. 286, n. (C.)

#### XXXIV. 8. *Obtaining Decree generally.*

8. Children, on whom several estates are settled, may recover part thereof without showing title to the remainder of the settled property.

But when estates and other property, forming a mixed fund, are settled subject to a power of appointment, the Court, when many parties are entitled to the mixed fund, will not, as against a purchaser of part thereof (in which purchase one of its objects acquiesced) act, as against that purchaser, without knowing all the dispositions of that mixed fund.—*Thompson v. Simpson*, 1 Dr. & War. 459. (C.)

deft. a day to show cause?—*Esmonde v. Cooke*, 1 Dr. & Wal. 250. (C.)

1. The minutes of a decree cannot be used in this Court. The decree itself must be produced.—*Hall v. Hill*, Fl. & K. 619. (R.)

2. When counsel has relied upon some only of several grounds of defence, such selection does not amount to a waiver of the rest. When such had been the case, and an appeal was made to the H. L., a petition was allowed for a re-hearing to amend the notes of the decree, without withdrawing the appeal.—*Galwey v. Barron*, Long. & T. 76. (E.E.)

3. *Semble*—The Court will not, on motion, amend a decree in a suit for sale, when one of the defts. is an infant, by inserting therein a direction for the infant deft. to have a day to show cause.—*Tilson v. Lawder*, 2 Dr. & War. 285. (C.); nom. *Tisdall v. Lawler*, 1 Con. & L. 892. (C.)

4. To amend the decree in any respect, save in case of a clerical mistake, or error arising from accidental slip or omission, there must be a re-hearing.—*Mahon v. Dawson*, 2 Dr. & War. 286, note. (C.)

5. The fact of a decree having been made upon consent, will not be a reason for permitting it to be amended.

If an addition have been made to a decree on a motion; *Semble*—That the decree, *quoad* such addition, may be amended on motion.—*Peed v. Cussen*, 4 Dr. & War. 199; 2 Con. & L. 384. (C.)

6. *Quære*—Can a decree of foreclosure be amended at the Rolls, on motion, by striking out a day to show cause given to an infant thereby?—*Flood v. Sutton*, Fl. & K. 179; 3 I. E. R. 340. (R.)

7. After a final decree pronounced, but not served, the Court permitted the ptf. to amend his charge, and proceed thereon before the Remembrancer; the Remembrancer to be at liberty to amend his report if he should think fit; and the Registrar to be at liberty to amend the decree, according to the amendment of the report; all to be done at ptf.'s expense.—*Cather v. Murphy*, Jones & Ca. 245. (E.E.)

8. The Court of Exch. will permit a final decree to be amended, when the object of the amendment is to provide for the rights of parties not before the Court at an earlier period of the suit.—*Pidgeon v. D'Alton*, Jones & Ca. 276. (E.E.)

9. Final decree, and all prior proceedings, amended, by changing the ptf.'s name from George to John.—*Readin v. Lidwell*, 4 I. E. R. 688. (E.E.)

10. After enrolment, the Court refused liberty to amend a decree for a sale, by inserting denominations of lands mentioned in the

Master's report, but omitted by mistake from the final decree.—*Mansur v. Drinan*, 3 Dr. & War. 275. (C.)—[Such amendment may be now made under the 103rd G. O. of March 1843, q. v.]

11. It is a matter of course to dismiss with costs a petition of re-hearing presented while the decree remains in minutes.—*Malone v. Geraghty*, 3 Dr. & War. 252; 2 Con. & L. 235. (C.)

12. On a bill of review the decree was held erroneous in directing a sale of the fee to pay a sum which affected only the life estate, and the sale declared to be only for the life estate.—*Talbot v. Minnett*, 6 I. E. R. 83. (E.E.)

13. Amendment of the minutes of a decree in a matter for which the party should have been ready at the hearing, will not, in general, be allowed; but in this case an amendment as to costs was allowed under peculiar circumstances.—*Boyd v. Belton*, 8 I. E. R. 113; 1 Jon. & L. 730. (C.)

14. When decrees are manifestly erroneous, and prejudicial to the rights of a party who was, during all the proceedings, imbecile, the Court will set aside the erroneous decrees and proceedings, upon a re-hearing, the decrees not having been enrolled, although the first decree was pronounced over twenty years, and the second eighteen years, before the petition of re-hearing was presented.

Under the circumstances of the case, and the matter being between the Court and the imbecile person, the Court made an order, without a commission *de lun. inq.* of reference as to his state of mind, and the proper maintenance to be allowed him.—*Knox v. Watters*, 10 I. E. R. 353. (C.)

15. The enrolment of a final decree vacated, a decree *pro confesso* and report thereunder set aside, and the deft. allowed to answer; the bill having been taken *pro confesso* after an interview with the ptf.'s solicitor, at which the deft. swore he was deceived; and the decrees being plainly against his just rights.

Distinction between decrees on default and on the merits as to opening the enrolments of them.—*Murray v. Byrne*, 11 I. E. R. 125. (C.)

16. In a renewal suit against the deft., tenant for life, and his eldest son, the question was, whether denomination X. was included in the lease, or was part of an adjoining farm held by the ptf. for a determinable interest? A decree was made for a renewal, and referring it to the Master to enquire and ascertain the boundaries. The interest in the farm having afterwards expired, the deft. brought an ejectment for X., which the ptf. defended, and obtained a verdict. Deft.'s son having died, and his second son, a minor, become tenant in tail, a new bill was filed against the deft. and this son, which stated the ejectment, and that the question tried in it was identical with that involved in the reference, but not in the decree made in 1844, which accorded with the prayer, only directed the former decree to be carried out between the

parties. In 1845, the son, being of age, barred the entail; and conveyed the fee to the deft. A bill was filed relying on the ejectment, and praying a declaration that it was unnecessary to carry on the reference, and that the former decrees might be in other respects carried out. *Held*, that such relief was a variation of the decree of 1844, which could not be given without re-hearing the cause.

*Semle*—This was a bill of review, which should not have been filed without leave of the Court.—*Chute v. M'Gillicuddy*, 11 I. E. R. 312. (C.)

1. When, by an error, the bill in the statement and prayer set forth the sum due to ptf. as less than he was entitled to under a deed, and the decree followed the prayer, the Court, on motion, altered the decree; deft.'s answer having admitted the larger sum, and none of the parties objecting.—*Molloy v. Burke*, 12 I. E. R. 18. (C.)

2. An appeal from a decree for ptf. having been argued in the H. L., ptf. died before judgment. The cause was revived against his executors by deft., who had appealed. The H. L. (9 Cl. & F. 1) reversed the decree, and dismissed the bill, "with costs of the suit in the Court below." *Held*, that the decree should be in the same words; and, since it contained additional words, giving costs payable by the executors, it was varied on a re-hearing.—*Eyre v. Hollier*, 12 I. E. R. 607. (C.)

3. Lands having been sold under an erroneous decree, the purchaser excepted to the title. To avoid the errors in the decree, a deed of appointment was executed, vesting in adults estates previously in contingency. *Held*, that the Court can cure errors in its own decrees; that a valid appointment would cure the errors; that a vendor has time to validate the title until an order discharging the purchaser has been pronounced; that a deed of appointment is not invalid because executed for the purpose of making title.

That such a deed is invalid if, in consequence of its execution, a pecuniary benefit directly results to the donee of the power.—*Wier v. Chamley*, 4 I. Jur. 1. (C.)

4. An order was made, but the notes of the Registrar omitted to notice the costs, which were subsequently inserted in the decree signed by the Registrar. On motion to have the costs inserted—*Held*, that the Court would not, upon motion, amend an order in the nature of a decree, signed by the Registrar.—*Blackledge v. Barry*, 5 I. Jur. 14. (C.)

5. An order was made under the Trustee Act, 1850, appointing new trustees, and vesting the trust funds in them, and the order not having been got out of the office in time to be stamped, the Court allowed it to be re-issued, as of the date of the application.—*In re Molloy's Trusts*, 7 I. Jur. 50. (R.)

6. Under the Ren. Lease. Conv. Act was filed a petition wherein the petitioner alleged

that no demand under the Tenantry Act had been made on him. The respondent, though served with notice, neglected to appear on the hearing. An order for a f.f. grant was pronounced. On an affidavit by the respondent, showing that the petitioner had suppressed a letter addressed to him by the respondent, several years before and which might be held to be a demand under the Tenantry Act, the Court allowed the petition to be re-heard; and varied its order.

Waiver of such a demand, if the petitioner intends to rely upon it, should be put in issue by the petition; not by an affidavit in reply.—*Ex parte Bull*, 3 I. Jur. N. S. 332. (R.)

7. The 98th G. O. 1843, limiting the time for applying to amend a decree to six days after the decree has been pronounced, will be construed strictly; the only remedy is by petition to re-hear.—*O'Neill v. Innes*, 5 I. Jur. N. S. 208. (C.)

#### XXXIV. 14. *Entry of, Drawing up, Enrolling Decrees.*

*Entry of.* See G. O. (1867), 118, 259.

*Drawing up.* See G. O. (1867), 98, 99, 100, 259.

*Enrolling.* See G. O. (1867), 103, 105-109.

*Vacating Enrolment.* See G. O. (1867), 123.

8. A Court of Equity's decree against an equitable tenant in tail for specific execution of a contract relating to the entailed lands, and founded upon a personal equity against the tenant in tail, does not bind the issue in tail, when the tenant in tail dies without having performed the decree.—*Stoney v. Saunders*, H. & J. 519. (E.E.)

9. A judgment of the H. of Lords will not be made a rule of this Court, without an affidavit verifying the signature of the Clerk of the Parliament.—*Blakeney v. Annesley*, H. & J., App. 47. (E.E.)

10. After enrolment of a decree, on application of a minor deft. who attained age after that enrolment, the Court re-heard a cause respecting a particular matter appearing on the face of the Master's report.—*Jackson v. Welsh*, 1 Dr. & Wal. 255. (C.)

11. An order dismissing a bill cannot be enrolled.

An order of the Court of Ch. dismissing a bill, may, although it cannot be enrolled, be relied upon by answer, as a defence to another bill filed in the Court of Exch. for the same object.—*O'Brien v. Manders*, Fl. & K. 628; 2 I. E. R. 39. (R.)

12. Any party desirous to enrol decree, shall within six months after it is pronounced, leave with the Dep. Keeper of the Rolls a docket, of his solicitor, countersigned by the Lord Chancellor's Secretary, naming the time when he shall attend his Lordship with the decree so deposited; and if his Lordship shall think

it right, and shall sign it, such decree shall thereupon be deemed enrolled; and in case any party is desirous to enrol a decree after six months from the making thereof, he shall obtain an order for that purpose conditional, unless on notice, and absolute without further order, unless cause shown within time therein specified; and pleadings filed in Rolls office shall be deemed as enrolments for the purposes of assignment of errors. 103rd G. O., March 1843; G. O. 68.

The enrolment of a decree will be vacated when it has been irregularly entered, and by surprise on the opposite party.—*Enraght v. Fitzgerald*, 1 Dr. & War. 72. (C.) [S. p. *Lambert v. Hill*, *ibid*, 74; *Heron v. Stokes*, *ibid*, 76; *Henn v. Bradshaw*, *ibid*, 78.] 1 Con. & L. 187; 4 I. E. R. 278. (C.)

1. A decree to account cannot in general be enrolled; but has been when it contained a declaration of the rights of the parties, and merely directed accounts which were consequential upon those rights.—*O'Brien v. Manders*, Fl. & K. 628. (R.)

2. There is no ground for giving greater facility to the opening of enrolments here than in England.—*Enraght v. Fitzgerald*, 4 I. E. R. 276. (C.)

3. Enrolment of a decree obtained contrary to the terms of the Order of 31st of March 1817, opened on that ground. A party moving to set aside proceedings on the ground of irregularity is not bound to specify in his notice the particular irregularity of which he complains.—*Heron v. Stokes*, 4 I. E. R. 277; 1 Dr. & War. 76. (C.)

4. An enrolment obtained after the period specified in the Order of March 1817, without a special order for the purpose, is irregular.

In acting upon that order for the future, the Court will only grant a rule *nisi* for enrolment.—*Henn v. Bradshaw*, 4 I. E. R. 278; 1 Dr. & War. 78; 1 Con. & L. 187. (C.)

5. It is not necessary to present a petition for an order for liberty to enrol a decree, when six months have elapsed from the time when the same was made. The application may be made by motion upon notice in the cause.—*Lord Trimleston v. Farrell*, 1 Jon. & L. 161. (C.)—[See 103rd G. O., Ch.; 95th G. O., E.E.]

6. The Court will not re-hear a cause in which the decree is not made up, but remains in minutes.—*The Commrs. of Ch. Don. & Beg. v. Hunter*, 1 Dr. & War. 544. (C.)

7. Upon a re-hearing, the ptf., if the deft. does not appear, is to make up his decree as at an original hearing.—*M'Cann v. O'Connor*, 2 Dr. & War. 42. (C.)

8. After a decree has been enrolled the Court has not jurisdiction to correct a clerical error upon motion.—*Mannix v. Drinan*, 3 Dr. & War. 276. (C.)

9. An application by a party to vacate his own enrolment of a decree is made to the discretion of the Court, and not of right.

The practice in vacating enrolments is the same here as in England.—*Battersby v. Rockfort*, 9 I. E. R. 499. (C.)

10. The enrolment of a final decree vacated, a decree *pro confesso* and report thereunder set aside; and the deft. allowed to answer, the bill having been taken *pro confesso* after an interview with the ptf.'s solicitor, at which the deft. swore that he was deceived, and the decrees being plainly against his just rights.—*Murray v. Byrne*, 11 I. E. R. 125. (C.)

11. A former decree dismissing a bill if not enrolled and pleaded, is not an absolute bar to another suit for the same demand. If it is relied on by answer and appears not to have been on the merits it is no defence.—*Joly v. Swift*, 11 I. E. R. 410. (C.)

12. A caveat prevents the enrolment of a decree only for twenty-eight days after the caveat is entered.—*Tilly v. Browne*, 13 I. E. R. 245. (C.)

13. The application for leave to enrol a decree pronounced more than six months previously may be either by motion or petition.—*Hamilton v. H.*, 1 I. C. R. 253. (C.)

14. A decree declared a will null and void, and directed an account of by-gone rents, and that the defts. A., and B. his wife, should, within one month after the date of the Master's report, pay to the ptf. the sum which the Master should report to be due on such account. A. died, and the suit was revived against his executor. After A.'s death, and before the revivor, B. filed a further discharge in the Master's office. *Held*, that the decree did not impose a several liability on B.; and the Court refused to order her to pay the sum found due by the report.

A decree, directing a husband and wife to pay a sum of money, imposes a joint liability on them, which may be enforced during the husband's life; but does not impose a several liability on the wife, nor can it be enforced against her after the husband's death.

If a decree directs a sum of money to be paid, ascertained by a report made or to be made, the report is, by reference, to be considered incorporated in the decree; and the report and decree may be enrolled under the 41 G. 3, c. 90, s. 36.—*Rossborough v. Boyse*, 3 I. C. R. 540. (R.) [Reversed: *ibid*, 629. (C.)]

15. When an appeal to the House of Lords has been lodged on a decree against which decrees sought to be enrolled would be evidence, the Court of Ch. will not refuse permission to enrol them, or put under terms the party seeking to do so.—*Spread v. Neue*, 7 I. Jur. N. S. 95. (C.)

16. Although a decree be made by the Court of Appeal in Ch. the application to enrol it

must be made to the Court of Ch., when the appeal is from Ch. Otherwise, when the appeal is not from the Court of Ch.—*Dolphin v. Aylward*, 10 I. Jur. N. S. 165. (C.A.)

1. The application to have an order of the Court of Appeal enrolled must be made to that Court, not to the Court of Ch. when the appeal is not from the Court of Ch.—*In re Sadleir's Estates*, 10 I. C. R. 461. (C.A.)

**XXXIV. 15. Of Suspending, Prosecuting, Enforcing, and Carrying into Execution Decrees.**

a. *Enforcing, Prosecuting, and Carrying into Execution.*

b. *Suspending, and Staying Execution of Decrees.*

**XXXIV. 15. a. Enforcing, Prosecuting, and Carrying into Execution Decrees.**

[See G. O. (1867), 120, 127–129: 30 & 31 Vic., c. 44, s. 147.]

2. *Semble*—The Court, having made an erroneous decree to account, is not bound to continue the error by further proceedings in the suit taken on the return of the Master's report.—*Roberts v. Hughes*, Beat. 417. (C.)

3. When a decree directs all proper parties to execute, and some, who are within the jurisdiction refuse to do so, the Court will not, in the first instance, direct the Master to execute under the 4 & 5 W. 4, c. 78: but will issue an attachment against them. In such a case, a creditor, who has proved his charge under the decree, is as much bound thereby as if he were a party.—*Usher v. Scanlan*, 3 I. E. R. 474; Fl. & K. 243. (R.)

4. An order, dismissing a bill with costs for want of prosecution, is within the 3 & 4 Vic., c. 105, s. 27; and, after taxation of costs, the Court will, without further order, appoint a receiver under that section.—*Madden v. Davis*, Fl. & K. 475. (R.)

5. A decree, not being a personal one, is not within the 26th of Sir Richard Bolton's Rules; and a bill of review and reversal may be filed without the decree being first performed.—*Kelly v. Lennon*, Fl. & K. 90. (R.)

6. Practice as to issuing a *fi. fa.* upon a decree, against the goods of the deft., pursuant to the 3 & 4 Vic., c. 105, ss. 27, 29.—*Ould v. Griffin*, 3 I. E. R. 565. (E.E.)

7. Before an attachment for non-performance of a decree or order of the Court can issue, personal service of the decree or order must be effected.—*Whistler v. Aylward*, in re *Fitton*, Dr. Rep. temp. Sugden, 1. (C.)

8. On a bill to carry into execution a former decree grounded on a question of construction then discussed, the Court will not re-open the question, though of opinion that

the decision was wrong. The original cause must be re-heard.—*Perse v. Daly*, 9 I. E. R. 508. (C.)

9. *Semble*—The 41 G. 3, c. 90, s. 6, which provides for the exemplification of Irish decrees in the Court of Ch. in England, applies to decrees or orders which direct payment of costs generally, as well as to those in which a particular sum is named.—*Stamer v. Nesbitt*, 1 I. Jur. 298. (C.)

10. Bill by A., personal representative to his father, to carry a decree into execution. A. died, and administration *c. t. a.* was granted to his widow, who took out administration *de b. n.* to the father of A. *Held*, that the widow was entitled to carry on the proceedings by bill of revivor.—*Hamilton v. H.*, 2 I. Jur. 153. (C.)

11. Husband seized of lands, in right of his wife, paid into Court the amount of a judgment, sought to be made a charge on the lands. Bill stating that the lands were exonerated from the judgment by deeds, and praying that the trusts of these deeds might be carried into execution, and the amount paid out of other lands. Decree directing an account. Report finding that the sum paid was due to husband and wife. Decree directing payment to husband and wife. Husband alone assigned the decree, and died, leaving the wife surviving. Bill by assignee of the decree to carry it into execution. *Held*, on demurrer for want of equity, that the right to the benefit of the decree survived to the wife.—*Rowland v. McDonnell*, 2 I. Jur. 107. (R.)

12. The owner of the legal fee of an estate was declared by decree of the House of Lords bound to convey that fee upon trusts. Afterwards he took a conveyance of an interest other than that which the decree was intended to affect. *Held*, no answer to those entitled to the benefit of the decree that he could not convey the property without parting with such other interest; but that his duty was to, first, obey the decree, and then set up any other right competent to him.—*Perse v. P.*, 1 I. Jur. N. S. 395. (H.L.); 5 H. of Lords Cas. 682.

13. The Corporation of B., having a power to borrow money to a limited amount, and to purchase lands to improve their town, borrowed money exceeding the amount authorised by their Acts, with which the Lands Cl. Cons. Acts were incorporated. K., being served by the Corporation with notice to treat for the sale of lands in the borough, agreed to sell, and allowed the price to remain unpaid. On an information filed against the Corporation, to which K. was not a party, they were restrained from applying the borough funds to the payment of specified debts, of which the petitioner's claim was one. He obtained against the Corporation a decree for specific performance, and for payment of the sum due to him in respect of his lands. *Held*, that he was not entitled to enforce that decree against chattel property of the Corporation, purchased

1. A demurrer for want of equity will lie to a cross-bill.—*Kirwan v. Gorman*, 9 I. E. R. 154. (R.)

2. *Semble*—A deft., who has answered the original bill, may demur to the whole of the amended bill, if the objection appears for the first time on the amended bill.—*Bayly v. Cumming*, 10 I. E. R. 405. (R.)

3. A notice party to a bill did not enter a common or a special appearance; and a memorandum of service on him was entered. At the hearing, the cause was ordered to stand over to amend by adding parties. The amended bill required the same party to answer. *Held*, that he might demur to it.—*Rowland v. M'Donnell*, 13 I. E. R. 365. (R.)

**XXXVI. 3. Time of Filing Demurrer: Entry and Enrolment of.**

[See 30 & 31 Vic., c. 44, s. 64: G. O. (1867), 46, 55, 62, 64.]

**XXXVI. 4. Amendment of Demurrer.**

4. A demurrer was allowed to be amended, by confining it to so much of a cross-bill (not in aid of a defence at law) as sought a discovery of the names and residences of the witnesses for the ptf. in the original suit, and of the evidence which they could give.—*O'Connor v. Malone*, S. & Sc. 551. (R.)—[See demurrer overruled as too extensive, *ibid*, 516.]

5. An order, made *ex parte* to amend a demurrer after a copy of it had been ordered and signed by the officer, set aside; it being doubtful whether the copy had been actually taken out, and the order being founded on a statement that it had not.—*Keatings v. Garde*, 12 I. E. R. 810. (R.)

**XXXVI. 5. Argument on: setting down Demurrer for and withdrawing it.**

[G. O. (1867), 55.]

**XXXVI. 6. Effect of Allowing or Submitting to Demurrer.**

6. When a demurrer is set down by the ptf. under the 64th Rule, and the deft. does not appear when the cause is called on, the demurrer will be overruled with costs.—*Purcell v. Buckley*, 10 I. E. R. 213. (R.)

**XXXVI. 7. Effect of Overruling Demurrer.**

**XXXVI. 8. Demurrer *ore tenus*.**

[See G. O. (1867), 47.]

7. Demurrer, for a cause assigned, allowed *ore tenus*, without costs.—*Rowland v. M'Donnell*, 13 I. E. R. 365. (R.)

**XXXVII. ELECTION TO SUE AT LAW OR IN EQUITY.**

8. The side-bar rule to elect applies only when the proceedings at law appear upon the

face of the pleadings. When the ptf. commenced an action at law, in which he could obtain part only of the relief prayed by the bill, the Court allowed him to proceed at law upon the terms that the bill, so far as it related to the relief sought at law, should be dismissed at the hearing with costs.—*Donnellan v. Wallace*, Fl. & K. 511. (R.)

9. The proper course to compel the ptf. to elect between a suit in Equity and one at Law, is, by entering a side-bar rule, and not by application to the Court.

The deft. is at liberty to enter the rule at any time after the filing of his answer, and by it to call on the ptf. to elect within eight days after service, notwithstanding that the ptf. has six weeks to except to the answer.—*Hollier v. Hedges*, 9 I. E. R. 37. (R.)

10. Any documents which could be used at Law as admissions to prove an agreement pleaded, may be used in Equity for the same purpose, though not noticed in the bill; but subject to enquiry, if deft. be taken by surprise. Such a method of proof may, however, affect the costs.—*Crosbie v. Thompson*, 11 I. E. R. 404. (C.)

11. If a ptf. proceed at Law and in Equity, the deft. cannot first give an evasive answer, and immediately enter a side-bar rule to elect. The rule is at the peril of the deft.; and if, upon exception, the answer be found not full, the rule is ineffectual.—*Read v. D. and D. Railway Co.*, 1 I. Jur. 19. (R.)

12. The rule, in the 3 & 4 Vic., c. 107, s. 71, respecting election, still prevails. The creditor need not elect until he has an opportunity of seeing which fund is most productive.—*In re Browne*, 9 I. C. R. 271. (R.)

**ENLARGEMENT OF TIME. See MORTGAGE, V.—TIME.**

**XXXVIII. EVIDENCE. See BANKRUPTCY, VI., X—MARRIAGE, II—PRACTICE, APPEAL—TITHES, VI., X—WILL, X.**

[See 30 & 31 Vic., c. 44, ss. 68, 71, 73, 74–84, 87–109, 128, 161: G. O. (1867), 16, 56, 61, 92–95, 142, 152–176, 216–218, 220, 225, 226, 233, 276, 278.]

1. *Generally.*

2. *What is Sufficient.*

3. *Of what Facts generally Evidence is necessary or admissible—Statements in Pleadings. (See also PLEADING, II. 2. a.—PRESUMPTION.)*

a. *Generally.*

b. *Declarations, Admissions, &c.*

4. *Parol Evidence: when admitted.*

5. *Onus Probandi.*

6. *Entering Evidence as Read.*

7. *Further Evidence: when admitted after Publication, on Appeal or Re-hearing, &c.*

8. *Before Master.*

9. *At Law.*

10. *Exhibits.*

11. *Affidavits and Affirmations.*

[The cases in the Ir. Ch. Rep. refer chiefly to the practice under the Court of Ch. Reg. Ir. Act 1850. See also 30 & 31 Vic., c. 44.]

- a. *Generally: their Incidents.*
- b. *Filing and Swearing them.*
- c. *Their Form.*
- d. *Their Effect respecting Information, Belief, &c.*
- e. *To support Injunction Motion.*
- f. *To support Interpleader Bills.*
- g. *To support Motions and Petitions generally.*
- h. *On Application for Leave to Sue in Forma Pauperis.*
- i. *Of Service.*
- j. *On Application for Leave to Substitute Service.*
- k. *On obtaining a Writ of Ne Exeat Regno.*
- l. *To support Application for Commission to Examine Witnesses.*
- m. *When necessary in other Matters.*
- n. *When Read against Answer.*
- o. *When to be Received and Read as Evidence, generally.*
- p. *In Reply.*
- q. *To Verify Petition, &c.*
- r. *On Motion for Decree.*
- s. *Notice of Using.*

12. *Answer.*

[See also 30 & 31 Vic., c. 44.]

- a. *When Answer may be Read as Evidence.*
- b. *What Evidence is good against Answer.*
- c. *Effect of Reading Answer.*

13. *On Bills generally, and when taken Pro Confesso.*

14. *Taken on Bills to Perpetuate.*

15. *Copies.*

16. *Taken in other Courts.*

17. *Decisions of other Courts.*

18. *Evidence of one Defendant read by or against another.*

19. *Decree in former cause.*

20. *Taken in another cause or matter.*

21. *Deeds; Proof of; other Documentary Evidence.*

- a. *Generally.*
- b. *Secondary Evidence.*
- c. *Registers and other Records: Books, Entries, Letters, &c.*

22. *When Admitted to Expound Deeds.*

23. *Of Handwriting.*

24. *In Tihe Causes.*

25. *To prove Will.*

26. *When Admitted to Expound Wills.*

27. *Witness.*

- a. *Generally: his Rights, Duties, and Liabilities: Subpœna ad Testificandum.*
- b. *Competency of.*
- c. *Examination touching his Credit.*
- d. *Demurrers to Interrogatories: who is Examinable, and respecting what Subjects.*

e. *Attesting Witness.*

28. *Examination.*

- a. *Generally, and under the Court of Ch. Reg. Ireland Act 1850, and G. O. of 1859.*
- b. *When and how taken.*
- c. *Examination viva voce.*
- d. *Before the Master.*
- e. *Before Examiner.*
- f. *Examination de bene esse.*
- g. *Pro interesse suo.*
- h. *Cross-examination.*
- i. *Further, or Re-examination.*
- j. *Of Parties to the Cause.*
- k. *Of Defendant on Interrogatories.*

l. *Commission to Examine.*

[6 & 7 Vic., c. 82—30 & 31 Vic., c. 44.]

1. *General Orders respecting.*
2. *Their Effect.*
3. *When granted: how obtained.*
4. *Second Commission.*
5. *How Discharged or Abated.*
6. *Execution of; of the Commissioners.*
7. *Return of*
8. *When Lost.*

29. *Depositions.*

- a. *Generally.*
- b. *Taken de bene esse.*
- c. *Amendment of.*
- d. *Suppression of.*

30. *Publication.*

- a. *Generally.*
- b. *Enlarging Publication.*

31. *Shorthand Report of Oral Testimony.*

XXXVIII. 1. *Evidence generally.*

[Statutes: Amending the Law of Evidence: 3 & 4 Vic., c. 92; 6 & 7 Vic., c. 85; 14 & 15 Vic., c. 99; 16 & 17 Vic., c. 83; 20 & 21 Vic., c. 62, s. 14.]

As to Admission of Documents: 8 & 9 Vic., c. 113; 14 & 15 Vic., c. 99.

As to Commissions to Examine Witnesses: 6 & 7 Vic., c. 82.

Amending the Law as to Evidence on Proceedings before Foreign Tribunals: 19 & 20 Vic., c. 113; 22 Vic., c. 20.

Making parties competent as witnesses: 14 & 15 Vic., c. 99; 15 & 16 Vic., c. 27; 16 & 17 Vic., cc. 20, 83; 20 & 21 Vic., c. 62, s. 14.]

1. Deft., having examined ptf. on personal interrogatories, declined to use the examination. *Held*, that ptf. could not resort to it.—*Cooper v. Madill*, *Hayes*, 578. (E.E.)

2. A discovery of evidence is not confined to a disclosure of such facts only as will tend to establish affirmatively the case of a ptf. in possession.—*O'Connor v. Malone*, 8 & Sc. 516. (R.)—[See s. c., *ibid*, 551. (R.)]

3. If a party uses a document as evidence in a Court of Justice, the whole of it will be



evidence against him on a future occasion.—*Hamilton v. Patten*, 1 I. E. R. 341. (C.)

1. An admission, which goes to the gist of the case, must be put in issue by the pleadings, otherwise, evidence thereof cannot be received.—*Earl of Donoughmore v. Cataneo*, Jon. & C. 250. (C.)

2. In a suit by children to enforce payment of their portions, their legitimacy was questioned by the next tenant for life, a deft. *Held*, that a marriage *de facto* having been once established, it lay on the party impeaching the marriage to show that it was illegal and void.

Sufficient evidence of a marriage *de facto* having been submitted to the Court—*Held*, that it was competent to decide the question of marriage for the purposes of the suit, without directing an issue.—*Piers v. Tuile*, 1 Dr. & Wal. 279. (C.)

3. *Quære*—Whether the evidence of a witness should be read, who had deposed to ptf.'s admission of his having abandoned the contract—the fact of that abandonment, but not the admission itself, having been put in issue by the answer?—*Garrett v. Earl of Bessborough*, 2 I. E. R. 180; 2 Dr. & Wal. 441. (C.)

4. In a bill to foreclose and sell, ptf. set forth so much of a mortgage deed as showed it to be in the nature of a Welsh mortgage, and at the hearing his counsel sought to read in aid of the bill the deed, which contained an express trust for sale. *Held*, that it should not be read.—*O'Connell v. Cummins*, 2 I. E. R. 251. (R.)

5. Evidence cannot be received of admissions made by a party, unless they are properly put in issue by the pleadings, so that he may have an opportunity of contradicting them.—*Austin v. Chambers*, 6 Cl. & F. 1.—[See 3 Dr. & War. 178; Dr. Rep. temp. Sug. 85.]

6. An admission in deft.'s answer; that his solicitor wrote a letter "to some such effect as that in bill stated; but for certainty as to the contents thereof, deft. begs leave to refer thereto, when produced and proved;" does not authorise ptf. to read the passage referred to in the bill, to show what were the contents of that letter.—*Kent v. Roberts*, 3 I. E. R. 279. (E.E.)

7. An objection to the ptf.'s title not noticed in the answer, but appearing from the ptf.'s own evidence, relied on at the hearing.—*O'Connell v. O'Callaghan*, 7 I. E. R. 596. (C.)

8. A deft. cannot read as against the ptf., depositions taken on behalf of a co-deft.—*Roddy v. Williams*, 3 Jon. & L. 1. (C.)

9. Payment of a small annual sum, inadequate to the value of the demised premises, for a number of years, is not *per se* evidence from which a tenancy from year to year can be inferred.—*Reynolds v. R.*, 12 I. E. R. 172. (R.)

10. Any document or evidence, that has been before the Court below, may, on appeal to the H. L., be properly brought under the notice of the House, but no others.—*Geraghty v. Malone*, 1 H. L. Cas. 89.

11. When a will purported to have been attested in presence of three witnesses, two of whom since died, and the third asserted that he had not signed it in presence of the other two, but it appearing from the affidavits that it probably was duly attested in their presence, the presumption is "*omnia rite esse acta*."—*In the Goods of Gibbons*, 3 I. Jur. N. S. 303. (P.)

12. An Electric Telegraph Company cannot refuse to produce messages, because they are privileged communications, if they relate to the affairs of the bankrupt. Any privilege attaching to such messages is the privilege of the sender; not of the company.—*In re Tobyn*, 7 I. C. R. 81. (B.)

13. Counsel's opinion was admitted as evidence that a disentailing deed was executed for the purpose of a mortgage, the lender's counsel having required the mortgage deed to be enrolled, but the disentailing deed having been executed in lieu of the enrolment.—*Power v. P.*, 7 I. C. R. 354. (R.)—[See s. c., 9 I. C. R. 178; Dr. Rep. temp. Nap. 268; 3 I. Jur. N. S. 369. (C.A.)]

14. A will propounded, and impeached only by a plea alleging a later will, cannot be decreed for unless some evidence of execution be given; an affidavit will suffice.—*Whitney v. W.*, 7 I. Jur. N. S. 392. (P.)

15. Unattested wills dated before the 1 Vic., c. 26, being impeached, cannot be established by evidence of the testator's handwriting only. Additional evidence, connecting the will somehow with the testator, must be supplied.—*Little v. Comyn*, 7 I. Jur. N. S. 413. (P.)

16. Under the 20 & 21 Vic., c. 79, s. 68, a will, or the contents of a lost will, may be proved by a single witness.—*Daly v. Burke*, 8 I. Jur. N. S. 73. (P.)

17. Parties referred to a Court of Law for a writ of *habeas corpus* to bring up a prisoner to give evidence in the Court of Probate.—*Ternan v. T.*, 8 I. Jur. N. S. 135. (P.)

18. Deft. on consent withdrew his pleas. The Court then made an order under the 20 & 21 Vic., c. 79, s. 65, in the nature of a decree, declaring the validity of the will proved, and without requiring further proof.—*Berry v. B.*, 8 I. Jur. N. S. 217. (P.)

19. Confidential letters, written before suit commenced, by one of the parties, to his solicitor, in reference to the subject matter in dispute, are privileged; and cannot be given in evidence at the hearing by the opposite party.—*Phibbs v. O'Donel*, 8 I. Jur. N. S. 226. (C.)

1. One of the attesting witnesses to a will, having gone to America, had not been heard of for seven years. The other, being in England, refused to attend to be examined, unless on receipt of sixty guineas. The will was established, on evidence of its due execution given by a person who was present thereat; and upon evidence of the handwriting of the testatrix and of the two witnesses given by others.

A legatee under a will disputed the due execution of a later will of which the watermark showed that it had been antedated. He was allowed his costs.—*Cowan v. Rankin*, 10 I. Jur. N. S. 38. (P.)

2. A testator produced an executed will to another person to whom he declared its contents. That production and declaration, held, admissible evidence to prove the will's contents.

*Semble*—Those declarations would not have been evidence if the will had not been at the same time produced, and shown to such person.—*Hanks v. Tottenham*, 10 I. Jur. N. S. 277. (P.)

3. *Quere*—Whether proceedings for service as heir in Scotland, in which the ancestor's domicile is stated, are admissible as evidence thereof?—*Lockhart's Trust; ex parte Lockhart*, 11 I. Jur. N. S. 245. (R.)

4. A will prepared by a solicitor from instructions of the testator, the contents being deposed to by him, was allowed to be proved, though the original was lost, [having been thrown out, as was supposed, by the testator's widow in a bed wherein she had concealed it.

To show that the will was an equitable one, the Court required evidence of the provisions made by settlement for next-of-kin not substantially provided for by the will.—*M'Cracken v. M'C.*, 11 I. Jur. N. S. 380. (P.)

#### XXXVIII. 2. What is sufficient Evidence.

5. When lands are decreed to be sold subject to an annuity, it is conclusive evidence that the annuity is prior to the claims of all claimants under the decree. A report, on a reference to ascertain priorities, found that the arrears of the annuity were posterior to some of those claims. Held, erroneous, and that it should be varied accordingly.—*Sparrow v. Cooper*, 1 Jones, 72. (E.E.)

6. Whether evidence of conversations with the parties, or with those under whom they claim, which are not put in issue specifically by the pleadings, will be received, is a question to be decided according to the circumstances of each case. There is not any inflexible rule upon the subject.—*Incorporated Society v. Rose*, 3 I. E. R. 257. (C.)

7. An *inspeeximus* of a grant by an archbishop, contained in a grant of confirmation by a subsequent archbishop, which was enrolled, was produced from the Rolls Record

Office. Held, good secondary evidence.—*Att.-Gen. v. Corp. of Cashel*, 3 Dr. & War. 294; 2 Con. & L. 1. (C.)

8. A witness proved a letter to have been duly posted and properly directed. The receipt of it was positively denied in the answer. The copy tendered in evidence had a defective direction at the foot of it. *Quere*—How far admissible in evidence?—*Sheridan v. Joyce*, 7 I. E. R. 115; 1 Jon. & L. 491. (C.)

9. The entry of payment of the King's silver is sufficient evidence of a fine having been duly levied; the fine being complete on such payment.—*Marjoribanks v. Hovenden*, 8 I. E. R. 317. (C.)

10. Ptf., claiming as assignee of F., sought an account of the real and personal estate of F., to which he was entitled under his father's will; and alleged by his bill that F., trading in Australia, was duly adjudged an insolvent, according to the meaning and effect of the laws there with respect to insolvent debtors; that all his estate, &c., there and in this kingdom thereupon became duly vested in H., and afterwards became duly vested in ptf. "in manner as appears by the petition of ptf. to C., Chief Justice; the fiat of C., the adjudication and vesting order signed by C., and the other orders in the matter, to which the ptf. refers," &c. F. was a minor at the time of the insolvency. His parents had previously resided and died in this country. Held, on demurrer, that the ptf.'s title, as assignee, was sufficiently stated, the profert of the proceedings in the foreign Insolvent Court being sufficient proof of the preceding allegations that F. was duly adjudged, &c.—*Stephens v. M'Farland*, 8 I. E. R. 444. (R.)

11. The Poor-law valuation is evidence, as a public document, of the value of land comprised in it.

A document not in issue by the bill, and a motion for the introduction of which by amendment has been refused, cannot be used as the hearing.—*Swift v. M'Tiernan*, 11 I. E. R. 602. (C.)

12. The Poor-law valuation is, as a public document, evidence of the value of the lands comprised in it.—*Welland v. Lord Middleton*, 11 I. E. R. 603. (C.)

13. The contributions of sub-tenants, under leases with *t. q.* covenants, to renewal fines, are to be calculated according to the proportion which the annual value of the lands comprised in each lease bears to the annual value of the entire lands comprised in the original lease at the time of the renewal.

Reference cannot be had to contemporaneous leases to ascertain how such contributions have been regulated on the estate.—*Molony v. Scollard*, 12 I. E. R. 93. (R.)

14. In a decree for an account of old standing against an executor, a direction was inserted allowing him to discharge himself by affidavit

for items though exceeding forty shillings.—*Dooner v. D.*, 12 I. E. R. 580. (C.)

1. A reference having been directed to enquire and report what was due for rent, fines, &c., and whether interest had been customarily paid on such fines, the report found that no evidence had been laid before the Master with respect to the interest having been customarily paid or not. The Master found a sum due for interest. The report having been excepted to on this ground was confirmed at the Rolls. On appeal—*Held*, that a lease set forth in the schedule to the report, showing that interest was payable, was evidence to sustain the finding; and that the M. R. was right in overruling the exception.—*Brabazon v. Lord Lucan*, 1 I. Jur. 116; on appeal, 2 I. Jur. 57. (C.)

2. By marriage articles of 1767, it was agreed that £1000, secured by bond of A., the intended husband, on which judgment was entered, should be divided among the younger children of the marriage. By deed of 1795, A. conveyed the lands of K., whereof he was seized in fee, to his own use, for life; remainder, subject to £500 secured by a term for his younger children, to J., his second son, for life; remainder to his third, &c., sons in tail. In 1798 A., by will, without noticing the deed of 1795, devised K., subject to £1000 for his younger children, to J. After A.'s death, bills were filed in 1803 and 1818, on behalf of some of the younger children, to raise the £2000 secured by the articles and the will; but not noticing or relying on the deed, which was afterwards put in issue by one of the answers. In 1818, G., the fourth son, entitled to an estate tail in remainder under the deed, became insolvent. He and his assignee were parties to the latter suit, but not in respect of that estate. A decree for sale of the fee was pronounced for the sum due under the articles, and for part of that due under the deed. The abstract of title stated C.'s insolvency; and that his assignee's heir would join in the conveyance. The assignment under the insolvency had been lost, but the deed of 1795 was referred to in the schedule. *Held*, that the abstract and schedule afforded sufficient evidence of an actual assignment of the estate tail in remainder under the Insolvent Act then in force.—*Keogh v. K.*, 13 I. E. R. 284. (R.)

3. A. agreed to mortgage premises by depositing title deeds, with which he delivered a letter, setting out the premises intended to be mortgaged, and a rental which included the rents of premises not mentioned in the letter, and of which the title deeds had not been delivered. *Held*, that the rental was not sufficient evidence of the parties' intention to include the latter premises.—*Stephenson v. Getty*, 4 I. Jur. 334. (C.)

4. By marriage settlement lands were conveyed to A. and B., and the survivor of them and his heirs, on trust for the intended husband for life, and after his death, in trust "to con-

vey at the request of the eldest son of the marriage" or of certain other persons. A. and B., having died, and a petition having been filed to carry into effect the trusts of the settlement—*Held*, that before giving secondary evidence of the settlement, proof should be given of an ineffectual search for it having been made among the papers of both trustees; and that proof of such search among the papers of the survivor was insufficient.—*Abbott v. Geraghty*, 6 I. Jur. 49. (C.)

5. In an action brought by D., claiming to be lessee of a several fishery in a public navigable river, against S., for disturbing D. in his fishery, S. pleaded not guilty; and that he was himself seized of a several fishery in the *locus in quo*. A verdict for D. was set aside upon exceptions; but eventually S. submitted to judgment against him.

*Semble*—That the verdict and depositions of the witnesses in that action were admissible in favour of a subsequent lessee of the fishery claiming under the lessor of D., against persons claiming to be entitled to fish, as of common right, in the *locus in quo*, it being a public navigable river, or arm of the sea. *Held*, that the admission of the verdict and depositions in evidence was not a ground for setting aside a verdict on an issue directed from Ch. to try whether the lessor of D. had the exclusive right which he claimed.

In a similar action, brought by a subsequent lessee of the fishery, the deft. pleaded a plea relying on the general public right. *Held*, that the verdict and depositions of witnesses in the former case were admissible as evidence of reputation.

An ancient grant of a several fishery in L., to I., was ambiguous with respect to the local limits of the fishery granted. On the trial of an issue "whether I. had an exclusive right of fishing in L., or any and what parts thereof," the deft. admitted I.'s right to all of the fishery of L., southward of C. I., however, gave evidence of the enjoyment of the fishery of L., southward of C. *Held*, that the Judge was not bound to have told the jury that evidence of enjoyment of the fishery by I., to the southward of C., was not evidence of a right to the fishery to the northward of C.—*Allen v. Donnelly*, 5 I. C. R. 452; 1 I. Jur. N. S. 165. (C.)

6. A deaf and dumb testator's will must be established by the clearest evidence of his perfect capacity, due instructions for, and proper execution of it.

When a deft., the heir-at-law, is of unsound mind, though not so found by inquisition, and no appearance has been had for him, though the citation and notice of hearing have, pursuant to order, been served on his mother and on the proprietor of the asylum, the Court will, on a hearing to prove the will, require the evidence to be taken down by a shorthand writer, and to be verified by him; his copy of the verified evidence to be lodged in the Registry, together with all documents given in evidence, to be preserved there, and not given out.

*Semble*—The Court has power to bind the rights of insane persons, though not so found by inquisition.—*Massey v. Pennefather*, 7 I. Jur. N. S. 268. (P.)

1. Degree of proof necessary to establish a will, when the case is suspicious.—*Moloney v. Casey*, 8 I. Jur. N. S. 156. (P.)

2. An affirmation, taken under the 3 & 4 W. 4, c. 82, stated that affirmant was a member of a religious sect called "Separatists," but did not in terms follow the form of affirmation required by the Act. *Held*, that it must be assumed to have been properly made.—*Wolsley v. Worthington*, 14 I. C. R. 369. (C. A.)—[Affirming Rolls decision, 13 I. C. R. 841.]

3. A. and B., brothers, were entitled as tenants in common to mill premises worth £7500, one-third only of which belonged to B., who owed A. many thousands of pounds.

B., by deed, assigned his share to A., in consideration of £50, in cash, and the release of a debt of £300. By deed, dated one month later, A., in consideration of love and affection to B., his wife and children, assigned all the mill premises in trust to pay an annuity of £150 a-year, for the benefit of B. and his wife and children. These deeds were prepared by the trustee, as solicitor, who deposed that they were one transaction, and that part of the consideration for the first deed (executed only two days before the date of the second) was the annuity granted by the second deed.

*Semble*—The evidence was not sufficient to prove a valuable consideration for the second deed.

To support, against creditors, a deed voluntary on its face, the proof of valuable consideration must be clear, and free from suspicion.—*Graham v. O'Keefe*, 16 I. C. R. 1. (R.)

4. In a possessory suit the petitioner is entitled to an injunction on proof of possession uninterrupted, save by the act complained of, during three years preceding the date of filing the petition.

A possessory petition should not rely on any title other than the triennial possession.

A possessory petition cannot be amended.

In a possessory suit issues may be directed.

The Crown, by letters patent of 19 Jac. 1, and 13 Car. 2, granted a several fishery within certain limits of the river Bann, which, within those limits, is divided into two branches by a channel, called the New Cut. The Court directed an issue. Upon the trial, the verdict found that the New Cut was, at the time of the trial, part of the river; but that there was no evidence to show whether it existed at the date of the grant, or whether it was a natural or an artificial channel. *Held*, that the letters patent did not give the right to a several fishery in the New Cut, unless it was, at the date of the grant, a branch of the river.—*O'Neill v. M'Erlaine*, 16 I. C. R. 280. (R.)

5. The Court refused to decree the cancellation of a bond, for which, at the time of its execution, no money passed, on the petitioner's sole evidence against the respondent's answering affidavit, stating that the bond was the petitioner's free and voluntary act, done for past services, and advances of money.—*Wyse v. Lambert*, 16 I. C. R. 378. (R.)

6. An incumbrancer on the final schedule noticed a prior incumbrancer, claiming under a judgment mortgage, that, on the final hearing of the schedule, he would be required to produce proof of his judgment mortgage, and that it was duly registered, so as to be a charge upon the lands.

The judgment mortgagee produced a certified copy of the affidavit made to register the judgment as a mortgage. The affidavit was right in point of form. No objection was filed. *Held*, sufficient proof of the validity of the judgment mortgage.—*In re Flood's Estate*, 17 I. C. R. 116. (C.A.)

7. *Semble*—A Scotch Advocate's opinion on a question of Scotch law, is not receivable in evidence unless expressed in the form of an affidavit, and in general terms, not pointed at the circumstances of the particular case.—*Lockhart's Trusts, ex parte Lockhart*, 11 I. Jur. N. S. 245. (R.)

XXXVIII. 3. *Of what Facts generally Evidence is Admissible or Necessary: Statements in Pleadings.*

[See also PLEADING, II. 2. a.—PRESUMPTION.]

a. Generally.

b. Declarations, Admissions, &c.

XXXVIII. 3. a. *Of what Facts generally Evidence is Necessary or Admissible: Statements in Pleadings.*

[See also PLEADING, II. 2. a.—PRESUMPTION.]

8. *Semble*—That the general rule of the Courts of Equity, that nothing is admissible in evidence which is not put in issue by the pleadings, ought not to be considered as a stringent unyielding rule, but ought to be modified according to the circumstances of each case.

*Quere*—Is the admission of a party to the suit admissible in evidence when the fact of which it is an admission is put in issue, but not the admission itself?—*Garrett v. The Earl of Bessborough*, 2 Dr. & Wal. 457. (C.)

9. *Semble*—It is not necessary for a deft. to put forward by his answer all the legal and equitable points of his defence; it is sufficient if he state fully the facts upon which they may be raised.—*Steele v. Mitchell*, 2 Dr. & Wal. 568; 8 I. E. R. 11. (C.)

10. *Semble*—The statement in a bill, that one co-ptf. had purchased in trust for another, without any evidence thereof—*Held*, sufficient.

Thus, at the hearing, the bill was not open to objection on the ground of misjoinder.—

*Butler v. Lord Portarlington*, 4 I. E. R. 1; 1 Dr. & War. 20; 1 Con. & L. 1. (C.)

1. When a deft. by answer insists that he is a purchaser for value, without notice, proof of payment of the purchase-money is an essential part of his defence. If he fails to prove this, the Court will not allow the cause to stand over to enable him to do so.—*Moloney v. Kernan*, 2 Dr. & War. 31. (C.)

2. When the bill prayed an account of what, without wilful default, might have been received, and the case was opened as if a simple account only was sought, evidence of wilful default was admitted, although the general rule is, that evidence cannot be entered to support a case which has not been opened.—*Crauford v. O'Sullivan*, 2 Con. & L. 410. (C.)

3. An objection to the ptf.'s title, not noticed in the answer, but appearing from the ptf.'s own evidence, relied on at the hearing.—*O'Connell v. O'Callaghan*, 7 I. E. R. 596. (C.)

4. In a suit to carry into execution the trusts of a will, a receiver will not be appointed over the lands in the possession of the heir-at-law, unless he admits the will; or until it is proved against him.—*Dobbin v. Adams*, 8 I. E. R. 157. (R.)

5. An agreement to reduce rent presumed from the receipt of the reduced rent, which was consistent with the recital in a settlement, though during the greater part of the period a tenant for life received the rent; and the reduction was held to extend to the entire interest, which was an estate for lives and a term of years in remainder, and not to be confined to the estate for lives.—*Enraght v. Haughton*, 8 I. E. R. 274. (C.)

6. An issue was directed by this Court to try whether R. was a lunatic at the time of the execution of certain instruments? At the trial, a memorial of a deed, executed by R. was produced, as evidence of the acts of R. The deed itself was not produced, nor was the non-production of it accounted for. Held, on a motion for a new trial, that the memorial was properly received in evidence.

R., after the date of the deeds, was found a lunatic under a commission. Orders and a report in the lunacy matter, containing recitals and statements which were not evidence, and might influence the jury in finding their verdict, were sent to the jury, the Judge informing them that the recitals and statements were not evidence of the facts contained therein, and cautioning them not to regard them. The Court refused a new trial on that ground.—*Creagh v. Blood*, 8 I. E. R. 434; 2 Jon. & L. 509. (C.)

7. When a marriage settlement made by the husband's father was defective on its face, in omitting any limitation after the life estate of the husband and a jointure to the wife, whereby the reversion would extend to X., the elder brother of the husband—a correction

of the settlement was refused as against a judgment creditor of X., though sought as soon as the omission was discovered, the evidence of the intended limitations consisting of a letter and memorandum from the lady's father, and conversations with the settlor after the date of the settlement, the draft being lost, and the solicitor who prepared it being unable to account for the omission.—*Milner v. M.*, 8 I. E. R. 488. (C.)

8. A Court cannot, without proof, presume an agreement on the ground that, if there was not an agreement, there was fraud.—*Siree v. Kirwan*, 9 Cl. & F. 716.

9. The answer admitted that a document was of the purport stated in the bill, but referred to it when produced and proved. Held, that ptf. was not entitled to read from the bill the statement of the contents of the document.—*Douling v. Legh*, 9 I. E. R. 413; 3 Jon. & L. 716. (C.)

10. When the fact of bankruptcy is not put in issue by the bill, evidence thereof is not admissible at the hearing.—*Archbold v. Comrs. of Ch. D. & B.*, 2 H. L. Cas. 440.—[Rev. 11 I. E. R. 187.]

11. The bill in an administration suit erroneously stated, in respect to dates and other particulars, agreements for leases to the testator, V. His heir-at-law, in his answer, admitted the agreements to be of the purport stated in the bill, but for greater certainty referred to the original agreements when produced. He died. The suit was revived as against his son and heir-at-law, T., a minor, who, in his answer (by his guardian) to the original and revived bill, also admitted the agreements to be of the nature set forth. A decree directed the Master to take an account of the real and personal estate of V., and to state whether the premises agreed to be demised to him formed part of his real or personal assets. The original agreements were not produced before the Master; but T., in his charge, filed in the Master's office, made an admission similar to that contained in his answer. The Master by his report found that the premises formed part of V.'s personal estate. To that report T. filed exceptions.

After the cause was set down for hearing, on the report, exceptions, and further directions, T.'s solicitor, who had been solicitor for T.'s father, for the first time obtained copies of the agreements. Counsel for T. mentioned at the hearing that the agreements differed from the description given of them in the bill, and tended to show that V. took a freehold estate in the premises. Other parties in the cause objected to the admission of the original agreements in evidence in opposition to the previous admission in the pleadings. The Court then yielded to that objection, and overruled the exceptions; but upon a special motion being afterwards made—Held, that the Master should be directed to review his report, and that T. should be permitted to file a

supplemental charge in the office, putting in issue the original agreements; but should pay the costs of the motion, and the costs arising on the new reference to the Master.

That, before the decree to account, T. would have been permitted by supplemental answer to rectify the erroneous admissions; but that, after the decree, leave to file a supplemental answer could not be granted.—*Carbery v. Cor*, 2 I. C. R. 377; 2 I. Jur. 25. (C.)

1. Z. upon his marriage settled a sum upon the issue of the marriage, reserving a life use. There was issue A., B., C., D., and E. A. went abroad, and never was heard of after the 20th Oct. 1817. Z. by will left all his personal property to E., and died in 1824. E. then claimed two-fifths of the fund, that is, his own share and all A.'s share, which he claimed through Z. B., C., and D. claimed each one-fourth of the entire fund, that is, their own shares and a distributive portion of A.'s, the seven years from the time at which A. was last heard of, not having expired till after Z.'s death.

Upon petition for distribution of the fund, one-fifth was ordered to be paid to each of the four children. The remaining one-fifth share was left in Court until evidence could be had of the period of death.—*Gore v. G.*, 5 I. Jur. 202. (R.)

2. V., by lease of July 1789, demised lands to P., for three lives. The lease contained the following covenant:—"And I, A. V., do bind myself, my heirs and assigns, on the decease of any of the above mentioned persons, to put in another person's life in said lease, the said P., his heirs or assigns, giving notice in twelve months of the decease of said life." The lease became vested in M., the last surviving c. q. vie. M. died in Feb. 1856, leaving the petitioner, then resident in America, and who had no communication with his family, his eldest son and heir-at-law. The petitioner's younger brother claimed as heir-at-law of M.; and, having nominated a life, filed a cause petition for specific performance of the above covenant. That petition was dismissed, the present petitioner being proved to be alive. The present petition was filed for the same purpose in July 1857. *Held*, that there were no equitable grounds for granting relief against the omission of the petitioner to give notice of the decease of the life within twelve months.

*Semble*—That the covenant to renew did not apply to the decease of the last surviving c. q. vie.—*Murphy v. Jackson*, 7 I. C. R. 502; 3 I. Jur. N. S. 288. (C.A.)—[*Affg.* 7 I. C. R. 189; 3 I. Jur. N. S. 132. (R.)]

3. A cause petition, by way of information and bill, should state, and proof should be given of, the individual interest of the person named as relator.—*The Attorney-General v. Le Hunte*, 8 I. C. R. 437. (R.)

4. A., seized in tail of K., and other lands, suffered a recovery of them in 1834; and in 1832, devised them. In 1836, A. borrowed money on a mortgage of K., and on a collateral

judgment. On that occasion a disentailing deed of all the lands was executed, and enrolled, by which A. conveyed all the lands to the use of himself and his heirs. *Held*, that the deed was a total revocation of the will.

On the occasion of the mortgage, the lender's counsel had objected to the recovery which had been suffered of K., and had advised that the mortgage should be enrolled. *Quære*—whether that opinion was admissible as evidence?—*Power v. P.*, 9 I. C. R. 178. (C.A.) 3 I. Jur. N. S. 379; *Dr. Rep. temp. Napier* 200. [Affirming *Rolls* decision: 7 I. C. R. 354.]

5. When, after a decree, material evidence is discovered, and a supplemental petition, in the nature of a bill of review, is filed to vary the decree, the supplemental petition ought to be set down to come on before the Court of Appeal along with the hearing of the appeal from the original decree.—*Barton v. Sampson*, 10 I. C. R. 161. (C.A.)

6. A petitioner is not entitled to read from his petition the statement of a document, to a copy of which the petition refers, although no affidavit has been filed by the respondent.—*Talbot v. Hamilton*, 14 I. C. R. 375. (C.)

#### XXXVIII. 3. b. *Declarations, Admissions, &c.*

7. The only evidence of notice (to B. a subsequent mortgagee) of a settlement was an affidavit by E., that he had apprised him thereof. The bill charged that, before the execution of the mortgage, B. was informed by the mortgagors of that settlement. *Held*, that the fact of notice was sufficiently put in issue to admit this evidence.—*Stuart v. Ferguson*, *Hayes*, 452. (E.E.)

8. Conversations in the nature of admissions cannot be read in evidence, unless they have been put distinctly in issue.—*Browne v. Chambers*, *Hayes*, 597. (E.E.)

9. *Quære*—Whether the evidence of a witness should be read, who deposed to an admission by ptf. that he had abandoned the contract; the fact of such abandonment, but not the admission itself, having been put in issue by the answer.

The principles upon which the Court acts respecting evidence of admissions considered.—*Garrett v. Earl of Bessborough*, 2 I. E. R. 180; 2 Dr. & Wal. 441. (C.)

10. An admission which goes to the gist of the case, must be put in issue by the pleadings, otherwise evidence of it cannot be received.—*Earl of Donoughmore v. Cataneo*, *Jon. & Ca.* 250. (E.E.)

11. Evidence cannot be received of admissions made by a party, unless those admissions are properly put in issue by the pleadings, so that he may have an opportunity of answering them.—*Austin v. Chambers*, 6 Cl. & F. 1.—[*See* 3 Dr. & War. 178; *Dr. Rep. temp. Sng.* 85. (C.)]

12. A bill of revivor against the executor of a deceased party, prayed that he should admit

assets, or for an account. The executor admitted assets sufficient to answer ptf.'s demand, if any, he being advised that the ptf. had not any demand against the assets. *Held*, not a sufficient admission of assets, and that an account should be directed.—*M'Tiernan v. Bell*, 3 I. E. R. 193. (E.E.)

1. Whether evidence of conversations with the parties, or those under whom they claim, which are not specifically put in issue by the pleadings, will be received, is a question to be decided according to the circumstances of each case. There is no inflexible rule upon the subject.—*The Incorporated Society v. Rose*, 3 I. E. R. 257. (C.)

2. Declarations of the testator contemporaneous with the will cannot be given in evidence, to show that a legacy was intended to be a satisfaction of a judgment debt of the testator's.—*Hall v. Hill*, 4 I. E. R. 27; 1 Dr. & War. 94; 1 Con. & L. 120. (C.)

3. The bill stated a deed, which was admitted by answer. On a hearing on bill and answer, the ptf. offered to read a deed corresponding with that stated in the bill, but which had not been identified with it. *Held*, that it could not be read.—*Hughes v. Cowley*, 5 I. E. R. 588. (E.E.)

4. Upon the trial of an issue directed in the cause, to ascertain whether the child was born alive or not, evidence was given of declarations made by members of the family shortly after the child's death. *Held*, that this evidence was properly receivable; and that the period after which declarations respecting matters of pedigree cease to be admissible in evidence, is the arising of a controversy respecting those matters, not the existence of the state of facts out of which that controversy arises.—*Reilly v. Fitzgerald*, 6 I. E. R. 335; Dr. Rep. temp. Sug. 122. (C.)

5. An account stated between a judgment debtor and his creditor, in which the latter admits payments on account, and a balance is struck of the sum due, cannot, after the death of the parties, be made use of in evidence, as an admission against interest, to prove these payments against third persons.—*Foster v. M'Mahon*, 11 I. E. R. 287. (C.)

6. Any documents which could be used at law as admissions to prove an agreement pleaded, may be used in evidence in equity for the same purpose, though not noticed in the bill; subject to enquiry if the deft. be taken by surprise. Such a mode of proving a case may affect the costs of the suit.—*Crosbie v. Thompson*, 11 I. E. R. 404. (C.)

7. A testator produced an executed will to another person to whom he declared its contents. That production and declaration, *Held*, admissible evidence to prove the contents of the will.

*Semble*—Those declarations would not have been evidence, if the will had not been at the

same time produced and shown to such person.—*Hanks v. Tottenham*, 10 I. Jur. N. S. 277. (P.)

8. A testator burned a will, and afterwards made declarations that he had revoked it by burning. At *Nisi Prius*—*Held*, that the declarations were inadmissible to prove revocation.—*Mullarkey v. Mathews*, 11 I. Jur. N. S. 218. (P.)

#### XXXVIII. 4. Parol Evidence, when admitted.

9. Lands being resettled, £2500 were charged for younger children, by a deed reciting that estates were charged with £1000 for them under a previous settlement, which really charged the lands with £2000. Those children claimed both sums. *Held*, that the real intention, if it had been to charge the £2500 in addition to only £1000, should have been proved by parol evidence.—*Ruby v. Foot and Beamish*, Beat. Rep. 581. (C.)

10. Parol evidence *held* not admissible to show that the consideration for a conveyance of unsettled property, by a father to his second son (an object of a power of appointment in the father's marriage settlement), was the son's relinquishment of his right as one of the male issue under that settlement.—*Barron v. B.*, 2 Jones, 226. (E.E.)

11. The handwriting of a party to a bill of exchange cannot be proved *viva voce* at the hearing, by a witness who has been examined in the cause.—*O'Hara v. Creagh*, Long. & T. 65. (E.E.)

12. There is no objection to correct a deed by verbal evidence, when there is anything in writing beyond the verbal evidence to go by. But when there is nothing but the recollection of witnesses, and the deft. by answer denies the case set up by the ptf., the ptf. appears to be without remedy.

The cases of *Booker v. Allen*, *Weall v. Rice*, and *Lloyd v. Harvey* (2 Russ. & M. 251), introduce a new rule upon the subject of the admissibility of parol evidence, which is not consistent with the previous authorities, and ought not to be followed.—*Hall v. Hill*, 4 I. E. R. 27. (C.)

13. Admission by parol not admissible to rebut the defence of the Statute of Limitations.—*Incorporated Society v. Richards*, 1 Dr. & War. 267; 1 Con. & L. 58; 4 I. E. R. 177. (C.)

14. An agreement was entered into in 1786, for a lease of eleven twenty-one parts of lands for 999 years; and a lease was executed conformably to the agreement. After some litigation between the representatives of the lessor and those of the lessee, it appeared that the lessor had power to demise only six twenty-one parts of the lands. Articles of agreement were entered into by them in 1839, by which it was agreed, that a lease of the six twenty-one parts should be granted for the residue of the original term, and that a new lease of the five twenty-one parts should be

granted for a similar term, "both rents to be paid over and above all charges and deductions except quit and crown rents." By the lease of the six twenty-one parts the tenant was made liable to the amount of the tithe rentcharge, in addition to the rent; but by lease of the five twenty-one parts, the rent was reserved in the words of the articles. There was no provision as to the rentcharge. The lessor filed his bill to have that latter lease corrected, by adding the amount of the rentcharge to the rent; and tendered parol evidence to show that such was the agreement, and that it had been omitted from the article in consequence of a mistake as to the tenant's liability under the 1 & 2 Vic., c. 119. *Held*, that parol evidence could not be admitted to show what was the intention of the parties.—*Davis v. Fitton*, 4 I. E. R. 612; 2 Dr. & War. 225. (C.)

1. In 1836, J. effected upon his life two policies of insurance, which in that year he assigned by deed to V., the ptf., a practising physician, whose patient J. then was. That deed recited that J. stood indebted to V. in £20 for professional services rendered by him to J., who was unable to pay that sum; and stated the consideration to be "the said sum of £20, so due, &c., and also the further sum of 10s." In 1837, J. died. His widow, becoming his personal representative, declined to concur with V. in giving the company the necessary receipt. This suit was instituted against her, as J.'s widow and administratrix, for an account, and to compel her to give the company a proper receipt.

She, by her answer, denied that the consideration money mentioned in the assignment had ever been paid; and insisted that the transaction was invalid, and could not be supported, because the relation subsisting between the parties, and the exercise of undue influence, rendered it contrary to public policy.

The ptf. offered evidence to prove that £11 was in fact paid at the time of the execution of the deed; and that the residue of the consideration money had then been due for past services as a physician. The Court rejected the evidence, and dismissed the bill, with costs.—*Ahearn v. Hogan*, Dr. Rep. temp. Sugden, 310. (C.)

2. A., B., and C. were tenants of lands. A. took a lease of the entire in the common form, describing them as in possession of A., B., and C. It was alleged that he took the lease upon trust for the benefit of B. and C. as to the portions in their possession. He subleased to B. his portion, subject to special covenants; and allowed C. and his representatives to continue in possession, paying him the same acreable rent he was himself subject to. They paid the tithe rentcharge. Parol acknowledgments were proved by A., that he would execute a lease to C. when called on; and that the original lease was as good for the occupiers as for himself. In his will he devised the profit rents of the other parts; but did not notice the part in possession of C.'s

representatives, and they were evicted by his heir. *Held*, that there was no trust or contract to give C. an estate in the lands, which could be enforced in equity.—*Donohoe v. Conrahy*, 8 I. E. R. 679; 2 Jon. & L. 688. (C.)

3. B. a creditor, signed to S. a letter of license, which would suspend his debt; but verbally stipulated that he would not be bound unless all S.'s creditors signed. Several did not sign. A commission of bankruptcy having been sued out by B., an issue was directed to try:—Whether the letter bound him? The jury found, that it did not; but that the condition annexed to his signature had not been communicated to other creditors, who signed when and after B. signed. The Court refused to supersede the commission. *Held*, that without deciding whether the parol evidence had been properly received, the order was conclusive against another petition to supersede on the same grounds.

On a re-hearing—*Held*, that the order was correct.—*In re Semple*, 12 I. E. R. 338. (C.)

4. A. in 1838 devised his real estates at M. to his nephew, and bequeathed legacies amounting to £8000 to other persons. The legacies were primarily charged upon the moneys which might be in bank to A.'s credit at his death. In 1839 the nephew, in compliance with A.'s express desire, purchased real estates at C. A., out of moneys standing to his credit in the bank, lent the purchase-money to the nephew, who shortly afterwards repaid it in part; but a balance of £7700 still remained due to A. By a codicil in 1840, A. reciting that he had devised real estates to his nephew, charged them with £8000, with interest at the rate of £5 per cent. from his decease; and directed that £8000 and interest to be paid to his executors within six months from his decease, to pay off legacies named in his will. *Held*, that parol evidence was admissible of facts showing that A. stood *in loco parentis* to the nephew; and also to show the circumstances attendant upon the purchase of the estates at C.; that the nephew being unable to repay the balance of £7700, A. refused to accept a security from him for it, but instead thereof, directed his own solicitors to prepare a codicil, charging £8000 upon the estates at M., which sum was to be applied towards the purposes to which he had by will directed a similar sum formerly in cash at bank to be applied; in consequence of which direction the codicil executed by him in 1840 was prepared.

That these facts amounted in equity to a release by A. of the debt of £7700 due to him from the nephew, and that the charge of £8000 upon the estates at M. must be considered as substituted for that debt.

The Court admitted the parol evidence, not for the purpose of construing the will or codicil, but to ascertain whether or not the £7700 was a debt due to A. at his death.

*Semle*—The dictum of Wigram, V. C., in *Cross v. Sprigg* (6 Hare 552), that if a debt be not released at law it cannot be considered as released in equity, is not sustainable.—*Hedges v. Aldworth*, 13 I. E. R. 406. (C.)



1. When an agreement, to sell a leasehold, is silent respecting production of the lessor's title, parol testimony is admissible to prove facts constituting a waiver by the vendee of production thereof.—*Wright v. Griffith*, 1 I. C. R. 695. (C.)

2. In a suit for specific performance of an agreement which was taken out of the Statute of Frauds by part performance, the petitioner having pleaded an agreement in writing which omitted to state the term of the lease to be made—*Held*, that parol evidence should not be received to supply the term.

*Semle*—A purchaser for valuable consideration without notice prior to his purchase, who afterwards receives express notice, is notwithstanding entitled to register his deed; and obtain all the benefits of the Registry Acts.—*Riddick v. Glennon*, 6 I. Jur. 39. (C.)

3. A. and B. became sureties for C., and were sued for his default. A. procured the amount sued for, on the security of a mortgage from A., and a judgment against B. The mortgage was paid off by A., who obtained an assignment of the judgment; registered it as a mortgage against lands of B.; and filed a petition for foreclosure and sale. B. by his discharge set up a defence that he became surety on A.'s promise to indemnify him from all loss. *Held*, that parol evidence was admissible to prove the contract to indemnify, as it was to rebut the equity on which the petition was founded.

*Semle*—Such a contract of indemnity is not within the Statute of Frauds, and need not be in writing.

*Held*, that the defence might be relied on without filing a cross petition.—*Rae v. R.*, 6 I. C. R. 490. (R.)

4. A., by will left to F. M. F., "and to his sister, M. F., my grand-daughter, share and share alike, M. F. now living in France, with her uncle M.," all his estates: M. F. was not then living, nor had ever lived; while her sister, C. F., was then living, and had lived for some time with the uncle, M. *Held*, that extrinsic evidence was admissible to explain the ambiguity in the will; that there was not such a perfect balance of probabilities, as to suspend the action of the Court.

That the name should control the description, and that M. F. was therefore entitled.—*In re Phunket's Estate*, 11 I. C. R. 361. (L.E.C.)

5. By an agreement in writing, A. agreed to let to B. a slip of ground, "bounded on the north by a road dividing said lot from Mr. T.'s holding." At the corner of the agreement, under the signature, was the following memorandum, signed with B.'s initials:—"The little angle at the road, opposite to T.'s, to be added to the road." The little angle was at the south side of T.'s road. The lease executed, in pursuance of the agreement, stated the lot to be bounded "on the north by a road dividing said lot from Mr. T.'s holding;" and referred to a map, which erroneously described T.'s road as a straight line, instead of a curve, and did not contain the

memorandum at foot of the agreement. *Held*, that parol evidence was not admissible to show the intention that the angle should be excluded from the lease.—*Gray v. Boswell*, 18 I. C. R. 77. (R.)—[*See s. c.*, 8 I. Jur. N. S. 81. (C.A.)]

6. In 1845, V., by will settled his estates on A., and his issue; then on B. and his issue. In 1854, V. made another will, settling the estates first on B. and his issue; then on A. and his issue; and in 1858, executed a codicil to the will of 1845, which he mistook for that of 1854, commencing thus: "This is a codicil to the above will." *Held*, that parol evidence was inadmissible to prove the mistake; that the will of 1845 was revived; and that it, together with the codicil, formed V.'s last will.—*In the Goods of Stowell*, 7 I. Jur. N. S. 325. (P.)

7. In the West Indies, a testator executed a will attested by three witnesses; and thereby gave several legacies in blank sums; appointed K. residuary legatee; named four executors; and revoked all former wills. *Held*, that parol evidence was inadmissible to prove a plea that the will was only deliberative and imperfect. Demurrer to such plea allowed.

On this point the same rules apply to wills of real and of personal estate.

A testator described himself as of L. in Ireland, at present at St. D. in Grenada. He died at St. D. The Court assumed that Ireland was his domicile.

To raise the point, the question of domicile should be pleaded, as well as the law of Grenada, if different from that of Ireland.—*Kennedy v. Kelly*, 7 I. Jur. N. S. 326. (P.)

8. All the persons entitled to the lessee's interest should be made parties, in suits for renewal of the lease. One of the lives in the renewal was described as "B. C., the younger, son of B. C., of Sion, aged fifteen years, or thereabouts." There were two persons of the name of B. C.; one, the eldest son of H. C., of Sion, and who was fifteen years old; the other, the fourth son of B. C., of Kildalvin, who was nine years old. *Held*, on the evidence, that the latter was the *c. q. vie*.

The tenant having tendered the renewal fine and interest from the death of the former, without objection on that ground on the part of the landlord—*Held*, that the tender was sufficient to save a forfeiture under the Tenantry Act.

There is no general rule as to what shall be deemed reasonable time for payment of the renewal fines.

The Court granted a renewal when a tender had been made just within six months of the demand, there being no fraud on the part of the tenant, and no circumstance to establish default, except the lapse of time.

Advertisements in the *Gazette*, &c., under the 2nd sec. of the Tenantry Act, are not a sufficient demand, when the head rent is paid to the landlord by an agent for the tenants. Such agent ought to be served with notice, if

the landlord shall find any difficulty in discovering his tenants or their assigns.

*Semble*—A demand of a renewal fine inserted in the *Gazette*, under the second sec. of the Tenantry Act, shall not be deemed to have been made on the day of the publication of the first advertisement.

Costs given to a respondent in a decree for renewal of a lease.—*Colclough v. Smyth*, 14 I. C. R. 127. (R.)

1. In an injunction suit to restrain respondent from destroying a hedge, parol evidence is not admissible to prove that the contract was, that the hedge should be maintained as an ornament.—*Armstrong v. Courtenay*, 15 I. C. R. 138. (R.)

2. One of the lives in a renewal of 1803 was described as "B. C. the younger, son of B. C. of Sion, aged fifteen years, or thereabouts." There were two persons of the name of B. C.; one, the eldest son of H. C. of Sion, who was proved by reputation to have been then fifteen years old; the other, the fourth son of B. C., of Kildalvin, who, as proved by the inscription on his tombstone, was then nine years old. *Held*, that neither reputation nor the inscription was admissible to prove the ages of the parties.

That, in the absence of evidence of mutual mistake of the executing parties to the renewal, B. C., the son of B. C., must be taken to have been the *cestui que vie*.—*Colclough v. Smyth*, 15 I. C. R. 347. (R.)—[*Affid. ibid*, 396. (C.A.)]

#### XXXVIII. 5. *Onus Probandi*.

3. A rent, which was to cease upon payment of a sum of money, was charged upon and payable out of several denominations of land. Evidence showed that it had not been paid by, or demanded from the owners of one of those denominations for upwards of a century. There was not any evidence that the rent had not been regularly paid out of the other denominations. *Held*, that the Court would not presume, either that the redemption money was paid, or that that portion of the land had been released.—*Warren v. Bateman*, Fl. & K. 448. (R.)

4. In a suit by children to enforce payment of their portions, their legitimacy was questioned by the next tenant for life, a deft., but a marriage *de facto* was established. *Held*, that, a marriage *de facto* having been once established, it lay on the party impeaching the marriage to show that it was illegal and void.—*Piers v. Tuite*, 1 Dr. & Wal. 279. (C.)

5. Although the recital or receipt in a deed is *prima facie* evidence of the payment of the consideration, yet if the Court comes to the conclusion that the consideration has not been paid, and directs an enquiry upon the subject, the *onus* of proving the payment lies upon the party insisting that it has been paid.—*Croly v. O'Callaghan*, 5 I. E. R. 32. (E.E.)

6. An application of a third person that a receiver should pass his account, and applicant have liberty to attend in the office on the passing of it, refused; no special ground for such application having been shown.—*Colburn v. Cooper*, 8 I. E. R. 510. (E.E.)

7. If there be a contest between a party to a suit and a solicitor, as to the authority given to the latter, the Court will decide against the solicitor, unless he has a written authority.—*Beddy v. Smith*, 8 I. E. R. 667. (R.)

8. A. invested money in stock, in the joint names of himself and his daughter. After his death, a trust for the benefit of a third person was sought to be fastened on the stock. *Held*, that the *onus* was cast on that person to rebut, by clear evidence the legal presumption in favour of the child, and to show that A.'s intention was, at the period of the investment, to affix that trust upon the fund.—*Snowe v. Darcy*, 4 I. Jur. 165. (C.)

9. In interest cases, when legitimacy is disputed, the *onus* of proof lies on the party alleging legitimacy.—*Corcoran v. Duggan*, 9 I. Jur. N. S. 18. (P.)

10. Goods were shipped for conveyance, for a freight agreed upon, to a port. After the bills of lading had been signed, and before the ship sailed, the shippers became bankrupt. *Held*, that their assignees could not insist upon re-delivery of the goods, except upon paying the freight, and indemnifying the master of the ship against all claims respecting the bills of lading; and that the messenger's possession of the goods under the Court's search-warrant does not change the *onus* of proof, or entitle the assignees, when the Court has re-delivered the goods to the master of the ship, to cast upon him the duty of impeaching, at the port of destination, the title of the holders of the bills of lading.

*Quære*—Has the Court of Bankruptcy in Ireland jurisdiction to issue a search-warrant respecting goods which are on the premises of a third party in England?—*In re Webster*, 10 I. Jur. N. S. 17. (B.)

#### XXXVIII. 6. *Entry of Evidence as Read*.

11. In an undefended case the proofs shall be entered as read, and ptf. shall take such a decree as he can abide by.—*Raymond v. Evans*, Long. & T. 582. (E.E.)

12. The bill prayed an account of what might, without wilful default, have been received. The case was opened as if only a simple account was sought. Evidence of wilful default was admitted, notwithstanding the general rule, that evidence cannot be entered to support a case which has not been opened.—*Crawford v. O'Sullivan*, 2 Con. & L. 410. (C.)

13. Objections to the reading of documents, on the ground that they have not been proved as against the objecting party, must be made

when the documents are tendered. This rule applies equally in the case of a minor and in that of an adult deft.—*Stoughton v. Crosbie*, 5 I. E. R. 451. (E.E.)

1. It is improper to examine in chief touching particular items of the account, the deft. being an accounting party; or to examine in chief touching particular acts of wilful default in not receiving rents, the deft. being bound to account for wilful default simply by reason of the nature of his relation to the ptf. Such evidence may, however, be entered as read; but the ptf. must pay the deft. its costs.—*Hamilton v. M'Cormick*, 3 Jon. & L. 183. (C.)

XXXVIII. 7. *Further Evidence: when Admitted after Publication; or on Appeal, or Re-hearing.*

[See also PRACTICE, IV. 5.]

2. Publication passed without the deft.'s having examined any witnesses. On the affidavit of the deft. that persons named were necessary and material witnesses to be examined; that he could not otherwise proceed to hearing; and that neither he nor his solicitor had read or had any knowledge of the evidence for the ptf.s; the Court permitted the deft. to examine under terms, being unwilling to exclude material evidence.—*Butler v. Troy*, 7 I. E. R. 70. (R.)

3. Reference to enquire what was due for rent, fines, &c., pursuant to the provisions of a bishop's lease; whether interest thereon had been customarily payable on the fines; and, if so, what amount was due?

The Master found a sum due for interest; but reported that no evidence had been laid before him with respect to the custom. The report was excepted to on this ground, but confirmed at the Rolls. On appeal—*Held*, that a lease set forth in the schedule, showing that interest was payable, was evidence to sustain the finding; and that the decision at the Rolls was right.—*Brabazon v. The Earl of Lucan*, 2 I. Jur. 57. (C.)

4. On appeal, this Court will allow affidavits to be used which were not used on the motion in the Court below. They are inadmissible, if made by the party who moved at the Rolls.—*Stradbrook, Lord, v. Fitzpatrick*, 3 I. Jur. 130. (C.)

5. The question, on a reference to enquire whether timber be essential to the possession and enjoyment of an estate, is one partly of fact, and partly of opinion and taste; the end of the enquiry being, to ascertain whether, though in respect of its intrinsic value, its loss may admit of pecuniary compensation, its adventitious value as an ornament to the estate be not so material as that it may reasonably be supposed that without it the purchaser would not have entered into the contract at all.

When the timber grew on a comparatively small portion of the estate, detached from

the demesne, and not in view of the mansion-house, pleasure grounds, or avenues, and the Master reported that it was not essential to the possession and enjoyment of the estate, though there were conflicting affidavits as to whether it was ornamental or not, the Court (reversing the order of the M. R.) refused to send back the report to be re-considered on further evidence.

A motion to vary a Master's report was directed to stand over for further affidavits. *Held*, that a party who had filed an affidavit could not, on appeal from the order made on the further affidavits, object to the admission of them as irregular and contrary to the practice of the Court.—*Stewart v. Conyngham*, 3 I. C. R. 104. (C.)

6. The Court will not in general admit affidavits not used before the Masters on appeals from orders made by them in cases referred under the Ch. Reg. Act, s. 15, especially when they refer to matters not put in issue by the petition or discharge.

In this case such affidavits were, by consent, admitted.—*Tressilian v. Caniffe*, 4 I. C. R. 399. (R.)

7. Upon an affidavit being made that it is necessary to file further affidavits for the hearing of a cause petition, the Court will give permission to file them, though the cause is in the list for hearing. This permission will be granted reluctantly, and if there be great delay, the parties will not get the costs.—*Guinness v. G.*, 6 I. Jur. 85. (R.)

8. On a re-hearing, documentary evidence, not offered at the original hearing, may be received. Depositions for anything more than identifying such documentary evidence cannot be given.—*Johnson v. Midland Gt. W. of Ireland Ry. Co.*, 5 I. C. R. 264. (C.)—[See s. c., 6 H. L. Cas. 798; 4 Jur. N. S. 648.]

9. On a question as to portions, settled subject to appointment by marriage settlement, articles entered into on the marriage of one of the objects of the appointment were read in evidence in the Court of Chancery, though they had not been mentioned in the schedule of evidence used before the Master, nor given in evidence at the Rolls.—*Simpson v. Frew*, 5 I. C. R. 517; 1 I. Jur. N. S. 222. (C.)

10. The Lord Chancellor has not jurisdiction to entertain an application for liberty to use new evidence upon a re-hearing of a cause before the Court of Appeal.

Such evidence must be put in issue by a supplemental petition, in the nature of a bill of review, and the application for liberty to file such petition must be made at the Rolls Court.—*Barton v. Sampson*, 3 I. Jur. N. S. 71. (C.)

11. A supplemental petition, in the nature of a bill of review, on newly discovered facts, cannot be maintained, when those facts would not, if previously known, have influenced the decree complained of; but would merely have

induced the complainant to take a different course in the original suit.—*Nason v. Peard*, 10 I. C. R. 233. (C.)

#### XXXVIII. 8. Evidence before Master.

[See also PRACTICE, IV. 5, ON APPEAL.]

1. It is improper to examine in chief touching particular items of the account, the deft. being an accounting party; or to examine in chief touching particular acts of wilful default in not receiving rents; the deft. being bound to account for wilful default simply by reason of the nature of his relation to the ptf. Such evidence may, however, be entered as read; but the ptf. must pay the deft. the costs of it.—*Hamilton v. M'Cormick*, 3 Jon. & L. 183. (C.)

2. On a reference under a decretal order in a general cause petition, the Master, on a summons on charge and discharge, directed, amongst other things, that the parties respectively should prove their case by affidavit or otherwise; the last affidavit to be filed, and publication to pass on the day month from the date of the order: thereupon to re-enter the summons. Both parties filed affidavits within the time; but the respondent failed to prove his case at the hearing, which was adjourned to enable him to apply to give further evidence. On motion grounded on the proceedings in the cause, but not on affidavit—*Held* that the respondent, his wife, and a third witness, should be examined *viva voce* before the Master, on the respondent's behalf; and that the petitioner should be cross-examined.—*Corbett v. Hayes*, 4 I. Jur. N. S. 1. (M.O.)

3. Evidence, rejected by the Master in the early stages of a suit, cannot be used upon appeal, nor can its rejection be questioned, unless that rejection be a ground of appeal.—*In re M'Kenna's Estate*, 6 I. Jur. N. S. 330. (C.A.)

4. On appeal the Court may admit documentary evidence which was not before the Master when he made the decretal order appealed against.

The Court has jurisdiction to review a Master's decision respecting what evidence is admissible under the Ch. Reg. Act, s. 13.

The practice in the Masters' offices under that section is irregular. The Master should order books of account to be received as *prima facie* evidence: items capable of independent proof should be proved before the order is made.—*Boag v. Bradford*, 11 I. Jur. N. S. 226. (R.)

#### XXXVIII. 9. At Law.

5. Form of order upon an application for liberty to read, on the trial of an issue, depositions taken in the cause, and made by a witness whom illness disenabled from attending the trial.—*Lynch v. L.*, Dr. Rep. temp. Sugden, 538. (C.)

6. Any documents, which could be used at Law as admissions to prove an agreement pleaded, may be used in Equity for the same purpose, though not noticed in the bill; but, subject to enquiry, if deft. be taken by surprise. Such a method of proof may, however, affect the costs.—*Crosbie v. Thompson*, 11 I. E. R. 404. (C.)

#### XXXVIII. 10. Exhibits.

[As to what documents are receivable in evidence without proof—See 14 & 15 Vic., c. 99, ss. 7, 8, 9, 10, 11, 12; 18 & 19 Vic., c. 42, ss. 1, 2, 3.]

7. Copies of the tithe certificate and applotment, compared and attested by the registrar of the diocese, are proveable as exhibits at the hearing.—*Hawkins v. Carry*, 2 Jones, 431. (E.E.)

8. When a minor is a party, the Court will not permit a witness to be examined *viva voce*, at the hearing, to prove a deed or exhibit. It must be proved in the office by examining the witness upon interrogatories.—*White v. Baker*, 1 I. E. R. 382. (E.E.)

9. Documents not under seal cannot be proved *viva voce* at the hearing of the cause, as exhibits. The practice in Chancery is otherwise.

In this Court the only documents which are permitted to be proved as exhibits at the hearing, are instruments under seal, which are unimpeached, and when nothing but handwriting is to be proved.—*O'Hara v. Creagh*, 3 I. E. R. 179; Long. & T. 65. (E.E.)

10. An objection to the reading of documents, because they have not been proved as against the objecting party, must be made when they are tendered. This rule applies equally to the case of a minor, and of an adult deft.—*Stoughton v. Crosbie*, 5 I. E. R. 451. (E.E.)

11. A party may prove an exhibit *viva voce* at hearing, upon bill and answer.—*Neville v. Fitzgerald*, 2 Dr. & War. 530. (C.)

12. When ptf.'s title depends on a deed impeached by the answer, the deed cannot be proved at the hearing, as an exhibit, by affidavit under G. R. 97.

In this case, there not being any other proof of the deed, the bill was dismissed with costs.—*Joly v. Swift*, 9 I. E. R. 195; 3 Jon. & L. 126. (C.)

13. The ptf. sought a renewal of a lease (not in his possession). The deft.'s answer denied his right to the renewal, "inasmuch as he is convinced from documents in his possession, to which he will hereafter more particularly refer, that no such lease was executed;" and then stated "that it appears by a certain deed and schedule, which he admitted to be in his possession, that a lease for a different term and rent had been executed, and that 'it is manifest' from the schedule that a renewal, if obtained, was

fraudulent." *Held*, that the deft. had referred to the deed and schedule in such a way as to make it part of his answer; and was bound to produce it. — *Phelan v. Hamilton*, 9 I. E. R. 264. (R.)

1. When documents are indorsed by a solicitor in compliance with a notice under the 164th Rule, the practice is to have a consent admitting the documents made a rule of Court by a side-bar rule. — *Killikelly v. Molton*, 10 I. E. R. 212. (R.)

2. Any documents which could be used at Law as admissions to prove an agreement pleaded, may be used in evidence in Equity for the same purpose, though not noticed in the bill; subject to enquiry if the deft. be taken by surprise. Such a mode of proving a case may affect the costs of the suit. — *Crosbie v. Thompson*, 11 I. E. R. 404. (C.)

#### XXXVIII. 11. Affidavits.

[The cases in the Ir. Ch. Rep. refer chiefly to the practice under the Court of Ch. Reg. Ir. Act 1850. See also 30 & 31 Vic., c. 44.]

- a. Generally: their Incidents.
- b. Filing and Swearing them.
- c. Their Form.
- d. Their Effect respecting Information, Belief, &c.
- e. To support Injunction Motion.
- f. To support Interpleader Bills.
- g. To support Motions and Petitions generally.
- h. On Application for Leave to Sue in Forma Pauperis.
- i. Of Service.
- j. On Application for Leave to Substitute Service.
- k. On obtaining a Writ of Ne Exeat Regno.
- l. To support Application for Commission to Examine Witnesses.
- m. When necessary in other Matters.
- n. When Read against Answer.
- o. When to be Received and Read as Evidence, generally.
- p. In Reply.
- q. To Verify Petitions, &c.
- r. On Motion for Decree.
- s. Notice of Using.

#### XXXVIII. 11. a. Of Affidavits generally: their Incidents.

[As to the practice under Court of Ch. Reg. Ir. Act 1850: See 13 & 14 Vic., c. 89, and Gen. Orders of 1851, 1852 and 1857: Gam. G. O. p. 30, &c.]

See also 30 & 31 Vic., c. 44, ss. 68, 74, 76–84, 89, 93, 104, 105, 108: G. O. (1867), 16, 92–95, 152–155, 162, 168–175, 216, 220, 225.]

3. The general rule—that an affidavit filed as cause, and notice thereof duly given, shall be cause against making absolute a conditional order—does not apply to conditional orders obtained as of course in the office. — *Murphy v. Meade*, H. & J. 720. (E.E.)

4. It is the right of the Attorney-General, on the part of the Crown, to have an affidavit taken off the file of the Court, in order that the deponent may be prosecuted for perjury. Though the case be such that the application would not be granted in the case of a private prosecution, it will be granted on the application of the Attorney-General. — *Greene v. Hogan*, 2 Jones, 573. (E.E.)

5. An application to take an affidavit off the file, in order to prosecute the deponent for perjury, is not to be granted *ex debito justitiæ*; before allowing it the Court will use circumspection. The applicant must make a case sufficient to induce the Court to exercise its discretion in his favour. — *Davis v. Nolan*, 7 I. E. R. 559. (R.)

6. An application to take an answer off the file to prosecute for perjury, though it be not *ex debito justitiæ*, approaches very closely to it. The Court will not scrutinise the grounds or merits of the prosecution, or the truth of the allegations on either side, but will give every facility to the application, provided it be satisfied that it is not made for vindictive or unjust purposes. — *Madden v. Woods*, 8 I. E. R. 48. (R.)

7. When the defence was, that the deed of assignment, under which the ptf. claimed, was executed after bill filed, and was made in trust for the assignor against whom the deft. filed a cross bill—*Held*, that the assignment could not be proved by affidavit at the hearing, under the 97th G. O. — *Joly v. Swift*, 9 I. E. R. 195; 8 Jon. & L. 126. (C.)

8. At the hearing of cause petitions under the Ch. Reg. Act, the affidavits of strangers to the cause may be used to support the case either of the ptf. or deft. The previous permission or direction of the Court is not necessary for this purpose.

To a cause petition for foreclosure or sale the defence set up by the answering affidavit consisted of articles of settlement of a date prior to the mortgage, but not registered until after it, of which articles the respondents alleged that the mortgagee had notice. Affidavits filed on behalf of the petitioner, and made by the solicitors engaged on both sides in the mortgage transaction, denying that the mortgagee had notice of the articles, were allowed to be read at the hearing.

The Court, at the instance of the deft., made an order allowing both parties to examine witnesses on interrogatories generally, as they might be advised.

When a person entitled *jure mariti* to chattels real mortgages them, the wife has not any equity to settlement thereof as against the mortgagee seeking a foreclosure and sale. — *Hatchell v. Egglese*, 1 I. C. R. 215. (C.)

9. Statements in affidavits of alleged conversations of a deponent in a cause will not be admitted to impeach his credit; he must be cross-examined as to the conversations. — *Crofts v. C.*, 6 I. Jur. 249. (C.)

1. Affidavits, in answer to a cause petition, filed on the day on which the cause was set down for hearing, but after it had been set down, were held irregular. Affidavits subsequently filed in reply thereto, as well as the answering affidavits, were permitted to remain on the file, as if the leave of the Court had been obtained for filing them. On a motion by the respondent, and cross-motion by petitioner, to take the affidavits off the file, no rule was made. There having been delay on the part of the respondent, the costs were made costs in the cause.—*Graham v. McDermott*, 6 I. Jur. 381. (R.)

2. The Court will not in general admit affidavits (not used before the Masters) on appeals from orders made by them in cases under the 15th sec. of the Ch. Reg. Act; especially when they refer to matters not put in issue by the petition or discharge. In this case such affidavits were admitted by consent.—*Tressilian v. Caniffe*, 4 I. C. R. 399. (R.)

3. A cause petition having been set down for hearing, the petitioner and respondent consented that each should file further affidavits. The respondent filed affidavits. The petition was struck out of the list by consent. The cause was, on the 2nd Nov., set down again by the petitioner, who filed his affidavit in reply on the 14th Nov. without leave of the Court. The respondent having refused to allow this affidavit to be used, the petitioner on motion obtained leave to use it; the respondent to have leave to file affidavits in reply, and to be paid £4 for the costs of the motion, without prejudice to respondent applying to the Lord Chancellor for the costs of the day if it should be necessary to postpone the hearing by reason of the petitioner's delay.—*Crooke v. Edwards*, 1 I. Jur. N. S. 44. (R.)

4. A., one of two bankrupt partners, in a Chancery suit, made an affidavit in which he admitted a debt, which was barred by the Statute of Limitations. A., when he made the affidavit, was so ill that he could not read or sign it. The British Consul at B. read it to A., who thereupon affixed his mark. *Held*, that the affidavit was not admissible in evidence in the bankruptcy proceedings.—*In re Clendinning*, 9 I. C. R. 284. (B.)

#### XXXVIII. 11. b. *Filing and Swearing Affidavits.*

[See 30 & 31 Vic., c. 44, ss. 68, 81–84, 93, 104; G. O. (1867), 92–94, 152, 154, 170, 225.]

5. The affidavit verifying the execution of a power of attorney executed at Brussels (where there is no commissioner of this Court for taking affidavits), was sworn by one of the witnesses to the execution of the power, before the Secretary of the British Legation at Brussels; and when produced, appeared to be under the seal of the Legation. There was no affidavit verifying the signature of the Secretary of Legation to the affidavit taken by him, but an attorney stated in open Court,

that he knew the signature to be that of the Secretary—*Held*, that the affidavit should be acted upon as properly taken.—*O'Connor v. Bernard*, 4 I. E. R. 689. (E.E.)

6. The affidavit to verify a petition for a receiver under the 5 & 6 W. 4, c. 55, and 3 & 4 Vic., c. 105, may be sworn and filed before the petition is presented.—*Clendinning v. O'Malley*, 2 Dr. & War. 210; 1 Con. & L. 363. (C.)

7. The affidavit verifying a petition under the 1 & 2 Vic., c. 109, s. 60 (Tithe Rentcharge Act) may, in a proper case, be made by the petitioner's agent; *e. g.*, when that agent has peculiar knowledge of the facts.—*Kellett v. Sturgeon*, 5 I. E. R. 159. (E.E.)

8. When an affidavit is made by a marksman, the jurat should state that the commissioner read and explained it to the deponent before he swore it. A statement in the margin of the affidavit, that it was read and explained to the deponent by a third person, is insufficient.—*Bredin v. B.*, 7 I. E. R. 501. (R.)

9. A motion cannot be grounded on an affidavit not filed.—*Reeves v. Nagle*, 8 I. E. R. 521. (E.E.)

10. Upon an affidavit being made that it is necessary to file further affidavits for the hearing of a cause petition, the Court will give permission to file them, though the cause is in the list for hearing. This permission will be granted reluctantly; and, if there be great delay, the party will not get the costs.—*Guinness v. G.*, 6 I. Jur. 85. (R.)

11. Before a cause petition was set down for hearing, the respondent's solicitor informed petitioner's solicitor that respondent was ill, and could not file affidavits. Petitioner's solicitor misunderstood him, and set down the cause for hearing. The Court granted liberty to the respondent to file his affidavit notwithstanding.

When a party wishes to amend a cause petition, he must serve notice; and set out the amendments in full.—*Boyle v. Guinness*, 6 I. Jur. 161. (R.)

12. Liberty to file answering affidavits will now be given almost at any time before the cause is heard; costs to be costs in the cause. *Wills v. Corcoran*, 6 I. Jur. 341. (R.)

13. Affidavits in answer to a cause petition were filed on the same day that the cause was set down for hearing, but after the cause had been set down. *Held*, irregular. Affidavits subsequently filed in reply, as well as the answering affidavits, were permitted to remain on the file, as if the leave of the Court had been obtained for filing them. On a motion by the respondent, and cross-motion by petitioner to take them off the file, no rule was made; and there having been delay on the part of the respondent, the costs were made

costs in the cause.—*Graham v. M'Dermott*, 6 I. Jur. 381. (R.)

1. In granting leave to file affidavits after a cause petition has been set down for hearing, the Court does not require an affidavit of merits.—*Knox v. Mahon*, 4 I. C. R. 34. (R.)

2. A motion for permission to file additional affidavits, notwithstanding the expiration of the time limited by the G. O., is made to the judicial discretion of the Court; and is not to be granted as of course, though it is to be favourably considered.—*Millet v. Mansergh*, 5 I. C. R. 48; 1 I. Jur. N. S. 147. (C.)

3. In analogy to the old practice respecting decrees *pro confesso*, leave will, on a proper affidavit of merits, and on proper terms as to costs, &c., be given to a respondent, who has not filed any answering affidavit, to file one after the proper time for answering has elapsed.—*Tuthill v. Latouche*, 5 I. C. R. 53; 1 I. Jur. N. S. 297. (C.)

4. A cause petition was set down for hearing on the 5th Feb. without respondent having filed any affidavit in reply. A motion by respondent for leave to file affidavits in answer to the petition in April, when the cause was in the Chancellor's list of the day, was refused with costs.—*Tuthill v. Latouche*, 1 I. Jur. N. S. 273. (R.)

5. On motion to obtain leave to file affidavits after the time for filing them had expired, *Held*, that, under the orders of June 1856, such leave could not be granted without evidence of facts to sustain the motion.—*Long v. Wolfe*, 6 I. C. R. 288. (C.)

6. An application for the enlargement of the time for filing answering affidavits before the time expires, is not within the 7th G. O. of May 1857.—*Kinneen v. Persse*, 6 I. C. R. 567. (C.)

7. Applications for liberty to file answering affidavits in a cause petition matter transferred to his Honor's list, in which no affidavit has been filed, should be made at the Rolls.—*Barton v. Major*, 8 I. C. R. 25. (R.)

8. An order extended, *beyond* the day upon which the petition would stand dismissed under the 27th G. O. of 1851, the petitioner's time to file affidavits in reply. Upon motion for liberty to set down the cause for hearing, *although* two Terms had elapsed since the answer was filed, and that, if necessary, the cause might be reinstated: the Court, without special ground, reinstated the petition.—*Armstrong v. A.*, 17 I. C. R. 132. (R.)

#### XXXVIII. 11. c. Form of Affidavits.

[See 30 & 31 Vic., c. 44, s. 104; G. O. (1867), 94, 152, 153, 168, 169, 171, 172, 175, 220].

9. In an affidavit verifying the petition for a receiver, under the 5 & 6 W. 4, c. 55, it suf-

fices to state that a lump sum is due for principal and interest on foot of a judgment, and costs, when only the ordinary costs of entering it have been incurred.—*Anon.*, 2 Jones, 349. (E.E.)

10. An affidavit to verify a petition under the 5 & 6 W. 4, c. 55, which merely states in general terms that the contents of the petition are true, is insufficient.—*Johnson v. J.*, 2 Jones, 430. (E.E.)

11. The affidavit in support of an application to discharge the solicitor from custody, should be instituted in the cause in respect of which the privilege is claimed.—*Re Keane*, S. & Sc. 81. (R.)

12. The affidavit upon which it is sought to obtain a receiver under the Sheriffs Act, must state expressly when the judgment has been revived; it is not sufficient to state that the petitioner is entitled to sue out an *elegit*.—*In re —*, 2 I. E. R. 418. (E.E.)

13. When an attorney applies to be paid his costs out of a fund allocated to his client, he ought to state in his affidavit that he distinctly informed the client of his intention to make the application.—*Redmond v. Gormley*, 4 I. E. R. 698. (E.E.)

14. The affidavit of a judgment creditor for a receiver in a petition matter under 4 & 5 W. 4, c. 55, was entitled as in a cause; the parties were styled ptf. and deft., and the petitioner was apprised of the irregularity. *Held*, that the affidavit was insufficient.—*Fawcett v. F.*, 6 I. E. R. 388. (R.)

15. The consent of a creditor to a *supersedeas* in bankruptcy was signed by a person authorised under a power of attorney, executed by the creditor, then resident in New York. The verifying affidavit was sworn before the British Consul, and attested by his seal of office, and did not purport to have been sworn before a Justice of the Peace. *Held*, that the consent was sufficiently signed.—*Ex parte Hutton*, 6 I. E. R. 522. (C.)

16. When an affidavit is made by a marksman, the jurat should state that it was read and explained by the Commissioner to the party before it was sworn by him.

A statement in the margin that the affidavit was read and explained to the party by a third person, is insufficient.—*Bredin v. B.*, 7 I. E. R. 501. (R.)

17. An omission having been made in the jurat of the affidavit to verify a cause petition, an order was made that the Dep. Keeper of the Rolls should be at liberty to re-swear the petitioner.—*Porter v. Archbold*, 2 I. C. R. 572. (R.)

18. The affidavits on which an application for a writ of prohibition is grounded ought to be entitled simply in the Court to which application is made.

The writ of prohibition may be issued to stay proceedings before Magistrates, even after conviction. The application to the Court of Ch. for a writ of prohibition is, to the Common Law side of that Court; and the conditional order, though issued from the Registrar's office, should not resemble an injunction order.—*Rich v. Anderson*, 3 I. C. R. 463. (C.)

1. An affirmation taken under the 3 & 4 W. 4, c. 82, stated that affirmant was a member of a religious sect called "Separatists." It did not follow in terms the form of affirmation required by the Act; but it purported to be supplemental to another affirmation which did, and to have been made before an officer authorised to administer it. *Held*, that it must be assumed to have been properly made.—*Wolesey v. Worthington*, 13 I. C. R. 341. (R.)—[*Affid.*: 14 I. C. R. 369. (C.A.)]

XXXVIII. 11. d. *Their Effect respecting Injunction, Relief, &c.*

XXXVIII. 11. e. *Affidavit to support Injunction Motion.*

2. When irreparable waste has been committed, and is about to be repeated, the Court will, without a positive affidavit of the facts, grant a conditional order for an injunction, and restrain the party meanwhile, if there be danger that the waste will be committed before such affidavit can be procured.—*Beere v. Head*, 7 I. E. R. 60. (R.)

3. An affidavit, verifying a bill for an injunction to restrain waste by breaking up ancient meadows, should state deponent's knowledge of the land for a considerable period (*Semble*—twenty years), and that it was not in tillage during that time.—*Creagh v. Carmichael*, 7 I. E. R. 304. (E.E.)

4. Consideration of the rule touching using supplemental affidavits on showing cause against an injunction in a possessory suit.—*Congleton v. Mitchell*, 12 I. E. R. 34. (C.)

5. A Railway Company, instead of obtaining the finding of a jury as to the amount of compensation due to the owners of land required for the railway, took hold of some verbal consent by a solicitor for the owner; entered into possession; and proceeded with the works. Bill filed to restrain the company by injunction. The answer of the company, verified by the affidavit of their solicitor, relied on the consent, and detailed conversations between the solicitors. A replying affidavit by the solicitor of the ptf. was filed, denying that consent was given. On the injunction being moved for, *Held*, that the affidavit of the deft.'s solicitor being unnecessary, it was allowable for the solicitor of the ptf. to reply, and his affidavit might be used; but that neither should be allowed in taxation.—*Hare v. Cork and Bandon Railway Company*, 3 I. Jur. 1. (C.)

XXXVIII. 11. f. *Affidavits in support of Interpleader Bills.*

6. On motion for an injunction in an interpleader suit, ptf. need not file an affidavit verifying the statements in the bill. One denying collusion between him and the defts. will suffice.—*Meredyth v. Molloy*, Fl. & K. 195. (R.)

XXXVIII. 11. g. *Affidavits in support of Motions and Petitions generally.*

[*See also* PLEADING, ANSWER. Under the Ct. of Ch. Reg. (Ir.) Act 1850.]

[*See* 30 & 31 Vic., c. 44, s. 68: G. O. (1867), 91-94, 153, 172.]

7. An affidavit, to ground an attachment for non-performance of a decree to pay money personally demanded from deft. under a power of attorney, must state that that power was produced and shown to deft. when the demand was made.—*Fleury v. Murphy*, 1 I. E. R. 117. (E.E.)

8. To support a motion for liberty to execute a sequestration on a decree, there must be an affidavit stating what was due on foot of the decree.—*Rowan v. —*, 2 Jones, 184. (E.E.)

9. By this Court's practice, a supplemental affidavit cannot be used on a motion to make absolute a conditional order.—*Smithwick v. Bradshaw*, 2 I. E. R. 94. (E.E.)

10. An affidavit to verify a petition under the 5 & 6 W. 4, c. 55, made by the petitioner's agent will not suffice; the petitioner must make it.—*Phelan v. P.*, Fl. & K. 177. (R.)

11. On motion for a receiver on bill and answer, an affidavit by ptf. may be read to explain a doubtful passage in an answer not disclosing the whole truth.—*Bell v. M'Loughlin*, Fl. & K. 272. (R.)

12. In petition cases under the Trustees Act, arising from trustees being out of the jurisdiction, it should be sworn where the absent trustee is, since service will be required if he is only absent in England.—*Ex parte Hughes*, 6 I. E. R. 559; 1 Jon. & L. 32. (C.)

13. A motion cannot be made, if grounded on an affidavit to be filed.—*Reeves v. Nagle*, 8 I. E. R. 521. (E.E.)

14. A bill filed to raise a charge stated that something was due for interest, but did not interrogate the deft. on that subject. The answer did not admit any sum to be due. Upon motion for a receiver, the Court permitted an affidavit to be used, setting forth the sum due.—*Martin v. O'Flaherty*, 1 I. Jur. 345. (R.)

15. The Court will admit a supplemental affidavit, if, without it, the ends of justice would be frustrated.—*In re Bodkin's Estate*, 3 I. Jur. 101. (I.E.C.)



1. When an injunction, obtained on filing the bill, has, on the coming in of deft.'s answer, been continued until the hearing, and ptf., for the first time, seeks to amend his bill without prejudice to the injunction, the Court will grant a motion to that effect, if the proposed amendments be not inconsistent with the case previously made by the bill for the injunction. To sustain the motion there is not any necessity for an affidavit stating when the matter of the proposed amendments came to ptf.'s knowledge.—*O'Beirne v. O'B.*, 1 I. C. R. 158. (C.)—[Rev. Rolls order: 1 I. C. R. 152.]

XXXVIII. 11. h. *Affidavit on Application for Liberty to Sue in Forma Pauperis.*

XXXVIII. 11. i. *Of Service.*

2. The process server's affidavit, made to ground a motion for liberty to enter process of contempt on the service of a subpoena in England, ought to recite the prayer of the bill.—*Sheilds v. Ellis*, Hay. & J. 802. (E.E.)

3. The affidavit of service of the conditional order to pay rent to a receiver ought to be filed before applying for a conditional order for an attachment for non-payment of rent.—*Pope v. P.*, Hayes, 335. (E.E.)

4. The affidavit of service of the subpoena on a deft. residing out of the jurisdiction, by leaving a copy thereof with the landlord of his lodgings, should also state that deft. was residing there when the copy was left.—*Ruttle v. Scanlan*, 1 Jones, 554. (E.E.)

5. The affidavit of the service of the petition and order to divide bog, under the 5 G. 2, (Ir.) c. 9, must state that there were not any persons in possession of the premises other than those served.

*Quære*—Must service of the petition and order be personal?—*Westropp v. M'Donnell*, 1 Jones, 619. (E.E.)

6. The affidavit of service of the petition did not state that the persons served were the only persons in possession of lands, the boundaries of which were to be settled. *Held*, a fatal defect.—*In re O'Brien*, 3 I. E. R. 161. (C.)

XXXVIII. 11. j. *Affidavit on Application for Leave to substitute Service.*

7. The affidavit upon which a motion to substitute service of the subpoena to appear and answer in a tithe bill is founded, must state the names, additions, and residences of the defts. upon whom it is sought to substitute the service.—*Clarke v. Fitzpatrick*, 1 Jones, 251. (E.E.)—[See *Porter v. Dawson*, *ibid*, 253, *note*.]

8. The affidavit in support of motion to substitute service of subpoena must show what diligence was used to effect personal service.—*Hearne v. Nagle*, 5 I. E. R. 158. (E.E.)

XXXVIII. 11. k. *Affidavit on obtaining a Writ of Ne Exeat Regno.*

9. An affidavit, from which the Court can, without difficulty, ascertain the exact sum due, sets forth the amount of the debt with certainty sufficient to ground a writ of *ne exeat*.—*Waller v. Fowler*, S. & Sc. 274. (R.)

XXXVIII. 11. l. *In Support of Application for Commission to Examine Witnesses.*

[See 30 & 31 Vic., c. 44, s. 74. See also PRACTICE, XXXVIII, 27—EVIDENCE, WITNESSES.]

10. A motion for liberty to examine witnesses upon interrogatories before the hearing of a cause petition, and that a commission for that purpose do issue, was grounded on the petitioner's solicitor's affidavit; stating that A. and other unnamed persons, when applied to, refused to volunteer evidence, by making affidavits in the case, but that deponent was persuaded that they would attend for examination upon interrogatories. It stated further that some unnamed witnesses resided in England; that a commission would therefore be requisite; and that deponent was advised that their evidence was material and necessary to the petitioner's case. Motion refused, with costs; the affidavit being vague and unsatisfactory.—[*Glascok v. Ross*, 1 I. C. R. 50, 57; *Hatchell v. Eggleso*, 1 I. C. R. 215, 222, followed.]—*Kirwan v. Lindsay*, 2 I. C. R. 23. (C.)

11. A party in the cause stated by affidavit that an intended witness was suffering from rheumatic pains, had lost the use of his limbs, and had refused to see a doctor, because it would be no use; and averred that there was not any chance that the witness would be able to attend the trial. *Held*, insufficient to obtain a commission.—*Tierney v. Byrne*, 11 I. Jur. N. S. 179. (P.)

XXXVIII. 11. m. *Affidavit; when necessary in other matters.*

12. Upon a motion to substitute one purchaser for another, there must be an affidavit, that no money has been paid for such substitution.—*Vincent v. Going*, Fl. & K. 428. (R.)

XXXVIII. 11. n. *Affidavit; when read against Answer.*

13. After answer, there cannot be an affidavit adding to the case made by the bill, there may be touching collateral matters.—*Shew v. Weir*, 1 I. E. R. 213. (R.)

XXXVIII. 11. o. *When Affidavits will be received and read as Evidence generally.*

14. The affidavit of a party, against whom process of sequestration has issued, will not be heard as cause against a conditional order obtained in the cause, unless it states some irregularity in the proceedings.—*Creed v. C.*, Long. & T. 581. (E.E.)

1. If a party answer an affidavit not filed until after the notice of motion, it cures the irregularity, and he cannot object to its being used on the motion.—*O'Brien v. Peebles*, 7 I. E. R. 558. (R.)

2. When there are reported due to wives, and their husbands, funds to which those wives are entitled, partly as personal representatives, and partly in their own rights; and the Court has not a power to direct an account to ascertain how much is due in each right; it will receive affidavits to prove how much is due to each wife in her own right, and how much is required to pay debts, &c., in due course of administration.—*Webber v. Jones*, 7 I. E. R. 639. (R.)

3. At a hearing of cause petitions under the Ch. Reg. Act 1850, the affidavits of strangers to the cause may be used to support the case either of the ptf. or deft. The previous permission or direction of the Court is not necessary for this purpose.

To a cause petition for foreclosure or sale the defence set up by the answering affidavit consisted of articles of settlement of a date prior to the mortgage, but not registered until after it, of which articles the respondents alleged that the mortgagee had notice. Affidavits filed on behalf of the petitioner, and made by the solicitors engaged on both sides in the mortgage transaction, denying that the mortgagee had notice of the articles, were allowed to be read at the hearing.

The Court, at the instance of the deft., made an order allowing both parties to examine witnesses on interrogatories generally, as they might be advised.—*Hatchell v. Eggleston*, 1 I. C. R. 215. (C.)—[Followed: *Kirwan v. Lindsay*, 2 I. C. R. 23. (C.)]

4. A petition was filed for payment of the principal and interest, or, in default, for sale of mortgaged premises. The answering affidavit charged that the mortgagor had notice of the articles. The petitioner filed affidavits denying such notice. Held, that such affidavits were admissible at the hearing without permission from the Court.—*Hatchell v. Chancellor*, 3 I. Jur. 164. (C.)

5. When the respondent, in a cause petition matter, has not himself filed an affidavit, by way of answer to the suit, affidavits filed on his behalf by other persons will not be permitted to be read.—*Murphy v. Longfield*, 3 I. Jur. N. S. 253. (C.)

6. A petitioner may read as his evidence a portion of a respondent's affidavit, without making the whole his evidence.—*Archbold v. Scully*, 8 I. C. R. 177. (C.)—[Affd.: 9 I. C. R. 152; Dr. Rep. temp. Napier, 330. (C.A.). Reversed: 9 H. Lds. Cas. 360.]

7. A., one of two bankrupt partners, after the bankruptcy, made in a Ch. suit an affidavit in which he admitted a debt, barred by the Statute of Limitations, to be due from him to E. The debt had originally been that of G.,

deceased, the former partner of A.; and the suit was instituted by G.'s executor. A., when he made the affidavit, was so infirm in health that he was unable to read or sign it. The British Consul at B. read it over to him, whereupon he affixed his mark. Held, that the affidavit was not admissible in evidence in the bankruptcy proceedings.

That, if admissible, the circumstances under which it was made, and the object of making it, deducible from circumstances, were sufficient to avoid it.

That, taking the acknowledgment in the affidavit to be equivalent to an admission in a bankrupt's schedule, such an admission does not take the debt out of the statute as against the bankrupt's assignees.

The assignees in bankruptcy, being trustees for the general body of creditors, are bound to set up the bar of the statute against an individual creditor.—*In re Clendinning*, 9 I. C. R. 284. (B.)

8. The affidavit of a party in a cause, so far as it states or charges facts merely for the purpose of eliciting a reply, is admissible as a part of the pleadings, although not as evidence.—*Kernaghan v. Kells*, 5 I. Jur. N. S. 163. (C.)

#### XXXVIII. 11. p. Affidavits in Reply.

[See G. O. (1867), 94, 158.]

9. It is the practice of the I. E. Court to allow affidavits in reply to be used, unless the opposite party be thereby surprised. In that event the case will be allowed to stand for rebutting affidavits.—*In re Wall*, 2 I. Jur. 92. (I.E.C.)

10. An order gave leave to amend a cause petition before the following day; and to file an affidavit verifying the amendment; the respondent to have liberty within fourteen days to file affidavits in reply. The amendments were not filed for several days. An affidavit verifying the amendments in detail, but filed before the motion for leave to amend, was relied on as sufficiently complying with the order to amend and verify. The Court on motion refused to take the amendments off the file for irregularity, but allowed the respondent the further time of fourteen days from the date of the latter motion to file affidavits in reply. Costs to be costs in the cause.—*Guinness v. Phelps*, 6 I. Jur. 389. (R.)

11. Petitioner, having set down the cause for hearing, and when it was in the Chancellor's list of the day, applied for leave to file further affidavits. Leave was given to file them, petitioner to pay £4, costs of the motion, without prejudice to the respondent applying to the Chancellor for the costs of the day.—*Martin v. Cooper*, 7 I. Jur. 123. (R.)

12. When a cause petition is set down for hearing by the petitioner, who afterwards applies for liberty to file further affidavits in support of the petition, he must pay the costs of the motion; especially if he had any con-

siderable time to file the affidavits, during which he neglected to do so.—*Hickey v. Meath*, 7 I. Jur. 212. (R.)

1. When petitioner files affidavits in reply to respondent's affidavits, and then sets down the cause for hearing, the respondent will be given liberty to use affidavits in reply filed after the cause had been set down, or such portion thereof as may be in answer to the new matter.—*Browne v. Betty*, 1 I. Jur. N. S. 273. (R.)

2. Matters not put in issue by the petition, or by amendment thereof, cannot be relied on at the hearing of a cause petition. To put them in issue by an affidavit in reply is not sufficient.—*Murphy v. Jackson*, 7 I. C. R. 189; 8 I. Jur. N. S. 132. (R.)—[S. c. 7 I. C. R. 502; 8 I. Jur. N. S. 288. (C.A.)]

3. Observations on filing affidavits in reply to other affidavits.—*Mortal v. Lyons*, 8 I. C. R. 112. (R.)

#### XXXVIII. 11. q. Affidavits to Verify Petitions, &c.

[See Ct. of Ch. Reg. Ir. Act 1850, 13 & 14 Vic., c. 89. 30 & 31 Vic., c. 44, s. 89: G. O. (1867), 220.]

See also PL. VI, Petition under the Statutory Jurisdiction of the Court.]

4. A petition for a receiver under the 5 & 6 W. 4. c. 55, should be verified by the affidavit of the person interested, whenever it is possible to procure such an affidavit.—*Cloncurry v. Piers*, S. & Sc. 669. (R.)

5. A judgment of the H. of L. will not be made a rule of this Court without an affidavit verifying the signature of the Clerk of the Parliament.—*Blakeney v. Annesley*, H. & J., App. 47. (E.E.)

6. The affidavit, verifying a petition by a judgment creditor for a receiver under the 5 & 6 W. 4. c. 55, need not state separately the sums due for principal, for interest, and for costs, on foot of the judgment.—*Tredennick v. Graydon*, 1 Dr. & Wal. 316. (C.)

7. An affidavit to verify a petition under 5 & 6 W. 4. c. 55, made by the agent of the petitioner, will not suffice, unless some special facts are stated. The affidavit must be made by the petitioner himself.—*Phelan v. P.*, Fl. & K. 177. (R.)

8. An affidavit to verify a petition under 5 & 6 W. 4. c. 55, which merely states, in general terms, that the contents of the petition are true, is insufficient.—*Johnson v. J.*, 2 Jon. 430. (E.E.)

9. A conditional order for a receiver will be discharged if there be no verifying affidavit by the attorney as to the service of the conditional order.—*Keogh v. K.*, 2 I. E. R. 412. (E.E.)

10. Affidavit verifying bill for an injunction to restrain waste by breaking up ancient meadow, should state deponent's knowledge of the land for a considerable period (*semble*, twenty years), and that it had not been in tillage during that time.

Leave given to file an affidavit to that effect.—*Creagh v. Carmichael*, 7 I. E. R. 804. (E.E.)

11. *Quere*—Whether, in a cause petition, by way of information and bill, and in the verifying affidavit, it suffices to describe the relator as "a ratepayer?"—*Att.-Gen. v. Le Hunte*, 8 I. C. R. 437. (R.)

12. An affidavit to register, entitled in the same words as the record of the judgment, stated that J., by the name and description of J., of 116 Grafton-street, Dublin, solicitor, obtained a judgment for, &c., dated, &c., against the deft. in this cause, by the name and description of P., of, &c., in the county of, &c., Esq." The affidavit then verified the place of abode and description of the ptf. and deft., and stated that "to the best of his" (deponent's) "knowledge and belief, P., the deft. in this suit, is at the time of swearing this affidavit, seized." *Held*, that, under the statute, the affidavit sufficiently verified the title of the cause; and that the deft. in the cause was the person whose lands it was sought to affect.—*Power's Estate; ex parte Taylor*, 6 I. Jur. N. S. 8. (C.A.)

13. The affidavit verifying a charge is not a sufficient affidavit to discharge an accounting party of items under forty shillings, mentioned in the charge.—*Palmer v. Goodwin*, 13 I. C. R. 171. (C.)

14. A power of attorney was witnessed by a notary public in Australia, and attested under his notarial seal. *Held*, that the handwriting of the person by whom the power purported to be signed should be verified by the affidavit of a resident in this country.—*In re Mann*, 8 I. Jur. N. S. 361. (R.)

#### XXXVIII. 11. r. On Motion for Decree.

[See 30 & 31 Vic., c. 44, s. 68: G. O. (1867), 91-94, 172.]

#### XXXVIII. 11. s. Notice of Using Affidavits, &c.

[See G. O. (1867), 162, 216.]

#### XXXVIII. 12. Answer.

- a. When Answer may be Read as Evidence.
- b. What Evidence is good against Answer.
- c. Effect of Reading Answer.

#### XXXVIII. 12. a. When Answer may be Read as Evidence.

15. Secondary evidence of a letter written by deft. having been given, she was allowed to read from her answer her account of the contents of the letter.—*Earl of Donoughmore v. Cataneo*, Jom. & Car. 250. (E.E.)

1. The answer of one co-defendant acknowledging the charge cannot be read against the other.—*Cruise v. Clancy*, 6 I. E. R. 552. (C.)

2. The Court will not permit the answer of the guardian *ad litem* of a superannuated person to be read against him, nor make a decree against him thereon, but will require the case to be proved against him.—*Freeman v. Grady*, 8 I. E. R. 137. (R.)

3. A suit for an account against an *elegit* creditor in possession was heard on bill and answer. The only evidence before the Master to charge the debt, with the rent of lands was the admission in the answer, accompanied by a statement that the lands were erroneously included in the *elegit*, and belonged to a third person, with whom the debt. had accounted. *Held*, that the Master was not bound to take the entire statement in the answer; but might, on the admission, charge the debt, with the rent received, and find that the property belonged to the debtor.—*McDonnell v. Alcock*, 8 I. E. R. 127. (C.)

4. The ptf. sought a renewal of a lease (not in his possession). The debt.'s answer denied his right to the renewal, "inasmuch as he is convinced from documents in his possession, to which he will hereafter more particularly refer, that no such lease was executed;" and stated "that it appears by a certain deed and schedule, which he admitted to be in his possession, that a lease for a different term and rent had been executed, and that 'it is manifest' from the schedule a renewal, if obtained, was fraudulent." *Held*, that the debt. had referred to the deed and schedule in such a way as to make it part of his answer; and was bound to produce it.—*Phelan v. Hamilton*, 9 I. E. R. 264. (R.)

5. The defts. by their answer admitted that two deeds were in their possession, stated them partially, and referred to them, when produced, for greater certainty. *Held*, that they were bound to produce them for the inspection of the ptf. on motion.

On a bill filed to sell the inheritance, it appeared on the face of the answer of the tenant for life, that the parties entitled to the remainder immediately expectant on the life estate, were not before the Court. *Held*, that the Court could not compel the tenant for life to produce the deed under which the absent parties held their estate, although, as against the tenant for life, the right of the ptf. to inspection was complete.

That, to show that the bill is open to a demurrer for want of equity, is not a valid objection to ptf.'s motion to produce documents.—*Dundas v. Blake*, 9 I. E. R. 640. (R.)

6. The bill in an administration suit erroneously stated, in respect to dates and other particulars, agreements for leases to the testator, V. His heir-at-law, in his answer, admitted the agreements to be of the purport stated in the bill, but for greater certainty referred to the original agreements when pro-

duced. He died. The suit was revived as against his son and heir-at-law, T., a minor, who, in his answer (by his guardian) to the original and revived bill, admitted the agreements to be of the nature set forth in the bill. A decree directed the Master to take an account of V.'s real and personal estate, and to state whether the premises agreed to be demised to him formed part of his real or personal assets. The original agreements were not produced before the Master, but T., in his charge, filed in the Master's office, made an admission similar to that contained in his answer. The Master by his report found that the premises formed part of V.'s personal estate. To that report T. filed exceptions.

After the cause was set down for hearing, on the report, exceptions, and further directions, T.'s solicitor, who had been solicitor for T.'s father, for the first time obtained copies of the agreements. Counsel for T. mentioned at the hearing that the agreements differed from the description given of them in the bill, and tended to show that V. took a freehold estate in the premises. Other parties in the cause objected to the admission of the original agreements in evidence in opposition to the previous admission in the pleadings. The Court yielded to that objection, and overruled the exceptions; but, upon a special motion afterwards made—*Held*, that the Master should be directed to review his report; and that T. should be permitted to file a supplemental charge in the office, putting in issue the original agreements, but should pay the costs of the motion, and the costs arising on the new reference to the Master.

That, before the decree to account, T. would have been permitted by supplemental answer to rectify the erroneous admissions; but that, after decree, leave to file a supplemental answer could not be granted.—*Carbery v. Cox*, 2 I. C. R. 377; 2 I. Jur. 25. (C.)

7. A petitioner may read as his evidence a portion of a respondent's affidavit, without making the whole his evidence.—*Archbold v. Scully*, 9 I. C. R. 152; Dr. Rep. temp. Napier, 330. (C.A.)—[See s. c., 9 H. L. Cas. 360.]

8. Though the petitioner may read a portion of the respondent's affidavit by way of answer without making the whole his own evidence, he cannot read any portion of any other affidavit filed on behalf of the respondent without making the whole his own evidence.—*Farrer v. Mercer*, 10 I. C. R. 502. (C.)

#### XXXVIII. 12. b. What Evidence is good against Answer.

9. When the answer of the debt. conflicts with the depositions of the sole witness for the ptf., if there are circumstances tending to give credit to the testimony of the witness, rather than to the debt.'s answer, the Court will grant a decree thereon upon the evidence of the former.—*Shany v. Garty*, 2 I. Jur. 187. (C.)

1. The Court refused to decree the cancellation of a bond, for which, at the time of its execution, no money passed; on the petitioner's sole evidence against the respondent's answering affidavit, stating that the bond was the petitioner's free and voluntary act, done for past services, and advances of money.—*Wyse v. Lambert*, 16 I. C. R. 378. (R.)

XXXVIII. 12. c. *Effect of Reading Answer.*

XXXVIII. 13. *Bills generally: when taken Pro Confesso.*

[See G. O. (1867), 65, 110–126.]

2. A bill in Chancery filed by tenant for life, though no decree was pronounced in the cause, may be read in evidence in a suit against the remainderman, partly relating to the same lands, but only as evidence of such a bill having been filed.—*Nangle v. Smith*, 1 I. E. R. 119. (C.)

XXXVIII. 14. *Evidence taken on Bill to Perpetuate.*

[See 30 & 31 Vic., c. 44, s. 98; G. O. (1867), 140.]

3. A commission to examine witnesses *de bene esse*, upon a bill to perpetuate testimony, granted, though deft. had not appeared, and was not in contempt.—*Allen v. Earl of Armesley*, 2 Jones, 260. (E.E.)

4. In a suit to perpetuate testimony of witnesses, the deft. not having answered, and having stood out process to a sequestration, to which there was a return of *nulla bona*, liberty was given to the ptf., under 13 G. 2, c. 9, to pass publication of depositions taken *de bene esse* in the cause. — *Scanlan v. McCoy*, Fl. & K. 366. (R.)

5. After replication filed in a suit to perpetuate testimony, it is not necessary to obtain an order to examine witnesses. — *Allen v. Hackett*, 11 I. E. R. 355. (R.)

6. Liberty given to the ptf. to examine witnesses *de bene esse*, under a bill to perpetuate testimony, although the deft. had not answered, and was not in contempt.—*Lindsay v. L.*, 2 I. Jur. 12. (R.)

7. In a cause petition suit to perpetuate testimony, the respondent filed no answering affidavit, and was in contempt for not answering interrogatories annexed to the petition. The petitioner, without an order for that purpose, examined witnesses, without complying with the requirements of the 13 G. 2, c. 9 (*Ir.*) s. 2. The Court allowed publication of those depositions to pass, saving all just exceptions touching their admissibility on the hearing of the matter wherein it was intended to use them; and reserving the right of the respondents therein to object at its hearing to the admissibility.—*Kiernan v. K.*, 6 I. Jur. N. S. 149. (R.)

8. A petition to perpetuate testimony of the contents of a lost deed was filed by the claimant of a reversionary interest thereunder. *Held*, that under a commission, issued pursuant to its prayer, the respondents could not examine witnesses on their own behalf; and that the defence of purchase for valuable consideration without notice is no answer to a suit to perpetuate testimony.—*Talbot v. Kennedy*, 7 I. Jur. N. S. 50. (C.)

XXXVIII. 15. *Copies.*

[See 30 & 31 Vic., c. 44, ss. 102, 109, 128, 152; G. O. (1867), 57, 59, 60, 62, 81, 170, 175, 177–190, 195, 197, 202, 218, 225, 244, 260, 270, 279.]

9. Secondary evidence of a letter written by the deft. having been given, she was allowed to read from her answer her account of the contents of the letter.—*Earl of Donoughmore v. Cataneo*, Jones & Ca. 250. (E.E.)

10. Copies of the tithe certificate and applotment, compared and attested by the registrar of the diocese, are evidence of the contents of the original document.—*Hawkins v. Carry*, 2 Jones, 431; *Crowley v. Flood*, *ibid*, 555. (E.E.)

11. By marriage settlement lands were limited to B., the settlor, for life; remainder to trustees for a term of years to secure a jointure and younger children's portions; remainder to B.'s sons in tail; remainder to B.'s heirs, to whom the estate descended, all the prior limitations having been spent. On a bill, filed by the representatives of the surviving younger child, an alleged copy of the settlement was produced, and an ineffectual search among her papers for the original proved, and also that this copy was found there. A witness believed that part of the document was in the handwriting of W., clerk to his father, the solicitor in the cause. W. had died twenty years ago. Witness had not ever seen W. write; but, by comparison, and by an endorsement, "Compared, W.," believed the writing to be W.'s, but did not know when it had been written. The original was registered, and a memorial thereof proved. *Held*, that the copy was not admissible in evidence, no search having been made among the papers of the trustees of the term, or of the inheritor, and W.'s handwriting not having been proved sufficiently. — *Cruise v. Clancy*, 6 I. E. R. 552. (C.)

12. The Deputy Keeper of the Rolls was directed to furnish to a deft. an office copy of a bill, with those interrogatories only which the deft. was required to answer.—*Daniel v. D.*, 2 I. Jur. 169. (R.)

13. Cause petitions under the Court of Ch. Reg. Act 1850 are not pleadings of which attested copies must be taken out of the Rolls office before answering affidavits will be received there.—*Daly v. Wade*, 1 I. C. R. 372. (C.)

14. A will lodged in the registry was impeached as a forgery. The Court refused to

allow the propounder to get a photographic copy of the signatures of the testator and of the witnesses, without an affidavit explaining the circumstances; but, on consent, ordered that a copy of the body of the will might be taken.—*Ternan v. T.*, 8 I. Jur. N. S. 51. (P.)

1. On special motion, the M. R. will permit an attested copy of amendments to a cause petition to be taken out by a respondent who has already been obliged to take out an attested copy of a common copy deposited in the Master's office.—*Bennett v. Wolfe*, 11 I. Jur. N. S. 189. (R.)

2. An incumbrancer on the final schedule noticed a prior incumbrancer, claiming under a judgment mortgage, that, on the final hearing of the schedule, he would be required to produce proof of his judgment mortgage, and that it was duly registered so as to be a charge upon the lands.

The judgment mortgagee produced a certified copy of the affidavit made to register the judgment as a mortgage. The affidavit was right in point of form. No objection was filed. *Held*, sufficient proof of the validity of the judgment mortgage.—*In re Flood's Estate*, 17 I. C. R. 116. (C.A.)

#### XXXVIII. 16. Taken in other Courts.

[See EVIDENCE ACT, 14 & 15 Vic., c. 99, s. 7.]

#### XXXVIII. 17. Decisions of other Courts.

[See 14 & 15 Vic., c. 99, s. 7.]

3. A verdict on an issue is not admissible evidence on a second trial of the same issue.—*O'Connor v. Malone*, 6 Cl. & F. 572. — [Rev. *Malone v. O'Connor*, 2 D. & Wal. 491. (C.)]

4. A decree of the Court of Claims under the 11 & 12 W. 3, sess. 2, c. 2 (*Eng.*), adjudicating on lands, vested in an innocent person, as charged with a rent, is not admissible in evidence, not having been within their jurisdiction; and although possession of the lands and the rent has ever since gone in accordance with the decree, the decree is not admissible, at least, without proving that it was known to the parties against whom it is produced, or to those through whom they claim.—*Archbp. of Dublin v. Lord Trimleston*, 12 I. E. R. 251. (C.)

#### XXXVIII. 18. Evidence of one Defendant read for or against another.

5. The answer of one co-deft., acknowledging the charge, cannot be read against the other.—*Cruise v. Clancy*, 6 I. E. R. 552. (C.)

6. When the personal representative, and the infant heir-at-law of a deceased debtor, were co-defts. in a suit instituted by a simple contract creditor of the ancestor, and there was a consent order that the personal representative should be examined as a witness—*Held*, that the deposition so taken was admissible in evidence against the infant deft.—*Lynch v. Joyce*, 3 Dr. & War. 349. (C.)

7. A deft. cannot read, as against ptf., depositions taken on behalf of a co-deft.—*Roddy v. Williams*, 3 Jon. & L. 1. (C.)

#### XXXVIII. 19. Decree in former Cause.

#### XXXVIII. 20. Evidence taken in another Cause or Matter.

8. A bill was filed in the Court of Ch. impeaching a will. A suit to recal probate had been instituted in the Prerogative Court, and a witness, who was examined *de bene esse* in the Ch. suit, died after having been examined. The Court would not permit his depositions to be published for the purpose of using them in a suit in the Ecclesiastical Court, issue not having been joined in the suit in Ch., and publication therefore not having passed in such suit.—*Shewell v. Hilliard*, 9 I. E. R. 469. (R.)

9. A., tenant under a lease for lives renewable for ever, assigned his entire interest by way of mortgage; but remained in possession. His lessor served on him, but not on the mortgagee, a notice under the Tenantry Act. For a considerable period, A. omitted to renew the lease; and a petition for renewal, filed by him, was dismissed on the ground of *laches*. In the mortgagee's suit—*Held*, that the lessor's affidavit, filed in A.'s cause, could not be read as evidence of the facts stated therein.—*Galbraith v. Cooper*, 6 I. C. R. 518; 3 I. Jur. N. S. 69. (C.)

#### XXXVIII. 21. Deeds: Proof of: Loss of: other Documentary Evidence.

a. In general.

b. Secondary Evidence.

c. Registers and other Records; Books; Entries; Letters, &c.

[As to Production of Deeds, See PRACTICE, LXXV, PRODUCTION OF DEEDS.]

#### XXXVIII. 21. a. Deeds generally: their Proof and Loss: of other Documentary Evidence.

[See 30 & 31 Vic., c. 44, ss. 71, 73, 109, 128: G. O. (1867), 162, 164-190.]

10. To warrant the reading of a document at the re-hearing, it must have been put in issue by the pleadings. That the fact intended to be proved by the document has been put in issue is insufficient.—*Lysaght v. Cullinan*, Hayes, 141. (E.E.)

11. The bill stated a deed which was admitted by answer. On hearing on bill and answer, the ptf. offered to read a deed corresponding with that stated in the bill, but which had not been identified with it. *Held*, that it could not be read.—*Hughes v. Cowley*, 5 I. E. R. 588. (E.E.)

12. There is not any objection to correct a deed by parol evidence, when there is anything in writing beyond the parol evidence to

go by. Where, however, there is not anything save the recollection of witnesses, and the deft.'s answer denies the case set up by ptf., ptf. is without remedy.

In a suit to reform principally by parol evidence, a mistake in a lease, what deft. admits or denies is of the utmost importance.—*Mortimer v. Shortall*, 2 Dr. & War. 363; 1 Con. & L. 417. (C.)

1. To bring a case within the 21 G. 3, c. 11 (the Act for validating recoveries after twenty years, though the deed making the tenant to the *præcipe* be lost), s. 8, it is not necessary to give strict proof of the loss of the deed.—*Townsend v. Earl of Kingston*, 6 I. E. R. 118. (E.E.)

2. A mortgage deed having been lost, its execution was admitted in the answer to a foreclosure bill, but the deft. swore there was an endorsement of payments on it. The memorial, executed by the mortgagor, and a counterpart in his possession, were offered in evidence, but a sufficient search for the original was not proved. *Held*, that there should be a decree to account, with an enquiry as to the original deed and the endorsement on it.—*Coulson v. Williams*, 9 I. E. R. 287. (C.)

3. Bill filed in 1816, for specific execution of a covenant contained in marriage articles, alleged to have been executed in 1760, but lost or destroyed; in which the covenantor agreed to bequeath by will to his intended wife, if she survived him, one-third part of the fortune or substance which he should die possessed of or entitled unto. A decree of the Lord Chancellor of Ireland, holding that the memorial of registry of such alleged articles, bearing date the 1st of Feb. 1763, though not executed by the covenantor, was admissible in evidence against those claiming under him, not only of the execution, but contents of those articles; and that the words "fortune or substance," embraced and included within them as well the covenantor's real as personal property, was affirmed by the House of Lords.—*Scully v. S.*, 10 I. E. R. 557. (H.L.)—[Affg. decree of Ld. Ch. of Ir.—See next case.]

4. A bill filed for a renewal set forth lost articles of demise of 1746, by V., then seized in fee, alleged to contain a covenant for perpetual renewal, also, in alleged conformity thereto, a lease executed in 1750 by V., who in the interim had become tenant for life, containing such a covenant, and reciting articles; also showing subsequent renewals successively by tenants for life. *Held*, that the memorial of the articles from the Registry-office, though not executed by V., was admissible in evidence against those claiming under him as purchasers, of the execution of such lost articles and of their contents.

That the successive renewals by subsequent tenants for life were evidence in support of the memorial, against the remainderman, of the execution of the articles.

That an agreement in a memorial to demise lands for three lives, "with a clause of re-

newal, provided the lessee, within six calendar months from the death of the last of the said three lives, should nominate such life or lives as he would have inserted in any lease to be made thereof, and paying, as well all rent due for the half year after the fall of such life, as the sum of £11. 7s. 6d. for renewing or adding such life or lives for ever," is a covenant for perpetual renewal.—*Biggs v. Sadlier*, 10 I. E. R. 522. (E.E.)—[See s. c. 4 H. L. Cas. 435, and *Scully v. S.*, 10 I. E. R. 557. (H.L.)]

5. Any documents, which could be used at Law as admissions to prove an agreement pleaded, may be used in Equity for the same purpose, though not noticed in the bill; but subject to enquiry, if deft. be taken by surprise. Such a method of proof may, however, affect the costs.—*Crosbie v. Thompson*, 11 I. E. R. 404. (C.)

6. The Poor-law valuation is evidence, as a public document, of the value of land comprised in it.

A document not in issue by the bill, and a motion for the introduction of which by amendment has been refused, cannot be used at the hearing.—*Swift v. M'Tiernan*, 11 I. E. R. 602. (C.)

7. The Poor-law valuation is, as a public document, evidence of the value of the lands comprised in it.—*Welland v. Lord Middleton*, 11 I. E. R. 603. (C.)

8. In a suit by the assignee of an annuity, a mortgagee of the estate charged denied the assignment. *Held*, that it could not be proved *viva voce* at the hearing, though the existence of the annuity was not disputed, and though the bill was taken as confessed against the assignor.—*Bagnall v. Horn*, 12 I. E. R. 19. (C.)

9. The last previous lease of premises included in a renewal is not the only evidence receivable of what are usual clauses within the meaning of a power requiring the usual clauses to be inserted in renewals. The Court refused to set aside a renewal, impeached for varying from the previous lease, in a case in which the objection was not made by the bill so as to lead the deft. to explain it.—*Marguis of Donegal v. Greg*, 13 I. E. R. 12. (C.)

10. Where in a suit to raise an incumbrance a deft. omitted to put in issue by her answer a deed of a certain date, under which she claimed an annuity; upon motion founded upon an affidavit, stating that the omission arose from inadvertence, but not stating any of the circumstances under which the deed was executed, she obtained liberty to prove the deed, and rely on it at the hearing, although it had not been put in issue.—*Held*, that under that order, evidence that the deed was executed upon a day different from that on which it bore date was inadmissible at the hearing; and that evidence of its execution merely could be then received.

The Court, inserted in the decree a declaration that the deft. should be at liberty to rely before the Master on the deed in relation to such rights as she might claim.—*Ramsay v. Huffington*, 13 I. E. R. 185. (C.)

1. The Court will not allow a deed to be taken out of the Master's office, to prove it in the cause, without notice to the parties.—*Wyse v. W.*, 4 I. Jur. 100. (R.)

2. Any document or evidence, that has been before the Court below, may, on appeal to the House of Lords, be properly brought under the notice of the House, but no others.—*Geraghty v. Malone*, 1 H. L. Cas. 89.—[See the case below: 5 I. E. R. 549; 3 Dr. & War. 239. (C.)]

3. On a re-hearing, documentary evidence, not offered at the original hearing, may be received; but depositions cannot then be received, if offered for any purpose beyond that of identifying such documentary evidence.—*Johnson v. Mid. Gt. W. of Ir. Ry. Co.*, 5 I. C. R. 264. (C.)—[See s. c., 6 H. L. Cas. 798; 4 Jur. N. S. 645.]

4. In 1805, C., entitled to a charge upon lands, died. It was alleged that she had made a will, and the petitioner claimed a portion of the charge under that will. No evidence of the existence or probate of that will was given, but for upwards of thirty years the parties interested in the charge, and in the lands on which it was a charge, had acted on the belief of its existence and probate. During a considerable portion of that time the owner of the lands was a lunatic under the protection of the Court of Ch., which had acted on the supposition of there being a will. Some of the respondents, who subsequently became owners of the lands, had in a former suit made verified statements mentioning and relying on the execution of C.'s will. *Held*, in a suit to raise the amount due on foot of the charge, that the existence and probate of the will, and the assent of the executor, might be presumed.—*Toker v. Lanesborough*, 7 I. C. R. 241; 3 I. Jur. N. S. 125. (C.)

5. A., seized in tail of K. and other lands, suffered a recovery of them in 1834, and had by will, in 1832, devised them. In 1836 A. borrowed money on a mortgage of K., and on a collateral judgment. On that occasion a disentailing deed of all the lands was executed and enrolled, by which A. conveyed all the lands to the use of himself and his heirs. *Held*, that the deed was a total revocation of the will.—[Affirming Rolls decision: 7 I. C. R. 354.]

On the occasion of the mortgage, the lender's counsel had objected to the recovery which had been suffered of K., and had advised that the mortgage should be enrolled. *Quære*, Whether that opinion was admissible as evidence?—*Power v. P.*, 9 I. C. R. 178; 3 I. Jur. N. S. 379; Dr. Rep. temp. Napier, 268. (C.A.)

6. If the tenancy of lands, over which a receiver has been appointed, is disputed, the Court will not issue an attachment for non-payment of rent.

*Semble*—A stamped copy of a lost unstamped document, requiring a stamp, is admissible in evidence.—[*Connor v. Cronin* (7 I. C. L. R. 480) doubted.]—*Herbert v. Rae*, 18 I. C. R. 25. (R.)

#### XXXVIII. 21. b. Secondary Evidence of Deeds, &c.

7. An admission in the answer that the deft.'s solicitor wrote a letter "to some such effect as that in bill stated, but for certainty as to the contents thereof the deft. begs leave to refer thereto, when produced and proved," does not authorise the ptf. to read the passage in the bill referred to, in order to show what were the contents of that letter.—*Kent v. Roberts*, 3 I. E. R. 279. (E.E.)

8. A memorial of articles for a settlement—*Held*, good secondary evidence of those articles, possession being shown to have gone along with them; and that execution of the memorial by the grantee was sufficient to satisfy the statute.—*Peyton v. M'Dermott*, 1 Dr. & Wal. 198. (C.)

9. A memorial is 'good secondary evidence of a lost deed.—*Allen v. A.*, 4 I. E. R. 472; 2 Dr. & War. 307; 1 Con. & L. 427. (C.)

10. An *insperimus* of a grant by an archbishop, contained in a grant of confirmation by a subsequent archbishop, which was enrolled, was produced from the Rolls Record-office. *Held*, good secondary evidence.—*Att.-Gen. v. Corp'n. of Cashel*, 3 Dr. & War. 294; 2 Con. & L. 1. (C.)

11. The word "and," in the last sentence of the 21 G. 2, c. 11, (the Act for validating recoveries after twenty years, notwithstanding the deed making the tenant to the *precipe* should be lost and not appear), s. 8, is to be read "or." It is not necessary, to bring a case within that statute, to give strict proof of the loss of the deed.—*Townsend v. Earl of Kingston*, 6 I. E. R. 118. (E.E.)

12. By marriage settlement, lands were limited to E. (the settlor), for life, remainder to trustees for years, to secure a jointure and younger children's portions, remainder to the sons of E. in tail, remainder to the heirs of E. The estate descended to the heirs of E., all the prior limitations being spent. On a bill filed by the representatives of the surviving younger child, an alleged copy of the settlement was produced, and an ineffectual search proved among her papers for the original, and that the copy was found there. A witness believed that part of the document was in the handwriting of W., who was clerk to his father, the solicitor in the cause, and had died twenty years before; he had never seen W. write, but believed the writing to be his, by comparison, and also an endorsement, "Com-



pared, W.," but did not know when it had been made. The original deed was registered, and the memorial of it was proved. *Held*, that the copy was not admissible in evidence, no search having been made among the papers of the trustees of the term, or of the inheritor, and the handwriting of W. not having been sufficiently proved.

*Semble*—That if the endorsement had been proved to have been in the handwriting of W., and to have been made when it purported to have been made, and the document had been transmitted with the title deeds, and acted on, it would have been admissible.—*Cruise v. Clancy*, 6 I. E. R. 552. (C.)

1. In 1816, a bill was filed praying specific execution of a covenant contained in marriage articles which, it was alleged, were executed in 1760, but had since been lost or destroyed. The covenantor had thereby agreed to bequeath to his intended wife, if she survived him, one-third part of the fortune or substance which he should die possessed of or entitled to. *Held*, that the memorial of the registry of those alleged articles, which memorial bore date 1st Feb. 1763, was, though not executed by the covenantor, admissible in evidence, against claimants under him, not only of the execution, but of the contents of those articles.

That the words, "fortune or substance," included the covenantor's real as well as his personal property.—*Scully v. S.*, 10 I. E. R. 557. (H.L.)—[Affg. decree of Ld. Ch. of Ir.—See next case.]

2. A bill for a renewal set forth lost articles of demise of 1746, by V., then seized in fee, and alleged that they contained a covenant for perpetual renewal. The bill also set forth, in conformity with those articles, a lease executed in 1750 by V., who, in the interval, had become tenant for life. This lease contained such a covenant, and recited the articles; and the bill further showed subsequent renewals by successive tenants for life. *Held*, that the memorial of the articles from the Registry-office was, though not executed by V., admissible in evidence, against claimants under him as purchasers, of the execution of such lost articles, and of their contents.

That the successive renewals were evidence, in support of the memorial, against the remaindermen, of the execution of the articles.—*Biggs v. Sadler*, 10 I. E. R. 522. (E.E.)—[See s. c., 4 H. L. Cas. 435, and *Scully v. S.*, 10 I. E. R. 557. (H.L.)]

3. By marriage settlement lands were conveyed to A. and B., and the survivor of them, and his heirs; on trust for the intended husband for life, and after his death in trust "to convey at the request of the eldest son of the marriage," or of certain other persons. A. and B. having died, and a petition having been filed to carry into effect the trusts of the settlement—*Held*, before giving secondary evidence of the settlement, proof should be given that an ineffectual search for it had been made among the papers of both trustees;

and that proof of such search among the papers of the survivor was insufficient.—*Abbott v. Geraghty*, 6 I. Jur. 49. (C.)

4. An affidavit of a respondent put in issue marriage articles, and stated their contents, "as by the same when produced and proved will appear." The articles were lost, but their loss was not stated in the affidavit. *Held*, that secondary evidence of their contents was not admissible.

The articles had been executed in Genoa, and a copy of them had been registered at the British Consulate there, by an officer whose duty it was to compare the registered copy with the original. *Held*, that the copy of the registered copy was not admissible in evidence.

After the cause had been heard, the book containing the copy of the articles was, on the application of the respondent's solicitor, forwarded to the Judge; but he refused to admit it in evidence without a re-hearing.—*Barron v. Constable*, 7 I. C. R. 467; 3 I. Jur. N. S. 312. (R.)

5. In a suit for specific performance, a contemporaneous letter of a deceased agent, with whom the contract was made, was admitted in evidence to prove the terms of the contract, the tenant having relied on the acts of the agent to establish that he had authority to contract.

In a suit for specific performance of a contract entered into by an agent, his authority to contract should be stated in the petition.

*Semble*—If it be not, the petitioner cannot prove it at the hearing.

Observations on the practice of filing affidavits in reply.—*Mortal v. Lyons*, 8 I. C. R. 112. (R.)

6. A solicitor, on a s. d. t., brought into Court a deed under which the respondents claimed as purchasers for value, and on which he did not claim any lien; but, by his client's instructions, refused to produce it, because the principal respondent owed his client a large sum of money.

*Semble*—That secondary evidence of the contents of the deed was not admissible.—*The Att.-Gen. v. Ashe*, 10 I. C. R. 309. (R.)

7. A document over thirty years old, purporting to be a copy of a lost instrument, and coming out of the proper custody, is not made evidence by an endorsement in the handwriting of the deceased family solicitor of the person claiming under the lost instrument, that he has compared the copy with the instrument, and knows the handwriting of the witnesses to the original, and of one of the parties, to be genuine.—*Kerin v. Davoren*, 12 I. C. R. 352. (C.)

8. A document purporting to be an old copy of a lost deed, which created charges on land, is not admissible in evidence against the owner of the land unless it is proved, when it comes from the custody of the owner of one of the charges.

A term of years was vested in trustees to raise a charge, no part of which was raised, though interest on two-thirds of it was paid to the parties entitled to the whole. On the remaining one-third no interest had been paid for upwards of forty years.

*Quere*—Whether a claim on foot of this one-third was barred by the Statute of Limitations?—*In re Coane*, 8 I. Jur. N. S. 124. (C.A.)

**XXXVIII. 21. c. Registers and other Records: Books, Entries, Letters, &c.**

[See 14 & 15 Vic., c. 99, ss. 7, 8, 9, 10, 11, 12; 18 & 19 Vic., c. 42, s. 3.]

1. The receipt granted by the collector of quit-rent is evidence of the apportionment of rent.—*Bowles v. Waller, Hayes*, 439. (E.E.)

2. Entries made in the chapel books by R. C. clergymen, whose deaths and handwriting have been proved, are evidence of a marriage or baptism recorded thereby.—*Malone v. L'Estrange*, 2 I. E. R. 16. (C.)—[See *Malone v. O'Connor*, 6 Cl. & F. 572].

3. To an *habere* upon a judgment in ejectment for non-payment of rent, the sheriff returned that he had delivered possession upon a particular day. *Held*, in a redemption suit, that the return was not conclusive evidence, against the tenant, of the date of the execution of the *habere*.

If evidence be conclusive at Law, it must be equally conclusive in Equity. We will not establish a rule of evidence, sitting as a Court of Equity, which, sitting as a Court of Law we would reject. The rules of evidence are substantially the same at Law and in Equity. What do you say to the case of *Gyfford v. Woodgate* (11 East. 297)? Have you any case overruling or varying that case; or any case denying the principle, that on a collateral matter, not an essential part of the return, and which the sheriff is not by the writ commanded to return, the sheriff's return is only *prima facie*, and not conclusive evidence?—*Fitzgerald v. Hussey*, 3 I. E. R. 319. (E.E.)

4. The *inspeximus* of a grant contained in the enrolment of a subsequent grant of confirmation of the preceding grant, produced from the records of the Rolls office—*Held*, to be good evidence of the former grant.—*Att.-Gen. v. Corp'n. of Cashel*, 2 Con. & L. 9; 3 Dr. & War. 299. (C.)

5. In a bill by one partner for an account on foot of the dissolved partnership, letters written by the deft. to the ptf., after the dissolution, were set out as in ptf.'s possession, and forming the basis of the partnership agreement, but which the deft., in his answer, denied. A motion by the deft. for the production of the letters, refused.—*Palmer v. Mahony*, 6 I. E. R. 504. (R.)

6. A witness proved a letter to have been duly posted, and properly directed. The

receipt of it was positively denied in the answer. The copy tendered in evidence had a defective direction at the foot of it.

*Quere*—How far admissible in evidence?—*Sheridan v. Joyce*, 7 I. E. R. 115; 1 Jon. & L. 401. (C.)

7. The entry of the payment of the King's silver is sufficient evidence of a fine having been duly levied, the fine being complete on such payment.—*Marjoribanks v. Hovenden*, 8 I. E. R. 317. (C.)

8. The Poor-law valuation is evidence, as a public document, of the value of land comprised in it.—*Swift v. M'Tiernan*, 11 I. E. R. 602. (C.)—*Welland v. Lord Middleton*, 11 I. E. R. 603. (C.)

9. The Down Survey, though conclusive only as to the boundaries of the new and old interests defined by the statute of *Cur. 2*, is, as a public document, admissible as evidence on questions between any persons of matters stated in it.

The Books of Distributions, being only abstracts of the survey, are not admissible as evidence of matters in them.

A decree of the Court of Claims under statute of 11 & 12 W. 3, sess. 2, c. 2 (*Eng.*), adjudicating upon lands vested in an innocent person, as charged with a rent, is not admissible in evidence, not being a matter within their jurisdiction; and although the possession of the lands and rent has ever since gone in accordance with the decree, it does not render it admissible, at least without proving that it was known to the parties against whom it is produced, or those through whom they claim.—*Archbishop of Dublin v. Trimleston*, 12 I. E. R. 251. (C.)

10. A return made by the Registrar of a diocese, in answer to the enquiry of a clergyman whose benefice was under sequestration, enumerating the writs lodged with him, with the dates of the delivery and the sums due, though not proved to be made in virtue of his office, is evidence against the bishop: so are letters of the Registrar of a similar character.

The applotment-book of a parish is not evidence to prove the value of the benefice in years preceding the establishment of tithe composition in the parish.—*Hogg v. Garrett*, 12 I. E. R. 559. (C.)

11. The minute-book, made evidence by the 8 Vic., c. 16, s. 98 (Companies Cl. Cons. Act), may be transcribed or made from rough minutes taken at time of the meeting.—*In re Jennings*, 1 I. C. R. 236. (B.)

12. In a cause petition under the Ch. Reg. Act, praying special performance of a contract—*Held*, that a letter referred to by an affidavit made by the petitioner in reply to the affidavit of the respondent, but not put in issue by the original or any amended or supplemental petition, was inadmissible on behalf

of the petitioner as evidence of the contract. —*Duffy v. Johnson*, 1 I. C. R. 591; 4 I. Jur. 14. (C.)

1. I. obtained a Crown grant of 111 acres profitable land, in M., with all pasture, turbary, bogs, mountains, to the premises belonging or in any wise appertaining. K. and F. obtained similar grants of lands in M. B. obtained a subsequent grant of one-quarter of lands in M. containing 134 acres profitable land, and also a parcel of bog in common unto the above lands, called C. containing 236 acres.

In the Book of Distributions C. was described as bog common to M., 236 acres. The lands of C. had been from time immemorial used for pasture and turbary by the tenants of all portions of M. *Held*, on petition for partition, that the representatives of J., of K., of F., and of M., were tenants in common of C.

The Book of Distributions is admissible evidence in points relating to property derived from the Crown, under the Acts of Settlement and Explanation, at least when the original survey cannot be produced.

Decree for petition, with reference to the Master to ascertain shares.—*Knox v. Mayo*, 7 I. C. R. 563; Dr. Rep. temp. Napier, 225. (C.) —[Affd.: 9 I. C. R. 192. (C.A.)]

2. If a partnership be admitted, the books are admissible in evidence, in taking the account of the partnership transactions, but the books of A. are not admissible against B. to prove a partnership if it be denied. —*Sim v. S.*, 11 I. C. R. 310. (R.)

3. A petitioner is not entitled to read from his petition the statement of a document, to a copy of which the petition refers, although no affidavit has been filed by the respondent. —*Talbot v. Hamilton*, 14 I. C. R. 375. (C.)

4. Letters of administration were insufficiently stamped. *Held*, that the Book of Acts was primary evidence of the title of the party to whom administration was granted. —*McDonnell v. White*, 1 I. Jur. N. S. 193. (C.)

5. A map made in 1609, by virtue of a commission issued by the Crown under the great seal of Ireland, in the 7th Jac. 1, and which map was preserved in the State Paper-office in London, was properly receivable in evidence. —*Staples v. Harpur*, 10 I. Jur. N. S. 121. (C.)

6. On appeal, the Court may admit documentary evidence which was not before the Master when he made the decretal order appealed against.

The Court has jurisdiction to review a Master's decision respecting what evidence is admissible under the Ch. Reg. Act, s. 13.

The practice in the Masters' offices under that section is irregular. The Master should order books of account to be received as *prima facie* evidence. Items capable of independent proof should be proved before the order is made. —*Boag v. Bradford*, 11 I. Jur. N. S. 226. (R.)

XXXVIII. 22. *When Evidence is admitted to Expound Deeds.*

[See also PRACTICE, XXXVIII. 4, PAROL EVIDENCE.]

7. Lands being re-settled, £2500 was charged for younger children by a deed reciting that estates were charged with £1000 for them under a previous settlement which really charged the lands with £2000. Those children claimed both sums. *Held*, not a case for election between the deeds, but a mere misrecital; and that the real intention, if it had been to charge £2500, besides only £1000, should have been proved by parol evidence. —*Ruby v. Foot & Beamish*, Beat. Rep. 581. (C.)

8. *Semble*—That evidence of a consideration, which is not inconsistent with the consideration set out on the face of the deed, is admissible to support the deed as one for value. —*Nixon v. Hamilton*, 1 I. E. R. 46; 2 Dr. & Wal. 364. (C.)

9. In 1710, Trinitarian Protestant Dissenters subscribed moneys for charitable purposes, and executed a trust deed for the management of the fund. It recited that the objects of the trust were: to support the Protestant Dissenting Interest against unreasonable prosecutions: to educate youth designed for the ministry amongst Protestant Dissenters: to assist poor Protestant Dissenting Congregations.

To aid in construing such a deed the Court will receive evidence of the acts of the founders, but not of their opinions.

Evidence is also admissible to explain the signification in which ambiguous words or expressions were generally understood when the deed was executed. —*The Att.-Gen. v. Drummond*, 1 Dr. & War. 353; 1 Con. & L. 210. (C.)—[Affd.: 2 H. Lds. Cas. 837.—For the form of decree in such a case, see 3 Dr. & War. 162. (C.)]

10. There is no objection to correct a deed by parol evidence when there is anything in writing, besides the parol evidence, to go by. But, when the sole evidence is the recollection of witnesses, and the deft., by his answer, denies the case set up by the ptf., the ptf. is without remedy. —*Mortimer v. Shortall*, 2 Dr. War. 363; Con. 1 & L. 417. (C.)

11. Before the 1 Vic., c. 26, a deed which revoked a will at Law, would also have revoked it in Equity, although the estate in Equity remained unaltered, unless the deed was executed for some partial or qualified purpose.

Intention is immaterial, if there was an alteration of the estate both at Law and Equity: but if there was no alteration of the estate in Equity evidence is admissible to rebut the inference of an intention to revoke, arising from the alteration of the estate at law. *Held*, therefore, that the opinion of counsel was admissible as evidence, that the disentailing deed was executed for the purpose of the mortgage. —*Power v. P.*, 7 I. C. R. 354. (R.)—[Affd.: 9 I. C. R. 178; Dr. temp. Napier, 268; 3 I. Jur. N. S. 379. (C.A.)]

XXXVIII. 23. *Handwriting.*

[Judicial signature admitted without proof; 8 & 9 *Vic.*, c. 113, s. 2.]

Handwriting may now be proved by comparison with other handwriting proved to be genuine; 17 & 18 *Vic.*, c. 125, ss. 27 & 103.]

1. A power of attorney was witnessed by a notary public in Australia, and attested under his notarial seal. *Held*, that the handwriting of the party by whom the power purported to be signed should be verified by the affidavit of a resident in this country. — *In re Mann*, 8 I. Jur. N. S. 361. (R.)

XXXVIII. 24. *Evidence in Tithe Causes.*

2. Ptf. in a tithe suit is not bound to prove his title by production of the certificate of his collation, presentation, or donation, when it is proved that he has been in receipt of the tithes for several years, and has been paid tithe by deft., unless deft. has distinctly denied ptf.'s title. — *Jones v. Waller*, 1 Jones, 300. (E.E.)

3. The ptf. sued as vicar for tithe composition. In his bill he set out the certificate in which he was named as vicar, and the applotment charging, as occupier, the deft., who in his answer stated his belief that the commissioners had made and signed such certificate, as was stated in the bill; but whether the same was duly prepared and signed, he referred to such proof as the ptf. should produce thereof. Upon the hearing on bill and answer, *Held*, that the certificate sufficiently proved the ptf.'s title. — *Crawley v. Flood*, 2 Jones, 555. (E.E.)

4. Under the 1 & 2 *Vic.*, c. 109, s. 32, upon application by three or more persons in any parish, each charged with payment of £3 or upwards in respect of the tithe rentcharge, and who have given notice in the manner specified by the Act, the Court of Q. S. may vary the rentcharge according to the price of corn.

An order reducing the rentcharge recited that, whereas due notice having first by them been given, three owners and occupiers of land in the parish of F., &c., each charged with payment of £3 and upwards in respect of the rentcharge payable in lieu of the composition for tithes made by certificate of, &c., applied to the Justices of the Peace at Q. S., &c.; afterwards the incumbent proceeded by petitions under the 30th section of the Act to recover the rentcharge which accrued from the gale-day after the order of Sessions, as if no reduction had taken place. A rule *nisi* for a receiver was obtained. The respondent, relying on the order of the Q. S., came to show cause against the rule. *Held*, that the recitals in the order were not evidence of the facts therein stated. — *Thompson v. Shiel*, 3 I. E. R. 135. (R.)

5. An objection to the reading of documents, because they have not been proved

as against the party objecting, must be made when they are tendered. This rule is equally applicable to the case of a minor as of an adult deft. — *Stoughton v. Crosbie*, 5 I. E. R. 451. (E.E.)

6. *Semble*—A certificate by the commissioners under the Tithe Composition Act (4 *G.* 4, c. 99, s. 25) is valid, though it only finds generally that tithes are payable to a lay impropriator, without giving his name.

*Semble also*—The title to the tithes is not concluded by the certificate. — *Greville v. Fleming*, 8 I. E. R. 201; 2 Jon. & L. 335. (C.)

7. The applotment-book of a parish is not evidence to prove the value of the benefice in years preceding the establishment of tithe composition in the parish. — *Hogg v. Garrett*, 12 I. E. R. 559. (C.)

8. The only evidence of the effecting of a composition in lieu of tithes is the original certificate of composition: the applotment-book is not sufficient. — *Kent v. Burrowes*, 6 I. Jur. N. S. 13. (C.)

9. The applotment of tithe rentcharge made by commrs. under the 9 *G.* 4, c. 99, is not in every case conclusive evidence of the amount payable by the tithe payer. — *Plunket v. Malley*, 8 I. Jur. N. S. 83. (M.O.)

XXXVIII. 25. *Will, Proof of.*

[See 20 & 21 *Vic.*, c. 79, ss. 68, 69.]

10. When it is sought to have a will, disposing of real property, declared well proved, it must be proved by three witnesses, or proof of their deaths and handwriting. For other purposes, not requiring such a decree, but merely to read it as a legal instrument, one witness to prove it suffices. — *Brown v. Chambers*, Hayes, 597. (E.E.)

11. Ptf. and deft. (the inheritor), a minor, both claiming under an ancient will, it may be proved at the hearing as an exhibit. Attested copies of records, when a minor is concerned, must be proved by interrogatories. — *Pope v. P., Hay. & J.* 77. (E.E.)

12. Proof of the *factum* of a will, and of the testator's capacity, are not sufficient to encounter suspicious circumstances which may raise a presumption of falsity or fraud, requiring for its removal clear and satisfactory evidence.

It is not necessary to prove the fraud or imposition, which may in such a case be presumed; the *onus* of proof lying on the party who propounds the will. — *Von Stentz v. Comyn*, 12 I. E. R. 622. (C.)

13. Since the 20 & 21 *Vic.*, c. 79, s. 68, a will, or the contents of a lost will, may be proved by a single witness. — *Daly v. Burke*, 8 I. Jur. N. S. 73. (P.)

XXXVIII. 26. *When admitted to Expound Wills.*

1. The general doctrine of the admissibility of parol evidence to explain a testator's intention, and the cases on the subject, considered.—*Hall v. Hill*, 4 I. E. R. 27; 1 Dr. & War. 94; 1 Con. & L. 120. (C.)

2. As to admitting evidence with respect to the construction of a will.—*Kennedy v. Kelly*, 7 I. Jur. N. S. 326. (P.)

XXXVIII. 27. *Witness.*

- a. *Generally: his Rights, Duties, and Liabilities: of a Subpœna ad Testificandum.*
- b. *Competency.*
- c. *Examination respecting Witness's Credit.*
- d. *Demurrer to Interrogatories: who is examinable by, and on what matters.*
- e. *Attesting Witness.*

[See 30 & 31 Vic., c. 44, ss. 82, 87–109; G. O. (1867), 158–161.]

XXXVIII. 27. a. *Generally: his Rights, &c.; Subpœna ad Testificandum.*

[See 30 & 31 Vic., c. 44, ss. 90, 91.]

3. The Court permitted a witness to read the interrogatories to which he was to be examined; it being sworn that he was deaf and could not be otherwise examined.—*Nangle v. N.*, 1 I. Jur. 78. (R.)

XXXVIII. 27. b. *Competency of Witness.*

[Incapacity of person from crime or interest to be examined as a witness abolished.—6 & 7 Vic., c. 83, s. 1; 14 & 15 Vic., c. 99, ss. 1–3; 16 & 17 Vic., c. 83, s. 1.]

4. A widow is an admissible witness against the personal representative of her deceased husband, to charge his assets.—*Harwood v. Bland*, 2 I. E. R. 11. (C.)

5. The evidence of a witness was rejected at the hearing, on the ground of interest. Motion to permit him to be examined in aid of an enquiry directed by the decree, or to permit his depositions to be read before the Master, with liberty to examine him to show that the passage in his depositions showing his interest was introduced by mistake. The Court refused the motion, being of opinion that the passage had not originated in mistake.—*Smith v. Harding*, Fl. & K. 184; 3 I. E. R. 336. (R.)

6. The lessee of a lease for lives renewable for ever became insolvent, and died. A judgment creditor of his filed a bill, and obtained a decree for sale of the land, and, with the sanction of the Court in that suit, filed a bill for a renewal. *Held*, that a judgment creditor of the party entitled to the lease, is a competent witness for the ptf.—*Smith v. Shannon*, 3 I. E. R. 452. (C.)

7. A witness had, through inadvertence, omitted to include in a release a portion of his interest. Liberty was given to re-examine him to the interrogatories to which he had already been examined.

A witness, incompetent by interest at the time of his examination was, after a release, ordered to be re-examined before publication, it appearing to the Court that there was no intention of varying the evidence already given.—*Gleeson v. Sandwich*, 3 I. E. R. 359; Fl. & K. 240. (R.)

8. The 6 & 7 Vic., c. 85, has not altered the practice in relation to the examination of a deft. by the ptf., and the order cannot be obtained to examine a deft. whose answer has been replied to, unless the replication be withdrawn as against him.—*Walker v. Tilly*, 9 I. E. R. 261. (R.)

9. A ptf. may examine a notice party without previous leave to do so.—*M'Carthy v. M'C.*, 9 I. E. R. 620. (C.)

10. A deft. whose interest in the suit so coincides with that of the ptf., that he might have been made a co-ptf., is, nevertheless, under the 6 & 7 Vic., c. 85, a competent witness for the ptf.—*Kelly v. Bennison*, 11 I. E. R. 605. (C.)

11. A solicitor prepared, on the day next but one before the testator's death, a draft will under which he took, as residuary legatee, a large pecuniary benefit. On the day on which the will was prepared the testator executed it in the presence of two witnesses brought by the solicitor to witness the testator's signature. The validity of the will having been questioned in a contested suit—*Held*, that the solicitor's evidence on his own behalf was admissible, but should be received with great jealousy and caution.

In such a case mere formal proof that the will was executed according to the forms prescribed by law, is not sufficient to establish the will: the evidence should satisfy the Court that the instrument so executed was the genuine will of a free and capable testator.

Review of the principles which govern the Court in estimating the capacity of a testator, and the testimony of witnesses, in contested testamentary cases.—*Keogh v. Barrington*, Dr. Rep. temp. Napier, 1. (C.A.)

XXXVIII. 27. c. *Examination touching Witness's Credit.*

[By examination as to former inconsistent statements, see 19 & 20 Vic., c. 102, ss. 26, 27, 28.]

12. Statements in affidavits of alleged conversations of a deponent in a cause will not be admitted for the purpose of impeaching his credit; he must be cross-examined as to the conversations.—*Crofts v. C.*, 6 I. Jur. 249. (C.)

**XXXVIII. 27. d. Demurrer to Interrogatories: who, and on what matters examinable.**

1. An attorney cannot, on the ground of professional confidence, refuse to answer an interrogatory touching his having seen a certain instrument; and, if so, when, and in whose hands?—*O'Gorman v. M'Namara*, Hayes, 174. (E.E.)

2. When a witness, who had been ptf.'s solicitor, declines to answer an interrogatory concerning documents in his possession, on the ground that he has a lien on them for costs, the Court (there not being in the case any danger of perjury) will permit a new interrogatory to the same intent as the former one to be exhibited to him, though publication has passed.—*Bloss v. O'More*, Hay. & J. 337. (E.E.)

3. In a renewal suit deft. examined a witness to prove service on ptf's. of a notice requiring them to renew, and pay the renewal fines. *Semble*—It was not competent for ptf's. to read the evidence of another witness examined by them in the same cause to prove an admission by deft.'s witness that he had not ever served that notice.

*Semble*—Articles should previously have been exhibited to the credit of defendant's witness by ptf's., to enable them to impeach his testimony.—*O'Keefe v. Allen*, 1 I. E. R. 382. (E.E.)

**XXXVIII. 27. e. Attesting Witness.**

[Deed or agreement not necessary to be proved by attesting witness, when no attesting witness necessary to validity thereof. 19 & 20 Vic., c. 102, ss. 29, 98.]

4. It is enough to examine one of the witnesses to a will except when it is proved against the heir-at-law, when it is necessary to examine all the witnesses.—*Brown v. Chambers*, Hayes, 597. (E.E.)

5. When an infant deft. is of years so tender that she cannot write, the Court will order her execution of the purchase-deed, pursuant to the 11 G. 4, & 1 W. 4, c. 47, to be attested by a Commissioner of the Court for taking Affidavits.—*Archbold v. Rice*, 5 I. E. R. 33. (E.E.)

6. Deft. assented to the appointment of the person nominated commissioner examiner by ptf.; and cross-examined one of ptf.'s witnesses, but did not examine any witness on the direct. *Held*, that he must pay the costs and expenses incurred by reason of his cross-examination, viz., for the commissioner's attendance during the time occupied by the cross-examination, and for engrossing the depositions on the cross-interrogatories; but not to contribute to the commissioner's travelling expenses.—*Rogers v. Aylmer*, 5 I. E. R. 586. (E.E.)

7. A medical man, who is attesting witness to a deed, is bound to prove the execution of it without compensation for loss of time.—*Kelly v. Jackson*, 2 I. Jur. 181. (R.)

8. The day before she died, testatrix, V., bequeathed a legacy to her sister, B.. The will was then properly attested by two witnesses. Immediately after they had signed, B., at V.'s request, and, as she thought, for greater security, signed her name to the will. After V.'s death, B. cut her name off the will. *Held*, that she signed as an attesting witness, and must pay the costs incurred by her spoiling the will.—*Toker v. Maguire*, 6 I. Jur. N. S. 24. (P.)

**XXXVIII. 28. Examination.**

[Under the Ch. Reg. (Ir.) Act 1850, see G. O. 1857. 30 & 31 Vic., c. 44, ss. 87-109; G. O. (1867), 158-161. And under the Ch. Reg. (Ir.) Act 1850, Gen. Orders in 1857, see in Gamble's Ch. O.]

- a. Generally.
- b. When and how taken.
- c. Examination Viva Voce.
- d. Before Master.
- e. Before Examiner.
- f. Examination de bene esse.
- g. Pro interesse suo.
- h. Cross-examination.
- i. Further or Re-examination.
- j. Of Parties to the Cause.
- k. Of Plaintiff or Defendant on Interrogatories.
1. Commission to Examine.
  1. General Orders.
  2. Their Effect.
  3. When Granted: how Obtained.
  4. Second Commission.
  5. How Discharged or Abated.
  6. Execution of: respecting the Commissioners.
  7. Return of.
  8. When Lost.

**XXXVIII. 2. a. Examination generally.**

[As to examination under the Court of Ch. Reg. (Ir.) Act 1850, see 13 & 14 Vic., c. 89; 88th G. O. (1857), 11, 12, 13, 14, 15; Gam. Ch. O. 51, 76, and 91.

See 30 & 31 Vic., c. 44, ss. 87-109; G. O. (1867), 158-161.]

9. It is no longer necessary to serve under the G. O. of the 20th May 1816, the twenty-one days' rule, to examine; the present practice being regulated by the 99th G. O. of 29th Nov. 1834.—*Ogle v. O.*, S. & Sc. 679. (R.)

10. When publication passed without deft.'s having examined any witnesses, on deft.'s affidavit that named persons were witnesses necessary and material to be examined; that he could not otherwise proceed to hearing; and that neither he nor his solicitor had read, or had any knowledge of the evidence for the ptf's.; the Court, being unwilling to exclude material evidence, allowed deft. to examine upon terms.—*Butler v. Troy*, 7 I. E. R. 70.

11. A ptf. may examine a notice party without obtaining an order for leave to do so.—*M'Carthy v. M'C.*, 9 I. E. R. 620. (C.)

1. After replication filed in a suit to perpetuate testimony, it is not necessary to obtain an order to examine witnesses.—*Allen v. Hackett*, 11 I. E. R. 355. (R.)

2. A party examining on personal interrogatories in the Master's office, may use as many of the answers as he chooses, without making the remainder evidence.—*Brabazon v. Teynham*, 11 I. E. R. 475. (C.)

3. An order, for leave to examine a deft., is not necessary since the 14 & 15 Vic., c. 99.—*Donnelly v. M<sup>c</sup>Clintock*, 2 I. C. R. 558. (R.)

4. The motion for leave to examine a witness under the provision of the 11th G. O. of May 1857, may be made to the Lord Chancellor.—*Ormsby v. Edgar*, 6 I. C. R. 295. (C.)

5. An order for liberty to examine witnesses made by the Lord Chancellor.—*Keegan v. Fenton*, 6 I. C. R. 296. (C.)

#### XXXVIII. 28. b. *When and how taken.*

[See 30 & 31 Vic., c. 44, ss. 88, 89.]

6. The 4 G. 4, c. 61, s. 43, applies as well when the witnesses reside abroad, as when they reside within the jurisdiction. Therefore the Court will not order a commission to issue to take the examination of witnesses residing abroad, with a direction, that the examiner shall not be required to qualify as directed by the statute.

When the parties will not consent that such a commission shall issue, the Court will respite publication until the witnesses can be examined before a duly qualified examiner.—*D'Alton v. Lord Trimleston*, Fl. & K. 663. (R.)

7. On a re-hearing, the petitioner applied for permission to examine the witnesses to the will. The application was refused.—*French v. Copinger*, 6 I. C. R. 568; 3 I. Jur. N. S. 21. (C.)

#### XXXVIII. 28. c. *Examination viva voce.*

[See 30 & 31 Vic., c. 44, ss. 88, 89, 93-97, 99, 101, 102, 106: G. O. (1867), 158, 159, 164, 171, 172.]

8. The Masters have not jurisdiction to examine *viva voce* any of the parties to the cause.—*Cashell v. Kelly*, Dr. Rep. temp. Sugden, 262. (C.)

9. A motion for leave to examine witnesses *viva voce*, supported only by an affidavit that counsel had advised that such examination was necessary, was ordered to stand over till the hearing.

It is not an answer to such a motion that the applicant had previously been refused permission to file additional affidavits made by the proposed witnesses.—*Murphy v. Longfield*, 6 I. C. R. 566. (C.)

10. On a reference under a decretal order in a general cause petition, the Master on a sum-

mons on charge and discharge, directed amongst other things, that the parties should respectively prove their case by affidavit or otherwise; the last affidavit to be filed, and publication to pass on the day month from the date of the order; and thereupon to re-enter the summons. Both parties filed affidavits within the time. On the case being heard, the respondent failed to prove his case. The Master having adjourned the hearing, to enable the respondent to apply to give further evidence—*Held*, on motion grounded on the proceedings in the cause, but not grounded on affidavit, that the respondent, his wife, and a third witness, should be examined *viva voce* before the Master, as witnesses for the respondent, and that the petitioner should be cross-examined.—*Corbett v. Hayes*, 4 I. Jur. N. S. 1. (M.O.)

11. When there has not been at any stage of a cause petition an oral examination of witnesses, oral cross-examination will not be permitted on appeal.—*Farran v. Mercer*, 6 I. Jur. N. S. 26. (C.A.)

12. A party who has not filed any affidavit (other than her discharge) in the Master's office, and who has not presented herself for cross-examination, may, nevertheless, be examined *viva voce* at the hearing on exceptions, and on the merits.—*O'Sullivan v. Edgeworth*, 11 I. Jur. N. S. 168. (R.)

#### XXXVIII. 28. d. *Before Master.*

[See ante, 8.]

13. At the hearing, a witness's evidence was rejected on the ground of interest. On motion, to permit him to be examined in aid of an enquiry directed by the decree, or to permit his depositions to be read before the Master, with liberty to re-examine him to show that the passage in his deposition, showing his interest, had been introduced by mistake; the Court was of opinion that it had not been introduced by mistake. *Held*, that, therefore, the motion should be refused.—*Smith v. Harding*, 3 I. E. R. 336; Fl. & K. 184.

14. The Masters have not jurisdiction to examine *viva voce* any of the parties to the cause.—*Cashell v. Kelly*, Dr. Rep. temp. Sugden, 262. (C.)

15. In a suit, to carry into execution the trusts of a will, defts. submitted to a decree to account. Under those circumstances, ptf. was allowed to object before the Master to evidence of a particular witness, which had been entered as read on behalf of one deft.—*Galway v. O'Driscoll*, 3 Jon. & L. 696. (C.)

#### XXXVIII. 28. e. *Before Examiner.*

[See 30 & 31 Vic., c. 44, ss. 89, 91-93, 95-97, 99, 100, 102, 103: G. O. (1867), 161.]

16. Through inadvertence, a witness omitted to include in a release a portion of his interest. Liberty was given to re-examine him

to the interrogatories to which he had been already examined.—*Gleeson v. Earl of Sandwich*, 3 I. E. R. 359; Fl. & K. 240. (R.)

1. By consent of ptf. and deft., a commission was issued to J. to examine witnesses residing more than 30 miles from Dublin. Under it ptf. examined on the direct; deft. merely cross-examined. J. moved against deft. for one-half of his fees and expenses as commissioner. *Held*, that he was to be considered as having undertaken, and been appointed to the office, on the parties' joint retainer, and his motion was granted, with costs. The question—"Who is immediately liable to pay the Commissioner?"—has not anything to do with the question respecting the costs in the cause to be decided at the hearing.—*Millner v. Joseph*, 5 I. E. R. 214. (R.)

XXXVIII. 28. f. *Examination de bene esse*.

2. A commission to examine witnesses *de bene esse*, on a bill to perpetuate testimony, granted, though deft. had not appeared, and was not in contempt.—*Allen v. Annesley*, 2 Jones, 260. (E.E.)

3. In a suit to perpetuate testimony, ptf. was given liberty under the 13 G. 2, c. 9, to pass publication of depositions of witnesses examined *de bene esse* in the cause.—*Scanlan v. McCoy*, Fl. & K. 366. (R.)

4. The Court will make an order for an examination *de bene esse*, whenever the justice of the case may appear to require it.—*Blackwood v. Burrows*, Fl. & K. 630; 4 I. E. R. 609. (R.)

5. An order for liberty to examine a witness *de bene esse*, will be made without notice, when the witness is of advanced age.—*Scott v. S.*, 9 I. E. R. 261. (R.)

6. In a suit to perpetuate testimony liberty will be given to examine witnesses *de bene esse*, though the deft. has not answered, and was not in contempt.—*Lindsay v. L.*, 2 I. Jur. 12. (R.)

XXXVIII. 28. g. *Pro interesse suo*.

XXXVIII. 28. h. *Cross-examination*.

[See 30 & 31 Vic., c. 44, ss. 88, 93-97, 99, 101, 102, 105: G. O. (1867), 158-161, 163, 171, 172.]

7. A party will not, as a matter of indulgence, obtain leave to cross-examine a witness, who has been produced by the other side, merely for the purpose of proving a will of lands.—*Moore v. M.*, 2 Jones, 445. (E.E.)

XXXVIII. 28. i. *Further, or Re-examination*.

[See 30 & 31 Vic., c. 44, ss. 88, 93, 95-97, 99, 101, 102, 105: G. O. (1867), 163.]

8. If an interrogatory be properly framed,

and the Examiner omits to examine to the whole of it, the witness may be re-examined.—*Smithwick v. S.*, Hay. & J. 397. (E.E.)

9. Motion, for liberty to re-examine a witness, refused; the application being made before publication.—*Knox v. K.*, 1 I. E. R. 107. (R.)

10. When it appears upon the deposition of a witness that he is incompetent by interest, the Court will not, except in a very clear case, permit him to be re-examined, to show that the allegation by which his interest appeared was by mistake.—*Smith v. Harding*, 3 I. E. R. 336; Fl. & K. 184. (R.)

11. Without an order of Court, a witness cannot be re-examined to the matter upon which he was originally examined.—*Bevan v. White*, 8 I. E. R. 160. (R.)

12. The Examiner, by mistake, omitted to examine the witness as to two interrogatories. Though publication had passed, and the cause was set down for hearing, the Court permitted a re-examination.—*Molony v. O'Brien*, 1 I. Jur. 20. (R.)

13. After publication in an examination in aid of an account, in the Master's office, liberty to examine further witnesses was refused, the party being aware, before publication, that material evidence was in the knowledge of these witnesses, and there being no surprise.—*Nicholls v. Crooke*, 2 I. Jur. 4. (R.)

14. On a reference under a decretal order in a general cause petition, the Master, on a summons on charge and discharge, directed (amongst other things) that the parties respectively should prove their case by affidavit, or otherwise; the last affidavit to be filed, and publication to pass on the day month from the date of the order; thereupon to re-enter the summons. Both parties filed affidavits within the time; but the respondent failed to prove his case at the hearing, which was adjourned to enable him to apply to give further evidence. On motion grounded on the proceedings in the cause, but not on affidavit—*Held*, that the respondent, his wife, and a third witness, should be examined *viva voce* before the Master, on the respondent's behalf; and that the petitioner should be cross-examined.—*Corbett v. Hayes*, 4 I. Jur. N. S. 1. (M.O.)

XXXVIII. 28. j. *Examination of Parties to the Cause*.

[See 30 & 31 Vic., c. 44, ss. 61, 63, 65, 72, 87, 138: G. O. (1867), 41-45, 62, 64-67.]

15. Although ptf.'s application, for leave to examine one deft. as a witness, is almost of course, yet it must be on notice. Ptf. takes the order, subject to all just exceptions at the hearing respecting the competency of the witness.—*Blake v. B.*, 1 I. E. R. 198. (C.)



1. The side-bar rule for examination of a deft. applies only as between co-defts. Therefore, a third person, proving a charge or discharge in the Master's office, and desiring to examine a deft. in the cause, must apply by motion of course for liberty to do so.—*Cramer v. Griffith*, 1 I. E. R. 369. (R.)—[See *Lord Dungannon v. Skinner*, 1 Hog. 269.]

2. When a ptf. wishes to examine a deft. as a witness, an application must be made to the Court, the side-bar rule applying only between co-defts.—*White v. Scott*, Fl. & K. 69. (R.)—*Vide* new Side-bar Order of March 1843.

3. Examination of *prochein* any of minor ptf. as a witness for the deft.—*McNeice v. Agnew*, 2 I. E. R. 445. (R.)

4. The ptf. is entitled, as of course, to examine a deft. as a witness, waiving all just exceptions. There is never a side-bar rule for the purpose.

Whether a ptf., examining a deft. as a witness, waives all relief as against him, or only that portion of relief to be given in respect of the matters to which the deft. is examined? *Quære*.—*Watson v. Pim*, 3 I. E. R. 344; Fl. & K. 192. (R.)

5. The personal representative, and the infant heir-at-law of a deceased debtor, were co-defts. to a suit instituted by a simple contract creditor of the ancestor. There was a consent order that the personal representative should be examined as a witness in the cause. *Held*, that the deposition so taken was admissible in evidence against the infant deft.—*Lynch v. Joyce*, 3 Dr. & War. 349. (C.)

6. The Masters have not jurisdiction to examine *viva voce* any of the parties to the cause.—*Cashel v. Kelly*, Dr. Rep. temp. Sugden, 262. (C.)

7. The statute of 6 & 7 Vic., c. 85, has not altered the practice in relation to the examination of a deft. by the ptf. The order cannot be obtained to examine a deft. whose answer has been replied to, unless the replication be withdrawn as against him.—*Walker v. Tilly*, 9 I. E. R. 261. (R.)

8. A ptf. may examine the opposite party without previously obtaining leave to do so.—*McCarthy v. McC.*, 9 I. E. R. 620. (C.)

9. The rule that a witness who had been examined in chief cannot be examined in aid without the leave of the Court applies only to an examination by the same party. A witness who had been examined in chief by the ptf., and not cross-examined, was examined in aid by the deft. without an order. The Court refused to suppress the depositions.—*Bannatyne v. B.*, 11 I. E. R. 359. (R.)

10. A deft. claiming under a deed impeached by the bill, may be examined in support of that deed, on behalf of co-defts.—*Irwin v. Rogers*, 1 I. Jur. 17. (C.)

11. A deft., against whom an order has been made to take the bill *pro confesso*, may be examined as a witness for the ptf., as to the statements in the bill.—*Kelly v. Fox*, 1 I. Jur. 20. (R.)

12. The Court will not in general interfere with the discretion given by the 115 G. O. to the Remembrancer as to the examination of parties by interrogatories in the office.—*Putland v. Evans*, 1 I. Jur. 68. (E.E.)

13. The 6 & 7 Vic., c. 85, has not altered the practice in relation to the examination of a deft. by the ptf.; no order can be had to examine a deft., till the replication be withdrawn. *Walker v. Tilly*, 9 I. E. R. 261. (R.). And see also *Dobbyn v. Adams*, 9 I. E. R. 275; and this will be so, though the deft. contend that the replication shall stand over, and a decree be made thereon.—*Thompson v. Beamish*, 2 I. Jur. 141. (R.); 2 I. Jur. (C.) *contra*.

#### XXXVIII. 28. k. Examination of Defendant on Interrogatories.

[See 30 & 31 Vic., c. 44, ss. 61, 63, 65, 72, 87, 138: G. O. (1867), 41-45, 62, 64-67.]

14. A party examining on personal interrogatories in the Master's office, may use as much of the answers as he chooses, without making the rest of them evidence.—*Brabazon v. Teynham*, 11 I. E. R. 475. (C.)

15. When interrogatories have been annexed to cause petitions, the respondents are, under the Ch. Reg. Act, s. 9, until the publication of G. O. under ss. 31, 32, to the contrary, entitled to two months time to file affidavits in answer to such interrogatories. Such cause petitions cannot be set down for hearing until the lapse of two months from the service of notice of filing the interrogatories.

When interrogatories had been annexed to a cause petition which was set down for hearing within two months after service of notice of filing the petition and interrogatories upon some of the respondents, and without any notice to the other respondents, a decretal order obtained on such hearing was set aside, with costs.

*Semble*—It is not a sufficient notice of setting down a cause petition for hearing to state that counsel will, on behalf of the petitioner, move on the petition "on the first opportunity."—*Sheridan v. Cannon*, 1 I. C. R. 245. (C.)

#### XXXVIII. 28. l. Commission to Examine.

[See 30 & 31 Vic., c. 44, s. 103.]

1. General Orders.
2. Their Effect.
3. When Granted: how Obtained.
4. Second Commission.
5. How Discharged or Abated.
6. Execution of: respecting the Commissioners.
7. Return of.
8. When lost.

XXXVIII. 28. 1. 1. *General Orders.*

1. The selection of a Commissioner to take evidence is vested in the Master's discretion. The Court will not vary his appointment upon a charge that the Commissioner is interested in the success of the ptf., because of his friendship for ptf.'s solicitor, the payment of whose costs depends on his succeeding in the suit.

In limiting the Master's discretion, G. O. 105, applies to cases in which an examination of witnesses is to be held in one place only.—*Malone v. O'Connor*, Sc. & S. 429. (R.)

XXXVIII. 28. 1. 2. *Their Effect.*XXXVIII. 28. 1. 3. *When Commission to Examine is granted: how obtained.*

2. Commission Examiners to take the examination of witnesses residing abroad must qualify under the 4 G. 4, c. 61, s. 43.—*Huggins v. Moffett*, Fl. & K. 621. (R.)

3. The 43rd sec. of the 4 G. 4, c. 61, applies as well when the witnesses reside abroad, as when they reside within the jurisdiction of the Court. The Court will not order that a commission shall issue to take the examination of witnesses resident abroad, with a direction that the Examiner shall not be required to qualify as directed by that Act. When the parties will not consent that such a commission shall issue, the Court will direct publication to be respited.—*D'Alton v. Lord Trimleston*, Fl. & K. 663. (R.)

4. Commissioners to take affidavits and answers pursuant to 55 G. 3, c. 57, will be appointed on petition only.—*In re Armitstead*, 2 Dr. & War. 50. (C.)

5. Practice as to commissions to examine witnesses in foreign countrys.—*Anonymous*, 2 I. C. R. 92. (R.)

6. The general rule with respect to cause petitions under the Ch. Reg. Act 1850 is, that examinations of witnesses by interrogatories, or *viva voce*, will not be permitted before the hearing. Very special grounds must be shown upon motion to induce the Court to vary this rule.

A motion for liberty to examine witnesses upon interrogatories before the hearing, and that a commission should issue for that purpose, which motion was grounded upon the affidavit of the petitioner's solicitor, stating that A., and other persons (not named), when applied to, declined to volunteer evidence by making affidavits in the case, but that the deponent was persuaded that they would attend for examination upon interrogatories; and also stating that some of the witnesses (not named) resided in England; that a commission would therefore be requisite, and that the deponent was advised that their evidence was material and necessary to the petitioner's case, was refused with costs.—*Kirwan v. Lindsay*, 2 I. C. R. 23. (C.)

7. In a cause petition matter, an order for the issuing of a commission to take depositions of witnesses abroad will not be granted in the first instance, having regard to the practice laid down in *Glasscock v. Ross*, 1 I. C. R. 57.—*Drewitt v. D.*, 2 I. Jur. N. S. 224. (R.)

8. The Court has jurisdiction to order a commission to issue to examine witnesses abroad, before the hearing, in cause petition matters under the Ch. Reg. Act 1850.

In general, the proper course is, to hear cause petitions on affidavit, in the first instance; but when there is no effectual mode of proof within the reach of the parties, the Court will issue a commission to examine witnesses before the hearing.—*Druitt v. D.*, 6 I. C. R. 171; 2 I. Jur. N. S. 273. (C.A.)

9. A commission made for the *viva voce* examination and cross-examination of the witness by counsel; but a shorthand writer not allowed to attend.—*Ratty v. Potts*, 6 I. Jur. N. S. 168. (P.)

10. An affidavit made by a party in the cause, stating that an intended witness was suffering from rheumatic pains, had lost the use of his limbs, and had refused to see a doctor, because it would be no use; and averring that there was not any chance of his being able to attend the trial.—*Held*, insufficient to obtain a commission.—*Tierney v. Byrne*, 11 I. Jur. N. S. 179. (P.)

XXVXVIII. 28. 1. 4. *Second Commission.*XXXVIII. 28. 1. 5. *How discharged or abated.*XXXVIII. 28. 1. 6. *Execution of Commission: respecting the Commissioners.*

11. Commissioners, to take the examination of witnesses abroad, must qualify under the 4 G. 4, c. 61, s. 43.—*Huggins v. Moffett*, Fl. & K. 621. (R.)

12. When a Commission Examiner is appointed on consent, the consenting parties must equally bear the costs of the commission, though one only may have examined under it on the direct.—*Stafford v. S.*, 5 I. E. R. 215, note. (R.)

13. The Court will compel a Commission Examiner to deliver, for the purposes of the suit, the documents lodged with him for the examination of witnesses, though he has not been paid his fees and expenses; the solicitor undertaking to return them to the Examiner after the termination of the suit.—*Lord Lucan v. O'Malley*, 8 I. E. R. 586. (R.)

14. One party in a cause, who sues out a commission to examine witnesses without the concurrence of the other, is bound to pay the entire expense of the Commission Examiner, unless the other party has examined on the direct, in which case he is

bound to pay the Commissioner for the examination and cross-examination of his own witnesses.—*Lord Lucan v. O'Malley*, 8 I. E. R. 712; 2 Jon. & L. 681. (C.)

1. A Commission Examiner gave up the depositions without having been paid. *Held*, that he retained a lien upon them. The Court directed that they should not be used on behalf of a party who would not pay his share of the Commissioner's fees and expenses.—*Murphy v. O'Connor*, 2 I. Jur. 84. (E.E.)

#### XXXVIII. 28. 1. 7. *Return of.*

#### XXXVIII. 28. 1. 8. *When lost.*

#### XXXVIII. 29. *Depositions.*

[See 30 & 31 Vic., c. 44, ss. 92, 99, 102; G. O. (1867), 162, 164, 168, 169, 171, 173-175.]

- a. *Generally.*
- b. *Taken de bene esse.*
- c. *Amendment of.*
- d. *Their Suppression.*

#### XXXVIII. 29. a. *Depositions generally.*

[See 30 & 31 Vic., c. 44, ss. 92, 99, 102; G. O. (1867), 162, 164, 168, 169, 171, 173-175.]

2. Depositions wrongly entitled cannot be read. The party who seeks to use them will be allowed to have them re-sworn upon terms.—*O'Hara v. Creagh*, 2 I. E. R. 419. (E.E.)

3. When a witness deposed to facts to which he could not have been examined, the Court, on motion, suppressed the depositions.—*Smith v. Harding*, 3 I. E. R. 386; Fl. & K. 347. (R.)

4. The deft. interrogated a witness as to a conversation between the witness and the ptf.'s testator.

*Quære*—Can the ptf. read the deposition, the deft. declining to do so?—*Long v. L.*, 5 I. E. R. 38. (E.E.)

5. The infant heir, and the personal representative of a debtor, were co-defts. to a suit by his simple contract creditor. It was ordered, on consent, that the personal representative should be examined as a witness. *Held*, that his deposition was admissible in evidence against the infant heir.—*Lynch v. Joyce*, 3 Dr. & War. 349. (C.)

6. Form of order upon an application for liberty to read, on the trial of an issue, depositions taken in the cause, and made by a witness whom illness disenabled from attending the trial.—*Lynch v. L.*, Dr. Rep. temp. Sugden, 538. (C.)

7. An application to take an affidavit off the file to prosecute for perjury, though it be not *ex debito justitiæ*, approaches very closely to it. The Court will not scrutinise the grounds or merits of the prosecution, or the

truth of the allegations on either side, but will give every facility to the application, provided it be satisfied that it is not made for vindictive or unjust purposes.—*Madden v. Woods*, 8 I. E. R. 48. (R.)

8. Depositions of witnesses in a cause must be signed by them. If not, they will be suppressed for irregularity.

A witness cannot be re-examined as to the same matter as that upon which he was originally examined, without an order of Court.

*Semble*—It is sufficient to entitle the depositions "In the cause of A. B., ptf. against C. D. and others, defts."—*Bevan v. White*, 8 I. E. R. 160. (R.)

9. A deft. cannot read as against the ptf. depositions taken on behalf of a co-deft.—*Roddy v. Williams*, 3 Jon. & L. 1. (C.)

10. On a re-hearing, documentary evidence, not offered at the original hearing, may be received; but depositions cannot then be received, if offered for any purpose beyond that of identifying such documentary evidence.—*Johnson v. Mid. Gt. Westn. of Ir. Ry. Co.*, 5 I. C. R. 264. (C.)—[See s. c., 6 H. L. Cas. 798; 4 Jur. N. S. 643.]

#### XXXVIII. 29. b. *Depositions taken de bene esse.*

11. In a suit to perpetuate testimony of witnesses, the deft. not having answered, and having stood out process to sequestration, to which there was a return of *nulla bona*; the ptf. was allowed under the 13 G. 2, c. 9, to pass publication of depositions taken *de bene esse* in the cause.—*Scanlan v. M'Coy*, Fl. & K. 366. (R.)

#### XXXVIII. 29. c. *Amendment of Depositions.*

12. Depositions wrongly entitled cannot be read; but the party seeking to use them will be allowed to have them re-sworn upon terms.—*O'Hara v. Creagh*, 2 I. E. R. 419. (E.E.)

13. When a mistake has occurred in depositions through inadvertence, the Court will permit the witness to be re-examined to the interrogatory.—*Fitzmaurice v. Sadlier*, 10 I. E. R. 9. (R.)

#### XXXVIII. 29. d. *Suppressing Depositions.*

14. A motion to suppress interrogatories as leading, should be made as soon as possible after publication. Such a motion was refused, when on a previous motion to suppress interrogatories in the cause, the Court had permitted the ptf. to re-swear the witnesses to the same interrogatories.—*O'Hara v. Creagh*, Long. & T. 65; 3 I. E. R. 179. (E.E.)

15. When a witness deposed to facts to which he could not have been examined, the Court, upon motion, suppressed the deposition.—*Smith v. Harding*, Fl. K. 184; 3 I. E. R. 386 (R.)

1. Depositions of witnesses in a cause must be signed by them; if not, they will be suppressed for irregularity.

A witness cannot be re-examined to the same matter as that upon which he was originally examined, without an order of Court.

*Semble*—It is sufficient to entitle the depositions "In the cause of A. B., ptf., against C. D. and others, defts."—*Bevan v. White*, 8 I. E. R. 160. (R.)

2. A Commission Examiner having permitted a solicitor in the cause to come into the room during the examination of witnesses, and being also in communication and concert with the solicitor, the Court suppressed the depositions.

Witnesses were sworn upon a book that did not contain the Gospels. The Court suppressed their depositions, as nullities.

The Commission Examiner may, before accepting the office, stipulate for the security or the payment of his fees and expenses; but if he accepts the office, he cannot stop in the execution of his duty, or refuse to examine witnesses until his fees are paid or secured. His duty is, to examine all witnesses tendered to him unconditionally.—*Doherty v. D.*, 8 I. E. R. 379. (R.)

3. The 6 & 7 Vic., c. 85, has made no alteration in the previously existing practice of Courts of Equity, which required a *rule* or *order* of Court to be had before the examination of a party in the cause.

The proper time to move to suppress depositions for irregularity is, *after* publication has passed.—*Dobbyn v. Adams*, 9 I. E. R. 275. (R.)

4. Under the 86th G. O., the ten-days' notice to be given of examining witnesses is exclusive of the day of serving the notice and of the day named for commencing the examination.

The Court is not bound to suppress depositions in every case of irregularity. When, from a misconception of the 86th Order, only nine days' notice of examining witnesses was given; but the examination was not commenced until after ten days, and no party was prejudiced thereby, and publication passed without objection, the Court refused to suppress the depositions.—*Att.-Gen. v. Ball*, 9 I. E. R. 463. (R.)

5. The rule that a witness who had been examined in chief cannot be examined in aid without leave of the Court, applies only to an examination by the same party. A witness who had been examined in chief by the ptf. and not cross-examined, was examined in aid by the deft. without an order. The Court refused to suppress the depositions.—*Bannatyne v. B.*, 11 I. E. R. 359. (R.)

6. The Court will not make an order to suppress depositions on the ground that some of the interrogatories were leading; unless it be shown what part of the deposition is an answer to the leading interrogatory; then so much only will be suppressed.—*Kirkwood v. Lloyd*, 1 I. Jur. 225. (R.)

7. The Court will not suppress depositions for every irregularity. When nine instead of ten days' notice of examination was given, and publication passed without objection, the Court refused to suppress.—See *Att.-Gen. v. Ball*, 9 I. E. R. 463; *Guirney v. Loughnane*, 1 I. Jur. 283. (R.)

8. *Semble*—That the Court will, at the hearing, suppress the deposition to a leading interrogatory.

Where however only part of an interrogatory is leading, the Court will not suppress more of the deposition than replies to that part.—*Wright v. Griffith*, 1 I. C. R. 695; 3 I. Jur. 138. (C.)

#### XXXVIII. 30. Publication.

##### a. Generally.

##### b. Enlarging Publication.

#### XXXVIII. 30. a. Publication generally.

9. After publication had passed, it was discovered that, in the title of the interrogatories and depositions filed on ptf.'s behalf, the names of two defts. in the cause had, by mistake, been omitted. Leave was given to amend that title, with a direction that, after the amendments had been made, the witnesses should be severally re-sworn to the truth of the depositions thus altered.—*Mitchell v. Roe*, 1 I. E. R. 144. (R.)

10. An application, merely that a witness may be re-sworn to his depositions, may properly be made before publication. When it is sought that the witness shall be re-examined to contradict or vary his previous evidence, the application must be after publication, as in such case the Court must have the opportunity of looking into the depositions.—*Gleeson v. Earl of Sandwich*, 3 I. E. R. 359; Fl. & K. 240. (R.)

11. It is not any longer necessary to serve the twenty-one days' rule to examine under the G. O. of the 20th May 1816. The present practice is regulated by G. O. 99, of 29th Nov. 1834.—*Ogle v. O.*, S. & Sc. 679. (R.)

12. In a suit to perpetuate testimony, ptf. was allowed under 13 G. 2, c. 9, to pass publication of depositions of witnesses examined *de bene esse* in the cause.—*Scallan v. M'Coy*, Fl. & K. 366. (R.)

13. The 6 & 7 Vic., c. 85, has made no alteration in the previously existing practice of Courts of Equity, which required a *rule* or *order* of Court to be had previously to the examination of a party in the cause.

The proper time to move to suppress depositions for irregularity is, *after* publication has passed.—*Dobbyn v. Adams*, 9 I. E. R. 276. (R.)

14. When a notice of motion to respite publication has been served, it is very improper for a solicitor to pass publication.—*Kelson v. Lewis*, 1 I. Jur. 226. (R.)

1. Publication respited, although improperly passed already, this course not delaying the opposite party.—*Kelson v. Lewis*, 1 I. Jur. 243. (R.)

2. Replication filed 1st March; amended 5th March. Rule for publication, entered 1st May, set aside for irregularity; and motion, that the rule might stand notwithstanding the irregularity, refused.—*M'Dermott v. O'Connell*, 1 I. Jur. 330. (R.)

3. On a reference under a decretal order in a general cause petition, the Master on a summons on charge and discharge, directed amongst other things, that the parties should respectively prove their case by affidavit or otherwise, the last affidavit to be filed, and publication to pass on the day month from the date of the order; thereupon to re-enter the summons. Both parties filed affidavits within the time. The respondent failed to prove his case at the hearing, which was adjourned to enable him to apply to give further evidence. *Held*, on motion grounded on the proceedings in the cause, but not on affidavit, that the respondent, his wife, and a third witness, should be examined *viva voce* before the Master as witnesses for the respondent; and that the petitioner should be cross-examined.—*Corbett v. Hayes*, 4 I. Jur. N. S. 1. (M.O.)

4. In a cause petition suit to perpetuate testimony, the respondent filed no answering affidavit, and was in contempt for not answering interrogatories annexed to the petition. The petitioner examined witnesses, without an order for that purpose, and without complying with the requirements of the 13 G. 2, c. 9 (*Ir.*), s. 2. The Court allowed publication of the depositions so taken to pass, saving all just exceptions as to their admissibility on the hearing of the matter in which it was intended to use them; and reserving the right of the respondents in that matter to object at its hearing to their admissibility.

Observations touching the practice in suits to perpetuate testimony.

*Semble*—In such suits it may be more prudent to proceed by bill than by cause petition.—*Kiernan v. K.*, 6 I. Jur. N. S. 149. (R.)

#### XXXVIII. 30. b. *Enlarging Publication.*

5. Publication will not be respited in order that a party may cross-examine a witness, who had been produced merely to prove the execution of a will of land.—*Moore v. M.*, 2 Jones, 445. (E.E.)

6. When on the day of the examination of ptf.'s witnesses in this country, pursuant to notice to the deft., the deft.'s solicitor gave notice to the Examiner, and the ptf.'s solicitor, that he intended to cross-examine, but did not lodge the cross-interrogatories until the following morning; and it appeared that on the evening after the direct examination, the witnesses (having been told by the Examiner and the ptf.'s solicitor, that as cross-interrogatories had not been lodged before the

direct examination closed, they were not bound to remain), sailed on their return to England, the Court ordered that publication should be respited; a new commission be issued to the former Commissioner; and that the ptf. should produce the witnesses for cross-examination at her own expense. Leave given to examine *prochein amy* of infant ptf. as witness for deft.—*M'Neice v. Agnew*, 2 I. E. R. 445. (R.)

7. If the ptf., in a cross-cause, have not been guilty of *laches*, it is almost of course to respite publication in the original cause, so that there may be but one examination, and that both causes may be heard together.

Publication, in the original cause respited until full answers put in by the defts. in the cross-cause; though the sole ptf. in the original cause was ready to file his answer at once, and could not compel the other defts. to answer: the ptf., in the cross-cause, undertaking to proceed with effect to enforce their answers.—*Manders v. M.*, 3 I. E. R. 63. (E.E.)

8. The 4 G. 4, c. 61, s. 43, applies as well when the witnesses reside abroad, as when they reside within the jurisdiction. Therefore the Court will not order a commission to issue to take the examination of witnesses residing abroad, with a direction, that the Examiner shall not be required to qualify as directed by the Act. When the parties will not consent that such a commission shall issue, the Court will respite publication until the witnesses can be examined before a duly qualified Examiner.—*D'Alton v. Lord Trimleston*, Fl. & K. 663. (R.)

9. A bill, impeaching a will, was filed in the Court of Ch., a suit to recal probate having been instituted in the Prerogative Court. A witness, who was examined *de bene esse* in the Chancery suit, died. The Court refused to permit his depositions to be published for the purpose of being used in the Prerogative Court, issue not having been joined in the Ch. suit, and therefore publication therein not having passed.—*Shewell v. Hilliard*, 9 I. E. R. 469.

EXAMINATION. See PRACTICE, EVIDENCE, 28.

EXAMINER. See PRACTICE, EVIDENCE, 28. e.

XXXIX. EXCEPTIONS GENERALLY. See PLEADING, ANSWER, BILL—PRACTICE, ANSWER, — ARBITRATION, V — PRACTICE, COSTS — PRACTICE, MASTER, REFERENCE TO, &c.

[See 30 & 31 Vic., c. 44, ss. 70, 72, 141: G. O. (1867), 68-78; and see G. O. (1867), 147-151.]

10. A ptf. served a notice to continue an injunction upon equity confessed, without reserving the right to except; and afterwards filed exceptions to the answer.—*Held*, that they were irregular, and must be taken off the file.—*Crofts v. Lord Egmont*, 3 I. E. R. 277; Fl. & K. 82. (R.)

1. Ptf., by moving for a receiver upon an answer, without reserving a right to except, is not thereby deprived of his right to except.—*Irwin v. St. George*, Fl. & K. 622. (R.)

2. Leave given to file exceptions to a report *nunc pro tunc* on payment of costs, under peculiar circumstances.—*Marjoribanks v. Hovenden*, 8 I. E. R. 317. (C.)

3. When the Master, under G. O. 134, overrules an objection, no exception can be taken. If there be a fatality, a special application for liberty to object should be made. Exceptions by parties not interested in supporting them, though so taken to save expense, are objectionable.—*Smith v. Chichester*, 12 I. E. R. 519. (C.)

4. When on exceptions to the Master's report, an issue is directed, upon which a verdict favourable to the excepting party is given, the ordinary rule respecting the costs of exceptions applies; each party must bear his own costs of the issue.—*Nixon v. Dane*, 6 I. C. R. 226. (C.)

5. The person filing objections is bound to have an office copy of the exceptions in Court when they are to be argued.—*Bohan v. Cambie*, 10 I. C. R. 466. (C.)

6. Exceptions for insufficiency were signed by counsel, but no certificate was affixed to them pursuant to the 74th Rule. On a motion to take them off the file for irregularity, the Court allowed them to be amended by affixing the certificate, on the statement of counsel that the omission was accidental; and that the exceptions were tenable; the ptf. paying the costs of the motion.—*Massy v. Graham*, 10 I. E. R. 207. (R.)

#### XL. EXCEPTIONS, BILL OF.

7. Upon a trial for felony, the prisoner cannot take a bill of exceptions.—*In re Hayes & Rice*, 3 Jon. & L. 568. (C.)

#### XXI. EXCHEQUER: PRACTICE IN.

8. The Court will not permit a deft.'s answer to be taken off the file in order to the institution of a prosecution for perjury, if it appears that the alleged perjury is in a part wholly immaterial to the merits of the case.—*M'Gowan v. Hall, Hayes*, 17. (E.E.)

9. In passing a receiver's account, the Remembrancer cannot report facts specially without the order of the Court.—*Roberts v. Hendricksen, Hay & J.* 396. (E.E.)

10. This Court will not refer it to the Chief Remembrancer to report generally what proceedings should be taken respecting certain lands.—*Cottingham v. Whyte, Hay & J.* 411. (E.E.)

11. In this Court, the decree for a sale does not direct the Remembrancer to settle the

draft of the conveyance to the purchaser. For that purpose, a special application is necessary.—*Hogg v. Waldron*, 6 I. E. R. 218. (E.E.)

12. This Court ordered its officer to attend in the Court of Chancery at the hearing of a cause there, with an answer sworn in this Court, the signature to which was impeached in the Chancery cause as a forgery.—*Grove v. Bowen*, 6 I. E. R. 656. (E.E.)

13. On a sale of lands under a decree in a cause wherein judgment creditors, prior to ptf., had not been made parties to the original suit, and a supplemental bill making them parties had been filed, but no decree in the supplemental suit had been obtained, the Remembrancer was ordered to execute the deed of sale, on consent of the parties in the supplemental suit.—*O'Kelly v. Bodkin*, 7 I. E. R. 338. (E.E.)

14. In a judgment matter pending in this Court, deft. having filed a bill in Chancery against the petitioner for an account, and the petitioner having obtained an order here for a receiver, the respondent moved to discharge that order. Held, that the motion should have been made in the Chancery cause, and should, therefore, be refused with costs.—*Smith v. Murphy*, 7 I. E. R. 304. (E.E.)

15. Case in which, in a creditor's suit in Chancery, Exchequer proceedings, previously had, were held not binding.—*Foster v. M'Mahon*, 11 I. E. R. 287. (C.)

#### EXHIBITS. See PRACTICE, EVIDENCE.

FEEs. See PRACTICE, OFFICERS OF COURT; SUITORS' FEE FUND.

[See 30 & 31 Vic., c. 44, ss. 162, 178-190.]

XXI.\* FILING PLEADINGS, &c. See PRACTICE, ANSWER: PRACTICE, DEMURRER: PRACTICE, EVIDENCE: PRACTICE, PLEA.

[See 30 & 31 Vic., c. 44, ss. 53, 56, 58, 60, 61, 63, 68, 72, 120, 121, 142, 149, 152: G. O. (1867), 8, 16, 41-43, 48, 55-57, 60, 65, 68, 72, 73, 75, 78-83, 92-94, 136-138, 142, 148, 149, 152, 154, 165, 172, 173, 175, 225, 238, 239, 265, 266, 269, 273.]

16. The Court will not allow a bill to be filed without a solicitor's name attached thereto.—*O'Shea v. —*, Fl. & K. 666. (R.)

17. The Chancery Registry-offices being open during vacation on two days only in each week, the last day for applying fell on a day between those on which the office was open. A petition filed on the next office day was, nevertheless, retained.

The proper course is to apply to extend the time.—*Wilmot v. Aylmer*, 6 I. Jur. N. S. 26. (C.A.)

18. There is no such thing as a general authority to file petitions. When a suit is

instituted in a next friend's name, the authority from him should be filed according to the 3rd G. O. of 19th May 1857.—*Geoghegan v Harding*, 6 I. Jur. N. S. 211. (R.)

#### FORM

- *Of Answer.* See PRACTICE, ANSWER.
- *Of Bills in Equity.* See PLEADING, BILL.
- *Of Demurrer.* See PLEADING, DEMURRER.
- *Of Plea.* See PLEADING, PLEA.
- *Of Bankrupt Petitions.* See BANKRUPTCY, XVII.
- *Of Exceptions to Answer.* See PRACTICE, ANSWER.
- *Of Appeal.* See PRACTICE, APPEAL.
- *Of Decree.* See PRACTICE, DECREE.
- *Of Affidavits.* See PRACTICE, EVIDENCE.
- *Of Injunction.* See PRACTICE, INJUNCTION.
- *Of Issue.* See PRACTICE, ISSUE.
- *Of Master's Report and Certificate.* See PRACTICE, MASTER, REFERENCE TO.
- *Of Master's Report and Exceptions to it.* See *ibid.*
- *Of Proceedings on Motion.* See PRACTICE, MOTION.
- *Of Order.* See PRACTICE, ORDER.
- *Of Subpoena.* See PRACTICE, SUBPOENA.

FORMER SUIT. See PLEADING, PLEA; PRACTICE, PLEA.

#### XLII. FUND IN COURT: ADVANCES THEREOUT TO A PARTY TO CARRY ON A SUIT, AND FOR OTHER PURPOSES.

[See Rolls Order, May 22, 1848; Gam. Ch. O. 182.]

1. The Court will not make an order *ex directo*, that an attorney's costs be paid out of a fund in Court upon which he has a lien. He must wait until his client applies to be paid the fund, and then insist upon his lien. The reason for not giving the costs on the attorney's own motion is, that there are not two litigants before the Court.—*Crosbie v. Molloy*, 2 Jones, 588. (E.E.)

2. W. died intestate, leaving E., C., and A., a minor, his next-of-kin. A. was also his heiress-at-law. E. and C., his administrators, entered also on his freeholds. A. filed against them a bill for an account, and obtained a decree against them, both as debtors to W.'s assets, and also as debtors to her in respect of the rents of the freeholds, and for the costs of this suit, pending which E. assigned for value her interest in the assets. In another cause, wherein E. and C., as administrators, were parties, they, together with A., were declared entitled to a fund in Court, as part of W.'s assets. A. applied to have the shares of E. and C. in this fund, in the second cause, transferred to her to pay the amount of the decree against them in the first cause. *Held*, that A.'s several demands under the decree in the first cause ought to be paid out of those shares in the fund in the second cause; and that E.'s as-

signees took, subject to those demands. A transfer was ordered accordingly.—*Hodgens v. Wheeler*, S. & Sc. 443. (R.)

3. Although the solicitor of a defaulting receiver cannot have the costs of his proceedings until the receiver's deficiency, with interest, has been paid in; yet when, at his own cost, and under the Court's order, the solicitor brought actions at law against defaulting tenants and their sureties, &c.; *Held*, that he was entitled to be paid the costs thereof out of the fund in Court.—*M'Bride v. Clarke*, 1 I. E. R. 203. (R.)

4. In a former suit L. filed a charge, claiming £1800, with interest at £6 per cent., from the 16th May 1818. The deft. T., the debtor, filed a discharge admitting the debt, and that it was due with interest at £6 per cent. from the 11th May 1818. By a mistake in the report it appeared that the interest was due only from the 24th April 1824. The account having been taken, and the report made without controversy, the mistake was not observed; and the final decree followed the report. L. received the £1800 with interest from the 24th April 1824. After several years, the residue of the fund in that cause having been transferred to the present administration suit of T.'s assets, L. discovered the mistake; and applied to be paid the balance of the interest out of that transferred fund. *Held*, that he should be so paid.—*Hackett v. Donnelly*, 1 I. E. R. 231. (R.)

5. When there was a clear surplus fund in Court, which had been produced by a sale under a decree in a foreclosure suit, the Court, on motion of the ptf., who was also a creditor, by judgment subsequent to the mortgage, referred it to the Remembrancer to enquire and report who was entitled to the surplus, and whether the applicant had any and what lien upon it?—and, if so, whether there was any, and, if any, what prior lien upon it?—*Mackey Martins*, 1 I. E. R. 381. (E.E.)

6. N. and P., incumbrancers, moved that their reported demand should be paid out of the rents paid in by the receiver, which, they insisted, should as to T., an incumbrancer, to whose cause the receiver had been extended, be deemed by-gone rents, having been collected by their diligence in causes to which T. was not a party, and long before he had obtained a decree for a receiver. *Held*, that the fund could not be paid out without regard to T.'s priority, and that it should accordingly be extended to all the causes; and that a fund in Court is never considered as by-gone rents, but in *custodia legis* for the persons entitled in priority.—*Murtagh v. Tisdall*, 2 I. E. R. 41. (R.)

7. When the surplus fund in Court was small, the Court would (before the G. O. of March 1843) allow it to be paid out, upon an affidavit that it was not incumbered; but when the surplus was considerable, there

should have been a reference to the Master.—*Seymour v. Sirr*, Fl. & K. 236. (R.)

1. A ptf. in a foreclosure suit obtained judgment against the mortgagor, who subsequently died. The suit was revived against his heir and personal representative. The Court refused an application by the ptf., under 3 & 4 Vic., c. 105, to charge the surplus fund in Court with the amount due on foot of the judgment.

Even if the judgment debtor were living, such fund would not be within the 3 & 4 Vic., c. 105, s. 25.

The Act does not extend to funds standing in the name of the personal representative of a deceased debtor.—*Wallace v. M'Conn*, Fl. & K. 570; 4 I. E. R. 522. (R.)

2. When an application is made to draw money out of Court, which has been the subject of a settlement, the settlement itself must be produced in Court.—*Batt v. Cuthbertson*, 3 Dr. & War. 58. (C.)

3. Dividends of small amount, which have accrued due on stock, ordered to be transferred to a party between the date of the order and the transfer of the stock, will be ordered to be paid to the attorney of the party who was authorised to accept the transfer. The application was made shortly after the transfer.—*Pidgeon v. D'Alton*, 3 I. E. R. 184. (E.E.)

4. In construing that section (the 5 & 6 W. 4, c. 55, s. 38), we are called on by those who represent Coleman, to say, that the word "received" there used, should be construed, having regard to the entire of the Act, as meaning "due," although not actually received; and I think that that is the proper construction to be put upon that section. If we were to hold otherwise, we should incur every case with difficulties, in ascertaining what sums were actually received by the receiver, and the periods of time they were received at; and there would be great trouble and expense in administering the fund. Still, the trouble and expense, however great, would not be a reason for putting a construction on an Act of Parliament which its words do not warrant; but, considering the whole tenor of the Act, and the purposes for which it was passed, I think we are well warranted in holding, that the first person who applies to the Court is entitled to the rents which fall due before any order is obtained, at the suit of a prior creditor, to extend the receiver. I think we are at liberty to say, that rents so due, and which ought to have been received, were in fact received; that, in principle, there is no difference between the actual receipt of the rents, and their being in a condition entitling the party to receive them; and that the default of the tenants in not paying the rent at the day, or circumstances of that nature, cannot alter the rights of the parties.—*Coleman v. Mason*, 4 I. E. R. 425. (E.E.)

5. In a foreclosure suit, there being a surplus fund after payment of reported incum-

brances, and the mortgagor being dead, a puisne judgment creditor sought an order, under the 3 & 4 Vic., c. 105, s. 23, to charge, with the amount of the judgment, the surplus fund, the residue of the purchase-money of real estate sold under the decree. *Held*, that the fund in question was to be considered either as real estate belonging to the heir-at-law of the deceased judgment debtor, or as personalty belonging to his personal representative; and that the 3 & 4 Vic., c. 105, does not give jurisdiction to attach by a charging order the property of a deceased debtor in the hands of his representative.

*Semble*—It is very questionable whether the 3 & 4 Vic., c. 105, s. 23, extends to money.—*Wallace v. M'Conn*, 4 I. E. R. 522. (R.)

6. When the fund sought to be charged with the judgment is impounded in the Court of Ch. it would be more convenient if the petition for the charging order were presented to this Court in the first instance.—*Gore v. G.*, 4 I. E. R. 166. (R.)

7. When a Court of Equity gets the possession of funds, it holds them for the benefit of the party who can show that he has an equitable title thereto, and any person is entitled to consider the Court is in possession, for his benefit, of so much of the fund as he can establish a claim to in right of his lien.—*Kellett v. Kelly*, 5 I. E. R. 36. (E.E.)

8. If a fund be given to one person for life, and after his death to his children, and there is any dispute, whether all the children are before the Court, it must be referred to the Master to ascertain who they are. That is the ordinary course, when there is any question before the Court, and a class of persons are interested in it. The Court never takes upon itself to decide who are the persons that constitute that class, but refers it to the Master to ascertain who they are, and acts upon his report.—*Kimberley v. Tew*, 5 I. E. R. 393. (C.)

9. The money brought into Court having been, on the motion of the ptf., invested in stock—*Held*, that he was entitled to the benefit of a rise in the price of stock.—*Wynne v. Brady*, 5 I. E. R. 239. (E.E.)

10. A person who was entitled to a life estate in lands, and had a policy of insurance on his life, conveyed his life estate to a trustee for parties, to whom he was indebted, upon trust, "out of the interest, proceeds, or annual rents thereof," to pay the head rent to which the lands were subject, and the premiums of insurance on the policy; and to pay to the creditors the amount due to them, with interest. The deed contained a provision that the debtor should be at liberty to make leases, but no covenant by the debtor to pay the money. By a separate deed, he assigned the policy of insurance to the trustee, to secure the debt—*Held*, that the creditors were not entitled to a sale of the debtor's life interest; but only to have a receiver appointed, and the trusts carried into execution under the direction of the Court.—*Taylor v. Emerson*, 6 I. E. R. 224. (C.)



1. A creditor, who had obtained a report and allocation order in the cause, died. The funds reported to him were allocated to his executor without any special order or variation of the allocation order.—*Roberts v. Hughes*, 6 I. E. R. 306. (R.)

2. The Court will, upon a diocesan probate, distribute a fund in Court which is payable to a personal representative, if the intestate had not *bona notabilia*.—*Graves v. G.*, 8 I. E. R. 36. (R.)

3. The Common Law side of this Court has not, under the Common Law Procedure Act, any jurisdiction to make a charging order against stock, upon a judgment in *sci. fa.*—*Reg. v. Uniacke*, 4 I. C. R. 492. (C.)

4. Lands evicted for non-payment of rent. A fund, the produce of those lands, standing in Court to the credit of the cause. Motion, that it be applied in payment of arrears due to the head landlord, granted.—*Sherlock v. Roe*, 1 I. Jur. 177. (R.)

#### XLIII. FURTHER DIRECTIONS.

5. After a decree for an account of subsequent dealings only, the Court will not on further directions go into an item overcharged in a previous settled account, when no sufficient ground for so doing was shown at the original hearing.—*D'Arcy v. Burke*, 2 I. E. R. 1. (C.)

6. To have a cause set down to be heard for further directions in the Court of Exch., a petition must be presented for that purpose.—*Cleary v. C.*, 3 I. E. R. 562. (E.E.)

7. Hearing for further directions. The premises, upon which the former decree had declared the pft.'s demand to be well charged, had in the interval become greatly dilapidated. Liberty to apply had been reserved to all parties. Upon the deft. declining to undertake to put the premises in repair, a decree for an immediate sale was pronounced. See 3 Dr. & War. 446.—*Simpson v. O'Sullivan*, Dr. Rep. temp. Sugden, 89. (C.)

8. V. bequeathed to A., his executors, &c., an annuity charged on all her property. Under the decree a specific sum of £3½ per cent. stock was transferred to the separate credit of A. to pay the annuity. Subsequently the £3½ per cents. were reduced to £3¼, while other funds were still in Court, though appropriated to other purposes. Held, that A. was entitled to have a further sum invested in stock to make the dividends still sufficient to pay the annuity.

The decree had been made in confirmation of a report finding the sum which should be appropriated. The order was now made by setting down the cause for further directions. *Sed quare*, if that was the regular course.—*Commissioners of Charitable Donations v. St. Lawrence*, 9 I. E. R. 560; 3 Jon. & L. 561. (C.)

9. Executors, in passing their residuary account, erroneously stated the degrees of relationship of the legatees to the testator, in consequence of which a large sum was paid to the Crown for legacy duty in excess of that properly chargeable. The liability for the principal sum so paid being admitted—Held, that the executors were also chargeable with interest.

They, by their answer, submitted that they were not liable for interest. The decree at the first hearing was silent upon the subject. Held, that the charge for interest could properly be made on further directions.—*Shaw v. Turbett*, 13 I. C. R. 324. (C.)—[Affd.: 14 I. C. R. 476; 8 I. Jur. N. S. 1. (C.A.)]

#### GENERAL ORDERS.

*Their Construction.* See GENERAL ORDERS, CONSTRUCTION OF, *ante*.

*Respecting Answers.* See PRACTICE, ANSWER.

*Dismissing Bill.* See PRACTICE, BILL, DISMISSAL OF.

*Contempt.* See PRACTICE, CONTEMPT.

*Decrees.* See PRACTICE, DECREE.

*Demurrer.* See PRACTICE, DEMURRER.

*Affidavits.* See PRACTICE, EVIDENCE.

*Depositions.* See *ibid*.

*Commission to Examine.* See *ibid*.

*Injunctions.* See PRACTICE, INJUNCTION.

*Motions.* See PRACTICE, MOTION.

*Orders.* See PRACTICE, ORDER.

*Plea.* See PRACTICE, PLEA.

#### XLIV. HABEAS CORPUS.

*Respecting the Warrant of Commitment.* See BANKRUPTCY, VIII.—STATUTES, CONSTRUCTION OF, II.

10. A solicitor being in custody under an attachment, the Court granted a writ of *habeas corpus*, directed to the Marshal, to bring him before the Taxing Master, to enable him to attend the taxation of bills of costs.—*Walsh v. Wilson*, 2 I. C. R. 79. (C.)

XLV. HEARING: SETTING DOWN CAUSE FOR HEARING, PRELIMINARY OBJECTIONS. See PRACTICE, ANSWER: CAUSE, ADJOURNING, &c.: PRACTICE, RE-HEARING—PRACTICE, DECREE.

1. *In general.*

2. *On objection for want, or misjoinder of Parties, &c.*

3. *Before what Judge.*

#### XLV. 1. Hearing, &c., in general.

[See 30 & 31 Vic., c. 44, ss. 67, 68, 88, 90, 93, 94, 106–109, 122–124, 146; G. O. (1867), 84–90, 94, 110, 112, 114–118, 160, 163, 205, 206, 226.]

11. *Semble*—The objection that the husband has been made a co-ptf. with his wife in a suit for her separate estate, though ground of demurrer, cannot be sustained at the hearing.—*Sweeny v. Hall*, 2 I. E. R. 22; S. & Sc. 662. (R.)

1. The objection by a prior mortgagee, brought before the Court in a foreclosure suit, that the ptf. has not offered by his bill to redeem him, if valid, ought to be taken advantage of by demurrer. The Court will overrule it at the hearing.—*Balfe v. Lord*, 4 I. E. R. 648; 2 Dr. & War. 480; 1 Con. & L. 519. (C.)

2. A creditor, a deft. in an administration suit, will not, on a re-hearing, be entitled to rely upon matters of which he might have had the benefit by taking objections and exceptions to the Master's report.—*Brownlow v. Earl of Moath*, 2 Dr. & Wal. 674; 2 I. E. R. 383. (C.)

3. Upon a re-hearing, if the deft. does not appear, the ptf. is to make up his decree as at an original hearing. A cause cannot be twice re-heard.—*M'Cann v. O'Connor*, 2 Dr. & War. 42. (C.)

4. It is a matter of course to dismiss with costs a petition of re-hearing presented while the decree is still in minutes.

It is not necessary that Counsel who certify for a re-hearing should have been engaged in the case at the former hearing.

When counsel at the original hearing abandon an objection as to parties, or as to proof of a document, the same objection cannot be made on the re-hearing.

On a re-hearing, no point not specified in the petition can be relied upon by the petitioners.—*Malone v. Geraghty*, 2 Con. & L. 235; 3 Dr. & War. 252. (C.)

5. Upon a hearing upon a special finding by the Master, the Court is confined to the alternatives thereby put.—*Montgomery v. Southwell*, 2 Con. & L. 263; 3 Dr. & War. 171. (C.)

6. The Court will not, upon a re-hearing, confirm an erroneous decree.—*O'Connell v. Macnamara*, 2 Con. & L. 266, note; 3 Dr. & War. 411. (C.)

7. When counsel has relied upon only some of several grounds of defence, that is not a waiver of the rest. That having been the case, and an appeal made to the H. L., a petition was allowed for a re-hearing, to amend the notes of the decree without withdrawing the appeal.—*Galway v. Barron*, Long. & T. 76. (E.E.)

8. In suits which have not been heard by the Court on the pleadings, although the original bill was filed ten years before the date of the 83rd G. O., i. e., 27th March 1843, the ptf. has, under that order, nine months from its date to bring the cause to a hearing. In such cases, applications for further time to bring the cause to a hearing are unnecessary, and the Court will not make any rule upon them until the time allowed by the G. O. is about to expire.—*Brown v. M'Clintock*, 5 I. E. R. 278. (R.)

9. The Master's Examiner will lodge with the Registrar of the Court, for the hearing of a cause, deeds deposited in the office for the purposes of the cause, upon receiving a requisition from any of the parties concerned. A motion that he shall be at liberty to do so is unnecessary.—*Plumptre v. O'Dell*, 5 I. E. R. 404. (R.)

10. Before considering those questions, however, I am anxious that the form in which the case comes before the Court should be distinctly understood. A petition of re-hearing was presented; but when the cause came on, it appeared that the decree had not been drawn up, but still rested in minutes. It was a matter of course that the petition should have been dismissed with costs; but, in order to save expense, the ptf. consented that the case should be heard as if it was a discussion upon the minutes. I have got into this explanation lest it might be supposed that I was breaking in upon the established rule of the Court, that a cause cannot be re-heard upon minutes.—*Malone v. Geraghty*, 5 I. E. R. 561. (C.)

11. When the deft. does not appear when the cause is called on, the ptf. must go on and prove his case; and cannot, as was formerly the practice, take such decree as he can abide by.—*Hayes v. Brierly*, 3 Dr. & War. 274. (C.)

12. Hearing for further directions. The premises, upon which the former decree had declared the ptf.'s demand to be well charged, had in the interval become greatly dilapidated. Liberty to apply had been reserved to all parties. Upon the deft. declining to undertake to put the premises into repair, a decree for an immediate sale was pronounced.—[See 3 Dr. & War. 446.]—*Simpson v. O'Sullivan*, Dr. Rep. temp. Sugden, 89. (C.)

13. Though it is generally true that an objection to a bill of revivor ought to be taken by plea or demurrer, yet when the ptf. in his bill of revivor misrepresents the character which he fills, the objection may be taken at the hearing.—*Stuart v. Burrowes*, Dr. Rep., temp. Sugden, 265. (C.)

14. An objection to the suit, for misjoinder of an insolvent and his assignee, cannot be taken at the hearing.—*Cashel v. Kelly*, 2 Dr. & War. 181; 1 Con. & L. 246. (C.)

15. A ground of suit, not put in issue by the bill, cannot be considered by the Court.—*Wallace v. W.*, 2 Dr. & War. 452; 1 Con. & L. 491. (C.)

16. An objection by a prior mortgage that ptf., a puisne mortgagee has not offered any his bill to redeem him, if first taken at the hearing, cannot be maintained.—*Balfe v. Lord*, 4 I. E. R. 648; 2 Dr. & War. 480; 1 Con. & L. 519. (C.)

1. That a motion, if granted, will have the effect of postponing the hearing of a listed cause is no reason why it should not be heard at the Rolls. When the case is called on, this Court will not entertain such a motion.—*Crawford v. Scott*, 4 Dr. & War. 278; 2 Con. & L. 412. (C.)

2. When a cause is set down to be heard *pro confesso*, formal amendments having been made in the bill, the Court at the hearing will require the matter of the amendments to be stated.—*Burrough v. Williamson*, 6 I. E. R. 374. (R.)

3. *Semble*—If a demurrer for multifariousness cannot be taken to a bill, because it contains a charge of collusion between the defts., and the ptf. fails to prove the collusion, the objection may be taken at the hearing.—*Nixon v. Robinson*, 7 I. E. R. 520; 2 Jon. & L. 4. (C.)

4. Bill to establish an unregistered lease against a subsequent duly registered mortgage. Ptf. failed to prove notice; but, his case being meritorious, the Court, at the hearing, permitted the bill to be amended, by praying a redemption, and decreed accordingly.—*Butler v. Sparrow*, 8 Jon. & L. 694. (C.)

5. The Court will not postpone the hearing of a mortgage cause, to allow the deft. time to get money to pay off the ptf., though it will enlarge the time for redemption after decree.—*Anonymous*, 9 I. E. R. 377. (C.)

6. When the parties before decree entered into a consent to take accounts, which was made a rule of Court, and a Master's report obtained on it, upon which the cause was set down—*Held*, the cause could not be heard.—*Hodnett v. Going*, 11 I. E. R. 421. (C.)

7. All the parties to an original bill being dead, the cause was set down in the names of the parties to a supplemental bill only. *Held*, regular, and that parts of the answer to the original bill could be read as of an answer in the cause at hearing, and that it was not to be treated as an answer in another cause.—*Anderson v. Pratt*, 12 I. E. R. 603. (C.)

8. When a ptf. has obtained, at the hearing, liberty to amend, he must either amend, or discharge the order to amend before the cause can be again set down.

Orders to amend, without prejudice to an order *pro confesso*, should be made only when the amendment cannot prejudice the deft.—*Baker v. M'Dermott*, 1 I. Jur. 162. (C.)

9. The Court has jurisdiction, at the hearing of the cause, to vary the report, if the error be apparent, though no exception be taken to it.—*Barry v. Cronin*, 1 I. Jur. 297. (C.)

10. A decree, obtained against a personal representative on a bill taken *pro confesso* was

set aside, and the cause allowed to be re-heard; defence not having been taken in consequence of a fatality, and the defendant alleging that he was not liable to the debt. The deft. was directed to pay the costs of the hearing and of the motion.—*Brooke v. Stewart*, 2 I. Jur. 226. (C.)

11. When interrogatories have been annexed to cause petitions, the respondents are, under the Ch. Reg. Act, s. 9, until the publication of G. O., under ss. 81 and 82 to the contrary, entitled to two months' time to file affidavits in answer to such interrogatories. Such cause petitions cannot be set down for hearing until the lapse of two months from the service of notice of filing the interrogatories.

Interrogatories had been annexed to a cause petition which was set down for hearing within two months after service of notice of filing the petition and interrogatories upon some of the respondents, and without any notice to the other respondents. A decretal order obtained on such hearing was set aside, with costs.

*Semble*—It is not a sufficient notice of setting down a cause petition for hearing to state that counsel will, on behalf of the petitioner, move on the petition "on the first opportunity."—*Sheridan v. Cannon*, 1 I. C. R. 245; 3 I. Jur. 250. (C.)

12. Two counsel only are to be heard on each side in this Court.—*Bentley v. Robinson*, 10 I. C. R. 287; 5 I. Jur. N. S. 7. (C.A.)

13. Cause petitions under the Court of Ch. Reg. Act will be heard, in the first instance, on the petition and affidavits filed in support of, or in opposition to it, and on the answers to interrogatories (if any) filed. On that hearing the Court may direct that all or any of the matters, stated in the petition or affidavits, and touching which it is necessary to have further proof or enquiry, shall be so proved or enquired into by further affidavits, or by *viva voce*, or written examination, or by the trial of an issue at law, or otherwise, as may be deemed most suitable to the nature of the case; and appoint the time and modes of examination as may be most expedient; and reserve further order and directions thereon until after such proof and enquiry shall have been had.—*Glasscock v. Ross*, 1 I. C. R. 50. (C.)

14. When a petition for re-hearing has been presented, the cause is before the Court, as it would be, in the first instance, on exceptions; and, before the re-hearing, the Court will hear a motion for liberty to file a supplemental bill.—*O'Keefe v. Holmes*, 5 I. Jur. 153. (C.)

15. On a re-hearing, documentary evidence not offered at the original hearing may be received; but depositions for anything more than identifying such documentary evidence cannot then be given.—*Johnson v. Mid. Gl. W. Ry. Co.*, 5 I. C. R. 264. (C.)

1. When a supplemental petition in the nature of a bill of review has been filed, this Court has jurisdiction under the 19 & 20 Vic., c. 92, to hear it along with the re-hearing of the decree in the original cause. The proper practice is to set down such supplemental petition for hearing, along with the re-hearing of the decree appealed against, in the Court of Appeal.—*Barton v. Sampson*, 3 I. Jur. N. S. 71. (C.A.)

2. A supplemental petition, in the nature of a petition of review on newly discovered matter, having been filed, the original cause must be re-heard before the Court of C. A., simultaneously with the supplemental petition.

For this purpose, the original petition should be set down in the Chancellor's list of causes, and the order for re-hearing should direct that the supplemental petition be heard together with it.—[*Barton v. Sampson*, 3 I. Jur. N. S. 71, followed.]—*Radcliff v. Orme*, 5 I. Jur. N. S. 245. (C.A.)

3. A cause petition was not set down for hearing in proper time, because the petitioner was thrown off his guard by a pending negotiation for a settlement, and an understanding founded on an unauthorised arrangement between the solicitors as to the hearing. Motion to reinstate the petition granted.—*Shanney v. O'Leary*, 6 I. Jur. N. S. 12. (C.)

#### XLV. 2. *Hearing an Objection for Want or Misjoinder of Parties, &c.*

4. The deft. taking an objection for want of parties is entitled to begin.—*Galway v. Graydon*, 7 I. E. R. 868; 1 Jon. & L. 526. (C.)

5. When a cause is heard on an objection for want of parties, the party who took the objection begins.—*Prim v. McKenny*, 9 I. E. R. 115. (C.)

6. The bill having been dismissed against a deft. by the 64th Rule, a motion for leave to amend generally was refused with costs; but an amendment under the 49th Rule, by which the same deft. was made a party, was held regular; and an order to take the bill *pro confesso* against him was made.—*Hornibrooke v. Ware*, 12 I. E. R. 440. (R.)

#### XLV. 3. *Before what Judge.*

#### XLV.\* HOUSE OF LORDS.

[For Costs of Proceedings in, see PRACTICE, XXX. 10. c., COSTS OF APPEAL.]

7. A judgment of the House of Lords will not be made a rule of this Court without an affidavit verifying the signature of the Clerk of the Parliament.—*Blakeney v. Annesley*, H. & J., App. 47. (E.E.)

8. The H. L. will not give relief to an appellant against an order of which he complains by petition, unless he has taken the proper course to obtain relief in the Court

below.—*Tomney v. White*, 6 Cl. & F. 786.—[See s. c., 6 I. E. R. 303. (R.); 1 H. L. Cas. 160; 3 H. L. Cas. 49; 5 I. Jur. 321. (H.L.); 4 H. L. Cas. 313.]

9. The Court of Ch. in Ir. having directed an enquiry into the value of an estate at the time of its assignment, and touching the amount of interest therein of B. (a purchaser from the assignee), the H. L. reversed that order directing the enquiry; and, without making any order, remitted the case with a declaration of the nature and extent of B.'s rights, leaving it to the Court below to carry that declaration into effect.—*Simpson v. O'Sullivan*, 7 Cl. & F. 559.—[See the case afterwards at the hearing on the report and merits: 3 Dr. & War. 456. (C.)]

10. Matter not printed in the papers cannot be made the subject of argument before the H. L.

The H. L., in remitting a cause to the Court below to carry its directions into effect, will, if necessary, not merely declare the principle of its order, but state those directions fully on the face of its order.—*M'Can v. O'Ferrall*, 8 Cl. & F. 30.—[See 5 I. E. R. 105. (R.)]

11. When there are a cause and a cross-cause, and an appeal is taken against the decree in the cause only, the cross-cause is not in any respect before the House.—*Callaghan v. C.*, 8 Cl. & F. 374.—[See 4 I. E. R. 441; 8 I. E. R. 572.]

12. The first decree in suits, which had been in existence for some years, was made in 1818. The litigation continued; and other decrees on the footing of that decree were made, between the parties and others who were interested in the same transactions. In 1838, there was made a decretal order to revive and execute all former decrees and orders. Those decrees and orders, as well as the decretal order of 1838, were appealed against. *Held*, that, after so great a delay, and under such circumstances, the H. L. would not set aside any of the original decrees or orders, upon technical objections, which did not affect the merits of the case.

A decretal order, not alleged to have been made on the appearance of all the proper parties, was therefore irregular to that extent. It directed the revival and execution of several decrees and orders, but the suit in which it was made was regular, for some purposes at least. *Held*, that the decretal order should be reversed with directions, and the case remitted to the Court below to deal with the suit so as to advance the justice of the case, regard being had to the decision of this House touching the earlier decrees and orders, which the House had sustained as valid.—*Lawrence v. Blake*, 8 Cl. & F. 504.

13. When no appellant appears to support an appeal, the only order that the H. L. can make is to dismiss the appeal for want of prosecution, with costs.—*Scanlan v. Usher*, 8 Cl. & F. 561.

1. When no person appeared on the appellant's behalf, when his appeal was called on, and the agent only of the respondent appeared, but alleged that he had retained counsel, and prayed that the appeal be dismissed with costs, it was dismissed with costs.—*Murphy v. Conway*, 9 Cl. & F. 73.

2. The Court of Ch. in Ir. pronounced a decree against P., with costs. P. paid the costs, and appealed to the H. L., which gave judgment in his favour, and reversed the decree, with costs. P. thereupon applied for an order directing the repayment of the costs which he had already paid. The H. L. refused to make such an order, and left P. to apply to the Court below on the judgment now pronounced.—*Clark v. Smith*, 9 Cl. & F. 126.

[P., having originally paid those costs to the solicitor of the opposite party, subsequently applied to the Court of Ch. in Ir. for an order directing that solicitor to repay him the amount. The solicitor had, with his client's assent, applied the money in paying costs due to himself by the client. *Held*, that P.'s application should be refused.—*Smith v. Clarke*, 5 I. E. R. 423; 3 Dr. & War. 344. (C.)]

3. The H. L., in reversing a decree, which directed immaterial enquiries, and ordering the bill to be dismissed, as at the hearing, with costs, will not give the appellant relief from his costs of prosecuting the enquiries before he appealed.—*Siree v. Kirwan*, 9 Cl. & F. 716.

4. While a case was pending in the H. L., the deft. in a similar case made an offer to the ptf. to be bound by the decision of the House in the pending case. Ptf. took no notice of the offer, but compelled deft. to proceed with his defence. Judgment was given against deft., who appealed to this House, and prosecuted the appeal to a hearing after an adverse decision in the previously pending case. Judgment being given against him in his own case, he was ordered to pay respondent's costs.—*Farrell v. Gleeson*, 11 Cl. & F. 702.

5. When the H. L. varies a decree, but only on a point which had not been raised in the Court below, nor made a ground of appeal, the appellant must pay the costs of the appeal.—*Wallace v. Patten*, 12 Cl. & F. 491.—[See *Wallace v. Patten*, 5 I. E. R. 309; Long. & T. 479. (E.E.)]

6. Any document or evidence, that has been before the Court below, may, on appeal to the H. L., be properly brought under the notice of the House, but no others.—*Gerahty v. Malone*, 1 H. L. Cas. 89.—[See the case below, 5 I. E. R. 549; 3 Dr. & War. 239. (C.)]

7. *Semble*—A decree appealed from, but not adjudicated on further than dismissing the appeal generally, may be included in a future appeal.

*Semble*—Decrees and orders, which have not been enrolled, may, after any length of time, on being enrolled, be brought under appeal

with a recent order, made in the same cause, and duly enrolled.

A judgment of the H. L. is conclusive, and cannot be reversed or corrected, except by Act of Parliament.—*Tommeys v. White*, 3 H. L. Cas. 49.—[See *Tommeys v. White*, 6 I. E. R. 303. (R.); 6 Cl. & F. 786; 1 H. L. Cas. 160; 3 H. L. Cas. 49; 5 I. Jur. 321. (H.L.); 4 H. L. Cas. 313.]

8. On an appeal from a decree made by the Court of Ch. in Ir., no one appeared on behalf of the appellant; but counsel appeared on behalf of the respondent. Without respondent's counsel being called on, the appeal was dismissed with costs.—*Martin v. D'Arcy*, 3 H. L. Cas. 698.

9. A judgment of the H. L., given on an appeal, cannot be reversed. But, if that appeal and judgment have been obtained by suppression and misrepresentation, the H. L. will afterwards discharge the order granting the leave to appeal, and also the order constituting the judgment thereon.

In Jan. 1835, the Court of Ch. in Ir. pronounced a decree, which was enrolled in the month of May in that year. The proper time for appealing having gone by, a petition, for leave to appeal against that decree, was presented in Feb. 1839; but its prayer was refused. In 1844, the party, who was dissatisfied with the decree, filed a bill of review. That bill was demurred to for want of equity, and the demurrer was allowed. In 1846, the order allowing the demurrer was appealed against; and, in this appeal, the original decree was expressly complained of. In July 1847, the appeal was dismissed *generally* by an order, which specially mentioned the order which had allowed the demurrer, but which did not mention the original decree. In 1848, there was presented a petition for leave to appeal against the original decree and against certain other orders, which had been made in the course of the proceedings, but which had not then been enrolled. That petition stated that "it appeared by the order of July 1847, that the decree of Jan. 1835, had not been complained of, and therefore that their Lordships had not made any declaration with respect to it." The petition further stated that "the said decree had never been adjudicated upon by their Lordships."

Other proceedings having been taken, leave was given, on this petition, to include in the appeal the decree of Jan. 1835. The appeal was heard *ex parte*; and, in June 1850, that decree was reversed. *Held*, that this reversal had been obtained by suppression and misrepresentation.

The parties, whom that reversal affected, having petitioned for relief, the H. L. discharged the order which gave leave to appeal against the decree of Jan. 1835, and also discharged the order which had reversed that decree, but without costs.—*Ex p. White v. Tommeyes*, 4 H. L. Cas. 313.—[See *Tommeys v. White*, 6 I. E. R. 303. (R.); 6 Cl. & F. 786; 1 H. L. Cas. 160; 5 I. Jur. 321. (H.L.); 3 H. L. Cas. 49.]

1. Though an appellant comes to London so long before it is necessary to do so in order to attend the hearing of his cause, that he would not be discharged out of custody if then arrested, yet he will be discharged, if not arrested until his cause is actually in the paper.—*Persse v. P.*, 5 H. L. Cas. 671.—[See *Persse v. P.*, 7 Cl. & F. 279; 3 I. C. R. 196. (C.); 5 H. L. Cas. 682.]

2. Notwithstanding the 13 & 14 Vic., c. 89, s. 30, the time, for appealing to the H. L. against a decree or order of the Court of Ch. in Ir., is still to be calculated from the time of the enrolment of that decree or order, not from the day on which it was pronounced in Court.—*Lambert v. Peyton*, 7 H. L. Cas. 423.—[See *Peyton v. Lambert*, 6 I. C. R. 9. (R.); 6 I. C. R. 81. (C.A.); *Lambert v. Peyton*, 8 H. L. Cas. 1.]

3. There had been an objection made to the competency of an appeal to the H. L. The appeal committee directed that that objection should be heard before the House, which gave judgment in favour of the appellant. The appeal was then heard, and was dismissed on the merits, with costs. The House directed that the costs, incurred by reason of the objection to the competency of the appeal, should be deducted from the general costs.—*Lambert v. Peyton*, 8 H. L. Cas. 2.—[See s. c., 7 H. L. Cas. 423; 6 I. C. R. 81. (C.A.); 6 I. C. R. 9. (R.)]

4. A conveyance, made under the 21 & 22 Vic., c. 72, is, under sec. 85, "for all purposes conclusive evidence" that all previous proceedings, leading to such conveyance, have been regularly taken

Proceedings had been taken to sell estates, of which the sale and re-sale had been directed, in a manner which, when presented to the notice of the House, was declared to be marked with great irregularity. The complainant, however, had not brought that matter before the Court of Appeal until after the conveyances had been executed. *Held*, that the statute precluded this House from affording to the appellant relief against the consequences of such irregularities.

When the appellant went before the Court of Appeal, his petition was dismissed with costs. The H. L. reversed the order for costs, but affirmed the dismissal of the appeal.—*Power v. Reeves*, 10 H. L. Cas. 645.—[See *In re Power's Estate*, 11 I. C. R. 295. (C.A.)]

5. The Appeal Committee cannot decide what documents are, and what are not necessary to be printed in the appendix to a case. A question on this point, though known by the parties to exist, was not made the subject of discussion during the argument on the appeal. The H. L. would not hear it discussed afterwards, and refused to make any order touching the costs of the appendix.

The decision appealed against was reversed, and the cause remitted. The Court below was left to deal with the general question of

costs.—*Spread v. Morgan*, 11 H. L. Cas. 588.—[See 9 I. C. R. 535; Dr. Rep. temp. Napier, 525. (C.)]

*Incumbered Estates Court.* See PRACTICE, L. E. COURT.

*Information.* See CHARITY, IV—PLEADING, INFORMATION.

*Impertinence.* See PRACTICE, ANSWER—PRACTICE, MASTER, REFERENCE TO, &c.

[See 30 & 31 Vic., c. 44, s. 70: G. O. (1867), 151.]

XLVI. INJUNCTION. See PRACTICE, EVIDENCE—PRACTICE, PAYMENT INTO COURT.

1. *Generally: General Orders respecting: its Form.*
2. *How and when to be obtained: Motion for.*
3. *Obtained on Amended Bill.*
4. *Special.*
5. *Perpetual.*
6. *Its Extent and Effect.*
7. *Service of: Order for.*
8. *Breach of: what Constitutes Breach: Commitment for.*
9. *Reviving, Continuing, and Extending.*
10. *Dissolving: Cause against Dissolution.*
11. *Effect of Amendment: Obtaining Leave to amend without prejudice.*
12. *Against Proceeding at Law.*
  - a. *Generally.*
  - b. *Against Ejectment.*
  - c. *To stay Trial: Extending common Injunction.*
  - d. *To stay Execution and Distress.*
  - e. *To stay Proceedings in other Courts.*
  - f. *When Money will be ordered into Court on granting an Injunction.*
  - g. *In cases of Fraud: on grounds of Public Policy.*
  - h. *In cases of Interpleader.*
13. *Against Darkening Ancient Lights.*
14. *Against Breach of Contract, Covenant, or Trust.*
15. *Against Infringing Copyright and Patent.*
16. *Against Setting up Legal Bars and Defences.*
17. *Against Nuisance.*
18. *Against Payment of Money, or Transfer or Negotiation of Security or Estate.*
19. *To quiet Possession.*
20. *To prevent Ships Sailing.*
21. *Forbidding Sale.*
22. *Against Trespass.*
23. *Against Waste.*
24. *In Partnership Matters.*
25. *Against assuming or using the same Trade-marks, Names, &c.*
26. *In other Cases.*

XLVI. 1. *Injunction generally.*

[See 16 & 17 Vic., c. 113 (Com. Law P. Act (*Ir.*), 1853, s. 189; 19 & 20 Vic., c. 113, C. L. P. Act (*Ir.*), 1856, ss. 81–84; 23 & 24 Vic., c. 154, ss. 35–40; 30 & 31 Vic., c. 44, ss. 58, 149, 161, 170–174: G. O. (1867), 144–146.]

1. An injunction to put the purchaser into possession amounts to a discharge of the receiver.—*Anon.*, 2 I. E. R. 416. (E.E.)

2. Injunction order in a possessory suit set aside, because the ptf. had not, in the first instance, fully and fairly stated his case.—*Dease v. Plunkett*, Dr. Rep. temp. Sugden, 255. (C.)

3. Injunction, after revival of suit, continues without order.—*Kennedy v. Lloyd*, 8 I. E. R. 581. (R.)

4. Several statutes empowered the Corporation of D. to levy rates for supplying water to D., and to raise a sum by mortgage or debentures on the rates. They were directed to retain an annual sum, and the surplus of the rates, after what should be duly expended for the purposes of the Acts, to create a sinking fund to pay the loan. That money, directed to be retained to create a sinking fund, was not retained; and a decree ordered them to pay off a sum which they had borrowed. They paid it, by issuing new debentures on the surplus rates; the M. R. having expressed an opinion, and the decree having declared that they were the property of the Corporation. They also applied some of the rates in paying the salaries of retired officers, and interest on a sum borrowed, by which the interest on some of the debentures was decreased. Twelve years after that decree an information was filed to restrain them from applying the rates in paying the interest on the debentures, or the salaries of retired officers, or the interest on the further sum borrowed. The Court refused, with costs, to grant an injunction before answer, while expressing a doubt whether the rates had not been misapplied, and though the information charged that there would not be a surplus if the purposes of the Acts were properly effected.—*Att.-Gen. v. Corp. of Dublin*, 12 I. E. R. 465; 1 I. Jur. 177. (R.)

5. In granting injunctions to prevent the infringement of trade-marks, the Court exercises its jurisdiction in aid of Courts of Law, i. e., in cases in which an action could be maintained at law; but does not exercise an independent jurisdiction.—*Foot v. Lea*, 13 I. E. R. 484. (R.)

6. Independently of the reasons which I have stated, the motion should be refused. It is made on the eve of the trial at law, and according to the case of *Thorpe v. Hughes* that is sufficient ground for refusing it.—*Hendrie v. Thompson*, 1 I. C. R. 283; 3 I. Jur. 87. (R.)

7. A motion for an injunction to restrain the infringement of a patent, was ordered to

stand until the ptf. brought an action at law. There was a verdict for the ptf. The deft. tendered a bill of exceptions, pending which the motion was renewed. The Court granted an injunction; the ptf. undertaking to abide any order which the Court might make, by directing an issue, or otherwise, to ascertain the damage, if any, which the deft. should sustain by obeying the order, if the deft. obtained judgment in the action.

Principles which guide the Court in granting or withholding an injunction after verdict; but before the legal right has been finally determined.—*Baxter v. Combe*, 3 I. C. R. 245. (R.)—[Affd.: 3 I. C. R. 256. (C.)—See s. c., 1 I. C. R. 284. (R.)]

8. The conversion of lands into a cemetery is waste. Demise of lands for lives and years, with a covenant to yield them up in repair at the expiration of the lease. The lessee's assignee agreed with Poor-law Guardians, with the Poor-law Commissioners' assent, not under seal, to let a portion of the lands to the Guardians as a cemetery. The land was so used for many years. The reversion was sold in the L. E. Court; and conveyed, subject to the lease, to the petitioner, who, before the conveyance, had notice of the cemetery's existence. Held, that the agreement with the Guardians was not a "purchase or hiring" by the Commissioners, within the 10 Vic., c. 81, s. 20.

*Semble*—Such a "purchase or hiring" must be by deed; and from or with the concurrence of the owner of the fee.

The Court granted an injunction to restrain future burials, but refused to order the restoration of the surface to its condition at the date of the demise.—*Cregan v. Cullen*, 16 I. C. R. 339. (R.)

XLVI. 2. *How and when Injunction may be obtained: Motion for.*

[See 30 & 31 Vic., c. 44, ss. 161, 170–174: G. O. (1867), 144–146.]

9. Notice of an application for an injunction should be given to a deft. when it can be conveniently given without producing any mischief to the ptf., and although a subpoena may have been served, to appear and answer the bill.—*Home v. Thompson*, S. & Sc. 615. (R.)

10. If an injunction bill prays for an account and answer from any deft., all defts. must be served before moving on the bill.—*Newenham v. O'Sullivan*, 1 I. E. R. 68. (R.)

11. Exceptions to a report of a short answer having been overruled, the Court will restrain ptf. from issuing process to enforce a full answer, pending an appeal from the order overruling the exceptions.—*Att.-Gen. v. Conroy*, 1 I. E. R. 77; Jon. & Car. 78. (E.E.)

12. The Court will, upon motion by the receiver, without a bill being filed, grant an order for an injunction to restrain tenants

under the Court from committing waste.—*Cronin v. M'Carthy*, Fl. & K. 49. (R.)

—*Beere v. Head*, 7 I. E. R. 60. (R.)—[See *Jackson v. Cleary*, 61, note.]

1. The Crown having obtained judgment in an information of intrusion, which was more than a year old, the Court granted a conditional order to issue an injunction to put the Crown into possession, serving the parties in possession of the lands.—*The Att.-Gen. v. Riggs*, 6 I. E. R. 7. (R.E.)

2. Injunction to restrain waste issued without bill filed, in a lunacy matter, on application of the receiver.—*In re Chinnerys*, 6 I. E. R. 469; 1 Jon. & L. 90. (C.)

3. Persons entitled, as executors, to a lease of ferries over the River Liffey, filed a bill, stating a patent by which the Crown had granted all the ferries on that river to the Corporation of Dublin, and that the Corporation had granted a lease of them to their testator: that one of the defts. having been in the habit of ferrying passengers over the river for hire, they brought an action against him, and obtained a verdict in 1841: but that he and two other persons continued to carry passengers across the river for hire; and prayed that the defts. might be restrained from ferrying passengers across the river for hire within the limits of their ferries. One of the defts., a party to the action, stated by affidavit that the right of the Corporation was reputed to be confined within limits, within which he had not infringed upon their right; and that neither the Corporation, nor anyone claiming under them, had, within the memory of living men, claimed or exercised any right outside those limits, or disturbed the ferries of other persons beyond them. He also stated that the ptf. had recently brought an action against him for the disturbance of their ferries, which was still pending. *Held*, that the ptf. were bound to show upon their bill an actual possession of the premises for three years at least before the filing of the bill; and that they had not done so in the present case.

*Held also*, that they should have stated their case fully in the first instance.—*Hemphill v. M'Kenna*, 6 I. E. R. 57; 3 Dr. & War. 183; 2 Con. & L. 153. (C.)

4. The Ecclesiastical Court by sentence granted administration to A., as the intestate's only next-of-kin. That sentence was affirmed on appeal. B. filed a bill impeaching A.'s pedigree, and to establish his own. The Court refused an injunction till answer, to prevent A. from possessing himself of the assets, since A. was, by the Ecclesiastical Court's decree, legally and equitably entitled to the assets.—*Maher v. Gorman*, 6 I. E. R. 304. (R.)

5. When irreparable waste has been committed, and is about being repeated, the Court will, without a positive affidavit of the facts, grant a conditional order for an injunction, and restrain the party in the meantime, if there be danger that the waste will be committed before such affidavit can be procured.

6. The Court will not grant an injunction, to restrain waste, against persons specifically who are not defts., but they may be restrained as the deft.'s workmen or servants, if they fill that character.—*Freeman v. Burke*, 7 I. E. R. 282. (R.)

7. The Master having executed the conveyance for the principal deft., does not preclude him from giving the usual certificate to enable the purchaser to obtain an injunction to be put into possession.—*Lawlor v. Drew*, 7 I. E. R. 637. (R.)

8. The 26 G. 3, c. 57, gave power to the Crown to grant letters patent to keep a theatre in Dublin, and prohibited all persons from performing plays in Dublin for hire, under a penalty of £300 for each offence, to be recovered by action of debt, &c. by any person suing. Letters patent were granted to W., authorising him to establish a theatre, and perform plays in Dublin, and containing a clause prohibiting all other persons from doing so, unless authorised. *Held*, that the patentee could not sustain a bill for an injunction to restrain unauthorised persons who opened a theatre and performed plays contrary to the statute and patent.

In such cases the right to bring an action on the case and a bill for an injunction are concurrent.—*Calcraft v. West*, 8 I. E. R. 74; 2 Jon. & L. 123. (C.)

9. An injunction against the Corporation of Dublin, to restrain the application of the Pipe-water Rate to payment of interest on their debentures, was refused, the majority of the debenture-holders not being before the Court.

The Court, upon such an application, will consider the balance of inconvenience, and, though the act complained of be improper, refuse the motion, if the granting it would be attended with inconvenience to third parties.—*The Att.-Gen., at the relation of Jackson, v. The Corporation of Dublin*, 1 I. Jur. 177. (R.)—[See 12 I. E. R. 465.]

10. The ptf. in a creditor's cause who has got a decree, may move to stay other causes instituted for the same purpose.—*O'Keefe v. Holmes*, 13 I. E. R. 111. (R.)

11. A Railway Co., instead of obtaining the finding of a jury respecting the amount of compensation due to the owner of land required for the railway, but acting on some oral consent by the owner's solicitor, took possession, and commenced the works. *Held*, that the ptf. was entitled to an injunction, and that his right to compensation was clear; but that, since great public injury would, without corresponding benefit to the ptf., result from stopping the works, and to prevent injury to the company, there should be no rule on the motion, the company proceeding at once to obtain the finding of a jury, and paying all costs properly incurred, because they had gone



into possession without complying with the statute. — *Hare v. C. & B. Ry. Co.*, 3 I. Jur. 1. (C.)

1. When Commissioners, appointed by an Act of Parliament, exceed the authority given them by the Act, and thereby infringe on, or violate private rights, the Court has jurisdiction to restrain them by injunction.

The expense of works under the Drainage Acts was estimated by the engineer of the Commissioners of Public Works at £8378. The works proceeded, with the assent of the proprietors, and were returned by the Commissioners to the House as completed according to the original design, at the expense of £11,110. 4s. 3d. Afterwards additional works became necessary, the lands having been flooded in consequence of works carried on by the Commissioners in a neighbouring district. They, without the assent of the proprietors, and without taking the proceeding required by Acts, completed the additional works, and signed an award, charging the entire expense of the work at £21,026. 14s. 1d. The Court granted an injunction against enrolling the award, which, under the Acts, would be binding and conclusive against all parties when enrolled.

The Act under which the Commissioners derived authority provided that it should not be lawful for any person whatever, in any manner, to question or appeal against, or in respect of, anything whatsoever done or omitted to be done by the Commissioners, under the provisions of recited Acts and that Act; nor should any proceeding to be had or taken by or on behalf of the Commissioners, for the purposes of the Acts, be removed or removable by *certiorari* into any of her Majesty's Courts of Record. *Held*, following the decision of the Court of Exchequer (in *Sharply v. Hornsby*, 4 I. Jur. 38), that the provision applied only to questions of procedure; and afforded no protection when the Commissioners exceeded their jurisdiction.

An objection for want of parties, though it would be ground of demurrer to a bill, will not be an answer to a motion for an injunction in a cause petition.

*Semble*—The Court has authority to allow an amendment in a cause petition, so as to get rid of the objection of misjoinder.—*Foster v. Hornsby*, 2 I. C. R. 426; 5 I. Jur. 279. (R.)

2. The Commissioners of Drainage, without exceeding their jurisdiction, carried on works in so negligent and expensive a manner, that the sum stated in their award very largely exceeded that stated in the estimate of their engineer, on the faith of which the proprietors of the lands assented to the works. *Held*, that (assuming that the facts stated in the petition were proved) an action for negligence would lie by the proprietors against the Commissioners; and that the Court had power, and was bound to grant an injunction to prevent the signing and enrolling of the award until the action was determined, which the petitioners by their petition undertook to

bring.—*Stubber v. Hornsby*, 2 I. C. R. 449; 5 I. Jur. 281. (R.)

3. The M. G. W. R. Co. purchased, under the sanction of an Act, the R. Canal and all the property belonging to it; and afterwards entered into a contract with the G. Canal Co. to purchase the G. Canal and its property; and that until an Act of Parliament could be obtained for the purpose, a lease should be made by the G. Canal Co. to the M. G. W. R. Co. under the provisions of the Canal Carriers Act, 8 & 9 Vic., c. 42. The agreement was adopted at a meeting of the G. Canal Co., and a draft lease approved of, which comprised not only the tolls and duties of the canal, but also all the real estate and personal property belonging to the G. Canal Co. *Held*, on a petition filed by two shareholders of the G. Canal Co. to restrain the Co. from executing the lease, that although the lease *per se* was within the Canal Carriers Act, yet as it was part of the arrangement for the transfer of the canal and its property to the R. Co., it was illegal; and the Court granted an injunction to prevent the execution of it.

The R. Canal and the G. Canal run parallel to each other for a short distance, and then diverge and fall into the River Shannon, at some distance from each other.

*Held*, that as they communicate with each other by water, they are within the Canal Carriers Act, so as to enable the G. Canal Co., under that Act, to make a lease of their tolls and duties to the M. G. W. R. Co., who had become proprietors of the R. Canal.

The Court will not consider the *quantum* of interest of shareholders in a Company who seek for an injunction, nor whether their interest would entitle them to vote at a meeting of the Company; but when the petitioners had purchased two shares for a nominal consideration, after the agreement which they complained of had been entered into, and with full notice of it, and for the purpose of preventing its completion, the Court refused an injunction.—*McDonnell v. Gd. Canal Co.*, and *McDonnell v. Mid. Gt. W. Ry. Co.*, 3 I. C. R. 578; 5 I. Jur. 197, 198. (C.)

4. A. owned a life estate in lands over which a receiver had been appointed. B., a judgment creditor, had the receiver extended in Nov. 1849, to pay his judgment. C., D., and F., owners of a mortgage, the first charge on the life estate, had the receiver extended in Dec. 1849, to pay them. An order in Jan. 1854 permitted A., the owner, to remain in possession of the lands at an occupation rent to be fixed by the Master; otherwise the Master was to let the lands. A. at first agreed; but subsequently refused to give the usual security for the rent.

The Master then posted the lands for letting, but C., who appeared to be in collusion with A., issued an execution upon a judgment of 1843, seized the growing crops, and, by giving public notice thereof, prevented the lands being let. Under these circumstances B. obtained an order for an injunction to the sheriff, to put the receiver in possession of the house

and lands which the Master was then directed to let; for an attachment against C. for contempt in seizing the crops; and that B. should be paid the costs of the order of Jan. 1854, and of this motion.—*Reeves v. Cox*, 6 I. Jur. 403. (R.)

1. Two suits were instituted: one in the Court of Ch. in England; the other in the Court of Ch. in Ireland, to administer a testator's assets. The former suit was by the executor, who resided in England; the latter by residuary legatees, who were not served with a copy of the English bill. The usual order of reference, under the Ch. Reg. Act 1850, s. 15, was made in the Irish suit, on the 19th Dec. 1856. The executor entered an appearance on the 26th Jan. 1857. He obtained a decree to account in the English suit on the 7th March 1857. An order was made in the Irish suit on the 18th April 1857, that the petition should stand for a charge, and directing the executor to file a discharge, setting forth accounts. This order was amended on the 7th Dec. 1857, by directing an account of debts and legacies. The executor filed a supplemental bill in England, to bind the petitioners in the Irish suit by the proceedings in the original suit; and, on the 8th March 1858, the Master in the Irish suit by order restrained the executor from proceeding with the supplemental suit in England. *Held*, on appeal from the last order:—following *Stokes v. Coltsman* (1 I. C. R. 44), that the order of the 19th Dec. 1856 was a decree to account; this Court being bound by that decision.

That the Court of Ch. in Ir. had jurisdiction to restrain the executor from proceeding with the English suit.

That the executor, residing in England, had a right to protection from the Court of Ch., there, against the demands of creditors, which the order of the Court of Ch. in Ir. could not give him.

The Court, therefore, varied the order of the 8th March 1858; and made an order restraining the executor from proceeding in the English suit without the leave of the M. R. in England.

*Semle*—The order of the 18th April 1857 was not a decree to account.—[*Stokes v. Coltsman*, 1 I. C. R. 44, observed upon.]—*Parnell v. P.*, 7 I. C. R. 322; s. c., 3 I. Jur. N. S. 382. (R.) —[*See s. c.*, 8 I. C. R. 556. (R.)]

#### XLVI. 3. *Obtained on Amended Bill.*

#### XLVI. 4. *Special.*

#### XLVI. 5. *Perpetual Injunction.*

2. A., having power to raise, by sale or mortgage, or other disposition, of a reversionary term of 1000 years, the portions provided by settlement for his younger children, did, in 1815, on the marriage of a daughter with C., purport to charge, by appointment, this term with £4000 and interest. After C.'s death, his personal representatives, having been advised that that power to charge had

not been duly exercised, proceeded at law against A., on the covenant for title. A. gave judgment at law; and filed his bill, stating that the sum would, in a Court of Equity, be decreed to be well charged, and praying a perpetual injunction against the proceedings at law, but offering to execute any instrument deemed necessary to charge the lands. *Held*, that A., with the trustees of the term, should execute to C.'s representative a mortgage of the lands and premises in the term for £4000, and interest; and that a perpetual injunction should be granted against any further proceedings at law.—*Whaley v. Morgan*, 2 Dr. & Wal. 330. (C.)

3. A., a shareholder in the A. and C. Bank of Ireland, sold, in 1837, his shares to the company, who paid him therefor, and entered the sale in their books. The printed deed of transfer required by law was filled up and executed by the ptf., but not by any of the trustees of the bank; and no memorial of transfer was executed. In the register, filed in Nov. 1837, A.'s name appeared as having ceased to be a partner. It was omitted in the annual register of shareholders filed in the years 1838, '39, '40, '41, and '42. In 1848 A.'s name was again replaced on the register of shareholders, in pursuance, as alleged by A., of a fraudulent arrangement between the bank and B., a creditor on foot of debentures issued subsequent to 1837, in order to make A. liable. B. having obtained judgment against the bank on a plea of confession in an action on the debentures, sued out a *sci. fa.* thereon, against A. as a shareholder. A perpetual injunction was granted to restrain B. from proceeding at law against A. upon the *sci. fa.*, and to restrain the bank from placing A.'s name on the next ensuing annual register.

The Banking Act, 6 G. 4, c. 42, does not prevent a company from buying up the shares of an individual member; and although they dispense with the form of transfer directed by the Act, the sale will be binding as between them and the vendor.—*Taylor v. Hughes*, 7 I. E. R. 529. (C.)—[*Affg. Rolls decision*, 6 I. E. R. 480. (R.)]

4. Lands were vested upon trusts in strict settlement, with a leasing power to be exercised by two of the three trustees, with the consent of the tenant for life. A lease was executed in 1808 by one trustee, with the consent of the tenant for life. D., the first tenant in tail, attained age, and in 1819 the property was re-settled. In 1831, the tenant for life died, and D. received the rent reserved by the lease of 1808, up to 1843, when he purchased the lessee's interest, and took possession of the lands comprised in the lease; but did not take a conveyance. On an ejectment, brought by a judgment creditor of the lessee, judgment for the ptf. was given for one-third. *Held*, that D. was entitled to a perpetual injunction against the judgment creditor relying on the legal estate in the one-third derived by him from the trustee.—*Denny v. Busted*, 7 I. C. R. 201; 3 I. Jur. N. S. 377. (C.)—[*Affd.*: 8 I. C. R. 49. (C.A.)]

1. By letters patent of King Charles II, the fishery of the river of Galway from Lough Corrib to the sea was granted to P., under whom the petitioners claimed. The title of the Crown and its grantees to the fishery was deduced from the reign of King John. Acts of ownership, and convictions of persons who had trespassed on the fishery were given in evidence. The title of the petitioners had been established by the verdict of a jury in a prohibition suit at law to which some of the respondents were parties. The respondents admitted the right to a fishery in a part of the river, but contended that in other parts they and the public from time immemorial had exercised a right of angling; and they proved that for many years persons had been in the habit of angling in all parts of the river. The Court granted a perpetual injunction to restrain the respondents from fishing, without directing an issue or an action at law.—*Ashworth v. Browne*, 10 I. C. R. 421. (R.)

#### XLVI. 6. *Extent and Effect of.*

#### XLVI. 7. *Service of, and of Order for.*

#### XLVI. 8. *Breach of: what constitutes Breach: Commitment for.*

2. A deft., having been imprisoned eight months for breach of an injunction against breaking up ancient pasture lands, was discharged from custody, on undertaking to lay them down again.—*Scully v. Skehane, S. & Sc.* 710. (R.)

3. Planting potatoes in land previously ploughed is not such a breach of an injunction to stay waste as will be punished by attachment.—*Brophy v. Quarry, Hayes*, 449. (E.E.)

4. A landlord obtained a civil-bill decree in an ejectment against an overholding tenant, who appealed, and filed a bill for specific performance of an agreement to grant a lease, and for an injunction. The common injunction was obtained. On an appeal, the civil-bill was dismissed without prejudice. The landlord brought a second civil-bill, and obtained a decree. An attachment for breach of injunction was refused, as the second civil-bill was only the continuation of the first.—*M'Girr v. Jervis, Hay, & J.* 501. (E.E.)

#### XLVI. 9. *Reviving, Continuing, and Extending Injunctions.*

5. In an injunction cause, although ptf. excepts to deft.'s answer, whereby, under G. O. 92, the original injunction is continued until the exceptions are disposed of—*Held*, that ptf. may, nevertheless, move on the bill and answer to continue the injunction.—*Lambert v. L.*, 1 I. E. R. 9. (R.)

6. A motion to continue an injunction upon equity confessed by the answer, without any saving of the right to except, is a waiver of

all objections to the answer for insufficiency.—*Crofts v. Lord Egmont*, 3 I. E. R. 229; 3 I. E. R. 227. (R.)

7. An injunction obtained on the filing of the bill, continued to the hearing (the ptf. giving security and undertaking to speed his cause), it appearing that there was a serious question for the hearing, which, if decided in the ptf.'s favour, would entitle him to the relief sought.—*Donnell v. Church*, 4 I. E. R. 630. (R.)

8. When a demurrer to an injunction bill has been allowed by notice under the 64th G. O., and the bill amended, the 62nd G. Rule does not authorise the ptf. to move to continue the injunction already obtained, that injunction standing dissolved by the allowance of the demurrer.—*Atkinson v. Wright*, 6 I. E. R. 382. (R.)

9. When a deft. dies after injunction obtained against him, upon revival of the suit against his personal representative, the injunction stands continued without further order.—*Kennedy v. Lloyd*, 8 I. E. R. 581. (R.)

10. The answer was filed on the 31st March. Exceptions were taken on the 18th April, but abandoned. A motion to continue the injunction was *held* too late, not being within the time directed by the 62nd G. O.—*Jordan v. Gray*, 1 I. Jur. 315. (R.)

11. The ptf. married the deft., an alien; and afterwards, by deed of separation, not acknowledged, conveyed real and personal estate in trust to pay him an annuity. The trustee covenanted to pay the annuity, and the ptf. to indemnify the trustee. An action having been brought by the deft. against the trustee, the ptf. filed a bill in her own name for an injunction, and to set aside the deed, insisting that the deft. being an alien could take nothing under it; that the marriage was not legal according to the law of Guernsey, where it was celebrated; that the ptf. executed the deed under the impression that the deft. had by the marriage acquired legal rights over her property; and that the deed was not acknowledged by her. The Court refused to continue an injunction granted until answer on any of the grounds except the last.

*Semle*—The ptf., having by her bill denied the marriage, and having covenanted to indemnify the trustee, who at her instance incurred a legal liability, cannot rely on the deed not being properly acknowledged.—*Dumoncel v. D.*, 13 I. E. R. 92. (R.)

12. An injunction against felling timber was obtained against the respondent; who by his affidavit in answer claimed the timber as his own property. On a motion, founded on that affidavit, to dissolve the injunction, the Court directed an action to be brought to try the legal right. An action having been brought, the respondent obtained the judgment of the Court of Exchequer Chamber, one Judge alone dissenting. The petitioner

sued out and prosecuted a writ of error to the H. L. *Held*, reversing the order at the Rolls [3 I. C. R. 455], that the injunction ought to be continued.—*Mountcashell v. O'Neill*, 3 I. C. R. 619. (C.)

**XLVI. 10. Dissolving Injunction: Cause against Dissolution.**

1. In an interpleader suit the ptf. obtained an injunction against proceedings at law, upon the terms of paying into Court the rent claimed. One deft. answered; and before the other answered (there being process against him), entered a conditional rule to dissolve the injunction. *Held*, that the rule was irregular.—*Swanston v. Simpson, Jo. & Car.* 188. (E.E.)

2. If a ptf. applying *ex parte* for an injunction, suppress a material fact, it will be a ground for dissolving the injunction with costs.—*Hemphill v. McKenna*, 3 Dr. & War. 188; 2 Con. & L. 76; 6 I. E. R. 57. (C.)

3. Injunction order in a possessory suit set aside because the ptf. had not fully and fairly stated his case in the first instance.—*Dease v. Phinkett*, Dr. Rep. temp. Sugden, 255. (C.)

4. When after notice of motion by the deft. to dissolve an injunction upon answer filed, the ptf., on the eve of the Vacation after H. Term, filed exceptions to the answer, the Court would not entertain such motion.

*Quære*—Whether in cases of waste the deft. may move to dissolve the injunction?—*Persse v. Queely*, 9 I. E. R. 151. (R.)

5. An order, on showing cause against an injunction obtained on a possessory bill, allowing the cause to stand over, with liberty to amend the bill by putting in issue matter not stated in, or exactly consistent with it, cannot be made, since such a motion would be analogous to the final hearing of an ordinary cause. The rule, respecting the use of supplemental affidavits on such motions, considered.—*Congleton v. Mitchell*, 12 I. E. R. 34. (C.)

6. An injunction against felling timber was obtained against the respondent. On a motion to dissolve it, the Court directed an action to be brought. An action having been brought, and the respondent having obtained judgment in the Exchequer Chamber, the Court dissolved the injunction, notwithstanding the pendency of a writ of error to the H. L.; it not appearing that irreparable mischief would be done to the petitioner by dissolving the injunction.—*Mountcashell v. O'Neill*, 3 I. C. R. 455. (R.)—[Reversed: 3 I. C. R. 619. (C.)]

7. A house, garden, and parcel of land were demised in 1810. The lands were situate in a large district of bog, where the inhabitants supported themselves by the turbary, and which had been used for upwards of forty years as turbary. A portion of the lands had been reclaimed and cultivated by the tenant. The

Court restrained the tenant from cutting turf for sale on that portion of the lands which was demised as "garden," but dissolved the injunction as to the remainder of the lands.—*Stevenson v. Moore*, 7 I. C. R. 462. (R.)

**XLVI. 11. Effect of Amendment: Obtaining Leave to Amend without Prejudice.**

8. Leave to amend the bill without prejudice to an injunction will not be granted as of course. The motion must be made without delay, and be supported by an affidavit, stating the proposed amendments, and when the matter of them came to the ptf.'s knowledge.

Where the answer had been filed in April, an application made in August for leave to amend by introducing charges, and an interrogatory founded thereon in avoidance of a defence set up by the answer, was refused.

The practice in Ireland in this respect is correctly stated in *Donegal v. Berry* (1 Hog. 46), and differs from the practice in England, as stated in *Ferrand v. Hamer* (4 M. & Cr. 113).—*O'Beirne v. O'B.*, 1 I. C. R. 152; 3 I. Jur. 65. (R.)—[Rev'd.: 1 I. C. R. 158. (C.)]

**XLVI. 12. Injunctions against Proceedings at Law.**

- a. Generally.
- b. Against Ejectment.
- c. To stay Trial: extending common Injunction.
- d. To stay Execution and Distress.
- e. To stay Proceedings in other Courts.
- f. When money will be ordered into Court on granting an Injunction.
- g. In cases of Fraud: on grounds of public policy.
- h. In cases of Interpleader.

**XLVI. 12 a. Injunctions, generally, against Proceedings at Law.**

[See 30 & 31 Vic., c. 44, s. 149.]

9. A vicar having granted an annuity charged on his benefice, and being entitled to compensation for tithe arrears under the 3 & 4 W. 4, c. 100, may be restrained from receiving them until answer has been filed to a bill filed against him to raise the arrears of the annuity.—*Stannus v. Robinson*, Hay. & J. 622. (E.E.)

10. In a creditor's suit, after a decree to account, obtained upon sequestration, against the owner of the estate, the Court will on ptf.'s application stating that the fund is insolvent, and that he alone is interested in avoiding unnecessary costs, restrain a prior creditor from prosecuting a Chancery suit instituted for a similar purpose, the owner of the estate having had notice of the motion, but not appearing.—*Houston v. Barry*, 1 Jones, 154. (E.E.)

11. The ptf. being resident out of the jurisdiction, and his bill having been reported

prolix, the Court restrained him from proceeding in the cause until he paid the costs of the reference, and of the report of prolixity, though the deft. had neglected to compel him to give security for costs.—*La Touche v. Lawlor*, 2 Jon. 629. (E.E.)

#### XLVI. 12. b. *Injunctions against Ejectment.*

1. An injunction, to restrain proceedings in an ejectment until the hearing, will not be granted, except upon the terms of giving the deft. a complete judgment at law.

Therefore, when one of the defts. to the ejectment, who was not a party to the equity suit, refused to give judgment at law, the Court refused an application for an injunction until the hearing, upon the ptf. in equity giving judgment at law.—*Redmond v. Goodall*, 2 Jon. 812. (E.E.)

2. The ptf. by his bill prayed generally for an injunction to restrain the deft. from proceeding in an ejectment at law. Upon the motion for the injunction, the deft.'s counsel stated—that the deft. intended to rely at law upon forfeitures against which a Court of Equity cannot grant relief. The ptf.'s counsel then sought to confine the injunction to those forfeitures against which equity will relieve. *Held*, that that limited injunction should not be granted except upon the usual terms of confessing judgment at law; because the action at law was upon the eve of trial, the ptf. had suffered a considerable time to elapse before filing his bill, he had not required a particular of the forfeitures upon which the deft. intended to rely at law, and because the deft. would still be obliged to have a trial at law, even if the limited injunction were granted.

Notice of an application for an injunction should be given to a deft. when it can be conveniently given without producing any mischief to the ptf., and although a subpoena may have been served to appear and answer the bill.—*Home v. Thompson*, S. & Sc. 615. (R.)

3. Only in a strong case, if at all, will the Court grant an injunction to restrain proceedings for non-payment of rent.—*Clancy v. Roberts*, 1 I. E. R. 21. (R.)

4. The Court will not restrain a ptf. in an ejectment for non-payment of rent, from executing his *habere*, when the bill is filed after judgment in the ejectment.—*Ivess v. Hunt*, Fl. & K. 408. (R.)

5. A mortgagee in possession, who appears upon the pleadings to be paid off, and has given security to pay the rents into Court, will be restrained by injunction from ejecting the tenants in occupation of the lands, although the answer claims a sum to be still due.

Discussion of the powers of a mortgagee in possession.—*Robinson v. Maguire*, 9 I. E. R. 268. (R.)

6. A., tenant for life under a marriage settlement, with power to grant leases for three lives or thirty-one years, made a lease to a party under whom C. claimed, of the lands of X., for three lives and thirty-one years cumulatively, with a covenant for quiet enjoyment. Upon the marriage of B., eldest son of A., and remainderman under the settlement, A. and B. according to their respective estates, by deed in 1820, conveyed (amongst other settled estates) X. to trustees, "as fully and amply as the same had been enjoyed by A. and his undertenants." A likewise conveyed by that deed to the uses of the settlement other lands, and a f.-f. rent, of which he was seized in fee. The uses of the settlement were declared (subject to prior charges) to be, first, to pay an annuity to B. during the joint lives of himself and his father; and after a provision for pin-money for B.'s intended wife, and the maintenance of the children of B., if he died before his father, the estates were limited in strict settlement to A. for life, remainder to B. for life, remainder, subject to a jointure for the intended wife of B., and a term for securing same and younger children's portions, to the first and other sons of B. in tail male, with an ultimate reversion to A. in fee. A. and B. jointly and severally covenanted, with the trustees, against incumbrances, "except as hereinafter mentioned, and except the leases by which the premises then were held and enjoyed by the several tenants thereof, for the lives and at the rents therein expressed," &c.; and also "that the lands should be indemnified, &c., against all charges, claims, or incumbrances, except as before mentioned." After the expiration of the three lives, B. brought an ejectment to recover X. C. filed his bill to restrain those proceedings. *Held*, that according to the true construction of the exceptions in the covenants of the settlement of 1820, there existed a contract for valuable consideration between the father and son, that the son should confirm the defective lease in exoneration of the personal liability of the father under his covenant for quiet enjoyment; and that C. had an equity as against B. to restrain him from evicting the lease.—*Stoughton v. Crosbie*, 5 I. E. R. 451, approved of.—*Malcolmson v. Medlycott*, 4 I. Jur. 361. (C.)

7. A., having a title to property, acquiesced while B. dealt with it as his own. The Court restrained A. acquiescing from proceeding in an ejectment to recover the property from B.

*Semble*—A severance of a joint-tenancy may be presumed where the joint tenants have for several years enjoyed their respective shares in severalty, although no partition has actually been made.—*Roche v. Sheridan*, 2 I. Jur. N. S. 409. (R.)

8. Decree declaring the right of the petitioner under a deed which had remained in the grantor's possession, and had been destroyed by him; and granting an injunction to restrain his co-heirs from taking proceedings against the petitioner for the recovery of

the lands, they not resisting the decree, and making no claim to the lands.

*Quere*—Whether such a decree would have been made *in invitos*?

Construction of the 20th G. Rule of May 1857.—*Esmonde v. E.*, 9 I. C. R. 263. (R.)

1. A., rector of the parish of T., and proprietor of an adjoining estate, was seized in fee of the advowson and right of presentation to the living; and was also entitled to a rent of £28. 7s. 5d. per an., payable by the incumbent of T., for the time being, out of glebe lands. A.'s estate, including the advowson, having been put up for sale under an order of the I. E. Court, the printed rental stated among the particulars of the advowson, that there were attached to the living 19a. 1r. 7p. statute measure, of glebe, valued at £1. 10s. per acre (not mentioning that this land was subject to any rent).

In the same rental, in the lot which comprised the lands of T., a portion of them was described as "glebe lands not sold;" and in the annexed map the glebe land was left uncoloured, and marked as "not in the estate."

An advertisement subsequently published for the sale of the advowson, again stated that the 19a. 1r. 7p. of glebe land, valued at £30 a-year, were held with the living. A. was a party to all the proceedings in the I. E. Court. The Commissioners sold the advowson, and conveyed it to B., who sold it to a clergyman of the Established Church, who had previously visited the parish when A.'s son, X., showed him a copy of that advertisement, and represented that the particulars were correct. On A.'s death the purchaser presented himself to the living.

Shortly afterwards X., A.'s devisee, demanded from the new incumbent the rent of the glebe lands; and, when payment was refused, commenced an action of ejectment to recover the lands. The incumbent instituted an injunction suit to restrain the action, on the ground that A.'s acts had led him to suppose that the glebe lands were not subject to any rent. *Held*, that the relief sought should be granted since, during the proceedings in the I. E. Court, A. had lain by and not asserted his claim.

The glebe lands were held under a lease for lives renewable for ever, in which A.'s was the last life. The incumbent's petition prayed first, to have the glebe lands declared discharged from any lease or rent; secondly, that if subject to the lease, compensation should be made him for his loss as a purchaser; lastly, that, if necessary, a renewal of the lease should be executed to him by X. *Held*, that the frame of the petition was free from objection; and that the prayer for alternative relief was admissible.—*Belcher v. Brady*, 8 I. Jur. N. S. 265. (C.)—[*Affirmed, ibid*, 291. (C.A.)]

#### XLVI. 12. c. *To stay Trial: extending Common Injunction.*

2. A., in consideration of being permitted to become an intestate's administrator, agreed to deposit the share of C., a minor, and one of

the next-of-kin, in the hands of a trustee for C.; and accordingly deposited £180 with B. in trust for C., subject to the final settlement of the administrator's account. C.'s share was afterwards ascertained to be £156. A. having proceeded to recover the £180 at law from B., and having refused a tender of the difference between £180 and £156, B. was, on a bill filed by A., allowed to lodge in Court £180 to the credit of the cause; and A. was restrained from proceeding with the action.—*Fleming v. F.*, 2 Jones, 810. (E.E.)

3. A., entitled for life, with remainder to her children as she should appoint, to the interest in a chattel lease, of which the legal estate was outstanding in a trustee for her, sub-demised to B. A. gave B. a bond conditioned to make out good title within three months after the first of her (A.'s) children attained age; but did not do so. The lease was evicted for non-payment of rent. A. sued B.'s assignee for the rent reserved by the under-lease. The Court, by injunction, restrained the action.—*Murphy v. Stratton*, 13 I. C. R. 423. (R.)

#### XLVI. 12. d. *To stay Execution and Distress.*

4. When a party desires to restrain proceedings at law upon a judgment after an execution has been issued, the amount marked on the writ, and the costs at law, must generally be lodged in Court, or satisfactorily secured.—*Rogan v. Weir*, S. & Sc. 677. (R.)

5. When before decree, a receiver was appointed over the assets of a company formed under 6 G. 4, c. 42, which had stopped payment, the Court refused to restrain a creditor from suing out execution, under the 18th sec. of that Act, against the shareholders, upon a judgment obtained against the company.

In the cases of creditors' and administration suits, an injunction against another creditor, instituting a separate suit, will not be granted unless there has been a decree, and unless all the assets have been accounted for and placed within the control and disposition of the Court.—*Acheson v. Hodges*, 3 I. E. R. 516; Fl. & K. 371. (R.)

6. Injunction to restrain proceedings on a verdict, the time for answering not having expired, refused with costs.—*Connor v. C.*, 8 I. E. R. 510. (E.E.)

7. Injunction, against proceeding on a judgment, granted after pretermission of the opportunity of pleading at law, when the neglect of doing so was accounted for by the creditor's solicitor having said that he would not proceed any further if the lands were not subject to the judgment.—*O'Neil v. Browne*, 9 I. E. R. 131. (C.)

8. After a decree to account in a suit to administer assets, a judgment creditor of the testator, who had notice of the decree, sued

out a *sci. fa.* against the executor; obtained judgment by default; and issued a *fi. fa. de bonis testatoris*. The Court, at the application of the executor, restrained the creditor from proceeding on the *fi. fa.*, and gave the costs of the motion against him.—*Belmore v. B.*, 12 I. E. R. 493. (R.)

1. On a bill filed to restrain execution for the full amount of a verdict and costs, and to get credit for money which was not available as a set-off at the trial below, wherein the present ptf. was deft., and the now deft. ptf.; *Held*, that the circumstance of the credit claimed not being capable of being established as a legal set off at the trial, and the amount being indisputably due, was a special equitable ground for relief, and warranted the interference of this Court; but should not prejudice the lien of the solicitor for costs.—*Mahony v. M.*, 2 I. Jur. 129. (C.)

2. Pending a petition for, but before the allowance by the Lord Chancellor of, a certificate under the Bankers Acts (33 G. 2, c. 14, and 40 G. 3, c. 22, *Ir.*), a banker, not being entitled to be discharged from arrest at law, cannot obtain an injunction to restrain a creditor from issuing execution against him.

But a creditor who had appeared on the hearing of the petition, and opposed the allowance of the certificate, and had filed a discharge under the order of reference, and had thus made himself a party to the proceeding, was enjoined from issuing execution.—*Guinness v. Fitzsimon*, 13 I. E. R. 189. (R.)

3. A. devised lands, held for life, in trust, that his wife should reside upon the lands, and be maintained out of the proceeds; and that his executors should divide the estate between the respondent and his brothers. After A.'s decease, the lease having expired, a renewal was granted to the respondent alone, who was not one of the executors, with a proviso for the maintenance of his mother upon the lands. The family continued to reside upon the premises as under the former lease, but no division of the property had ever been made by the executors. The respondent for some time managed the farm. Having become paralytic, his brother (one of the petitioners) undertook the management of it for him. Subsequently, they having quarrelled, the respondent tried to remove his brother from the lands; and, having brought an action of ejectment on the title against him, obtained judgment in that suit, as also for mesne rates.

A motion for an injunction to restrain the respondent from executing the *habere*, or enforcing the judgment for mesne rates, until the hearing of a cause petition between the same parties, praying that the lease made to the respondent might be declared to be a graft upon the original lease, upon the grounds that there had been an understanding that the former lease was held in trust, was refused, the respondent being owner of the entire legal estate in the lands, and at least of a moiety of the beneficial estate; and the alleged trust

not being established.—*Keily v. K.*, 7 I. Jur. 269. (C.)

#### XLVI. 12. c. To Stay Proceedings in other Courts.

[See 30 & 31 Vic., c. 44, s. 149.]

4. After a decree to account in an administration suit, the Court will restrain a creditor from proceeding in a suit instituted by himself, only when the executor has in his answer, or in some other way, given an account of the assets, and brought the amount into Court.—*Hoops v. Earl of Kingston*, Fl. & K. 246. (R.)

5. It appearing to be for the benefit of the inheritor, who was a lunatic, the Court, on the application of the ptf. after decree, stayed the proceedings of another creditor in Chancery, and directed him to file a charge under the decree; the creditor consenting that if any thing should be found due to him, but not otherwise, the Chancery costs should be included in the report.—*Lynch v. Skerrett*, 2 Jones, 508. (E.E.)

6. Tenants will be restrained from proceeding at law, and a reference to the Master ordered to ascertain the damages which they have sustained in relation to their crops, &c., by reason of their having been put out of possession, and kept thereout until the writ of restitution was executed. The purchaser will be ordered to pay the amount of damages.—*Trotter v. Ellis*, S. & Sc. 149, note. (R.)

7. After a decree in an administration suit, and after the Court had taken the assets out of the executors' hands, a creditor was restrained from further proceedings at law, although the executors had given a plea of confession for judgment. The creditor, however, was allowed his costs.—*Quin v. Bagnal*, 1 I. E. R. 110. (R.)

8. A., having power to raise by sale, mortgage, or other disposition of a reversionary term of 1000 years, the portions provided by his marriage settlement for his younger children, did, in 1815, on the marriage of a daughter with C., purport to charge, by appointment, this term with £4000, and interest. After C.'s death, his personal representative, having been advised that the power to charge had not been duly executed, proceeded at law against A. on his covenant for title. A. gave judgment at law, and filed his bill stating that the sum would, in a Court of Equity, be decreed well charged; and praying a perpetual injunction against the proceedings at law; offering also to execute any instrument which should be deemed necessary for effectually charging the lands. *Held*, that A., with the trustees of the term, should execute to C.'s representative a mortgage of the lands and premises in the term, for £4000 and interest, and that a perpetual injunction should be granted against any further proceedings at law.—*Whaley v. Morgan*, 2 Dr. & Wal. 330. (C.)

1. An injunction will be granted to stay an action at law for damages for an arrest under an irregular writ of *ne exeat regno* issued from Chancery; and compensation for the injury done will be refused at the same time, or ordered to be given only on a proper case being made therefor. — *Darley v. Nicholson*, 2 Dr. & War. 86; 1 Con. & L. 207. (C.)

2. Trustees, by deed, having authority to advance the whole or any part of £2000 (assigned to them upon trusts) to M., upon his request, "provided the same should be with the consent of M.'s wife, in writing, under her hand and seal," &c., and "provided that M. should give to them, for and in lieu of the sum to be so advanced, such security for same as they should approve of, upon the same trusts as declared of the £2000," advanced the whole £2000 to M., without the consent in writing of his wife; and without obtaining any security for it. Afterwards M. lent this money to L. without security, but on L.'s promise to repay it to M. within a limited time. L. having broken his promise, M. commenced an action against him. One of the trustees, who was L.'s brother, thereupon filed a bill, stating that through ignorance he had been a party to a breach of trust, by advancing the £2000 to M.; praying that L. should be decreed to pay that sum back to the trustees; that M. should be restrained from proceeding in the action against L., and that L. should be restrained from paying M. On the motion for an injunction according to the prayer of the bill — *Held*, that it not appearing that there would be any greater risk of the money in the hands of M. than in the hands of L., and there being no offer by the ptf. or L. to bring in the money, the motion should be refused: that it was not competent to the ptf. to restrain the legal right which by his own act of misconduct M. had acquired; and that the fact of this being a trust fund made only this difference from the case of an ordinary loan, that all who took it with notice of the trust were constructive trustees; and that as soon as M. should recover it from L., he would be bound to apply it to its proper purposes; and the Court would compel him to do so. — *Lambert v. L.*, 5 I. E. R. 339. (R.)

3. An injunction will be granted to stay an action at law for damages for an arrest under an irregular writ of *ne exeat regno* issued from Ch.; and compensation for the injury done will be ordered by the Court of Ch., on a proper case being made therefor. — *Darley v. Nicholson*, 2 Dr. & War. 86; 1 Con. & L. 207. (C.)

4. H., having effected a policy of insurance on his own life, assigned it to the deft. T., in trust for J., a minor. The deed contained no exonerating clause or declaration that the trustee's receipt should be a good discharge. The insurance company had notice of the trust, and after the death of H. refused to pay T., who was the executor of H., on the grounds that there was no exonerating clause, or declaration that T.'s receipt should be a

good discharge; and also that he had attempted to obtain the money to apply it to his own uses, in breach of the trust. On an injunction bill filed by the company against T. and J., to restrain proceedings at law by T., alleging those facts, and offering to bring the money into Court — *Held*, on the motion, that, though the bill might probably be dismissed, yet, as there was a question for the hearing, the Court would not anticipate the decision of the cause, but would grant the injunction.

*Semble*—The rule requiring purchasers of property to see to the application of the purchase-money, does not apply to the case of debtors, so as to implicate them in trusts created by their creditors. — *Fernie v. Maguire*, 6 I. E. R. 137. (R.)

5. Upon a motion by deft., administrator, after decree in a creditor's suit, to restrain creditors from proceeding in a suit at law; the administrator having, by his answer in the cause, stated what assets had come to his hands; and having given the ptf. at law notice, after they had served their writ, to come in and prove their demand under the decree — *Held*, that the deft. was entitled to the injunction, and that the ptf. at law were not entitled to any costs incurred by them after the notice.

That the fund being deficient, the payment of the costs was not a condition precedent to granting the injunction.

If the answer did not contain a sufficiently full statement of the assets received, the Court would allow the motion to stand over until the assets were accounted for. — *Pepper v. Foster*, 6 I. E. R. 384. (R.)

6. A., a shareholder in the A. and C. Bank of Ireland, sold, in 1837, his shares to the company, who paid him therefor, and entered the sale in their books. The printed deed of transfer required by law was filled up and executed by the ptf., but not by any of the trustees of the bank; and no memorial of transfer was executed. In the register filed in Nov. 1837, A.'s name appeared as having ceased to be a partner; and his name was omitted in the annual register of shareholders filed in the years 1838, '39, '40, '41, and '42. In 1843, A.'s name was replaced on the register of shareholders, in pursuance, as alleged by A., of a fraudulent arrangement between the bank and B., a creditor on foot of debentures issued subsequent to 1837, in order to make A. liable. B. having obtained judgment against the bank on plea of confession in an action on the debentures, sued out a *sci. fa.* thereon against A., as a shareholder. The Court granted an injunction until answer, to restrain B. from proceeding at law against A. upon the *sci. fa.*, and to restrain the bank from placing A.'s name as a shareholder on the next ensuing annual register. — *Taylor v. Hughes*, 6 I. E. R. 480. (R.) — [*Affid.*, 7 I. E. R. 529. (C.)]

7. When an action at law has been commenced against a party for irregularly issuing



an attachment, and arresting the deft. under it, it is in the discretion of the Court to restrain the action.

The Court will not exercise this discretion, in restraining the action in a case in which serious and substantial damage has been sustained.—*Mackinnon v. Palmer*, 7 I. E. R. 496. (R.)

1. A creditor on foot of a joint and several bond of B. and N. (having entered judgment against B. only) proved under a decree to account in a suit against the assets of B. He was also a party to the report under a decree to account in a supplemental suit affecting the assets of N., but did not prove under it. The Court restrained the creditor from proceeding at law against the administrator of N.—*Cuffe v. Young*, 8 I. E. R. 37. (R.)

2. When, on a bill for discovery merely, an injunction is granted to restrain an action at law, the plaintiff will not be required to give judgment in the action at law.—*Wilder v. Farrell*, 8 I. E. R. 101. (R.)

3. When tenants have, without leave of the Court, replevied distresses for rent made by the receiver, the Court will restrain them from proceeding in the replevin suits, and direct a reference as to the rent due.—*In re Persse*, 8 I. E. R. 111. (R.)

4. Injunction, to restrain proceedings upon a verdict at law, the time for answering not having expired, refused with costs.—*Connor v. C.*, 8 I. E. R. 510. (E.E.)

5. The proper course to compel the ptf. to elect between a suit in equity and one at law is, by entering a side-bar rule, not by application to the Court. The deft. is at liberty to enter the rule at any time after the filing of his answer, and by it to call on the ptf. to elect within eight days after service, notwithstanding that the ptf. has six weeks to except to the answer.—*Hollier v. Hedges*, 9 I. E. R. 37. (R.)

6. The receiver in the cause having distrained for rent due by a tenant (who really held for deft.), as deft. alleged, on lands in deft.'s possession, and not on those over which the receiver had been appointed, the Court restrained an action of trespass brought by deft., and granted the usual reference to the Master; there not being any good reason to suppose that the receiver acted maliciously or *mala fide*, or that deft. had sustained any substantial damage.—*Parr v. Bell*, 9 I. E. R. 55. (R.)

7. When a creditor's suit in the Court of Ch. has been stayed by reason of a prior decree to account in the Court of Exchequer, and the ptf. in the stayed suit had paid the costs of one deft., the Court refused to direct the receiver to pay the ptf. these costs, but restrained the defts. in the stayed suit from proceeding against the ptf. to recover them.—*Levinge v. De Montmorency*, 1 I. Jur. 251. (E.E.)

8. Injunction against proceedings on a judgment granted after premitting the opportunity of pleading at law; the neglect to plead being accounted for by the creditor's solicitor having said that he would not proceed any further if the lands were not subject to the judgment.—*O'Neill v. Browne*, 9 I. E. R. 131. (C.)

9. The ptf. filed his bill against his wife and her trustees to restrain them from proceeding at law upon a separation deed, which he alleged was void as against public policy, and by reason of a sentence for restitution of conjugal rights. Held, that the defence (if any) raised legal questions, and that the Court ought not to restrain the action.—*Heath v. H.*, 9 I. E. R. 635. (R.)

10. Bill to administer assets. After a decree to account, one of the creditors, with notice of the decree, served a civil-bill upon the executrix for a debt due by the testator, alleging promises by the executrix. An injunction was granted; and the creditor was directed to pay the costs of the motion.—*Irwin v. De Massey*, 1 I. Jur. 243. (R.)

11. A bill by the directors of an Insurance Co. stated matters which amounted to a legal defence, and prayed a discovery thereof; that a policy of assurance might be delivered up to be cancelled, and an injunction to stay an action at law brought on it. The bill was against A., the administratrix of the assured, and B., the assignee of the policy, in concert with whom, and by whose directions the bill charged the policy to have been effected, but who was not a party to the action. The Court refused the injunction on the bill as a bill of relief, because it stated facts amounting to a defence at law; or as a bill of discovery, because it prayed relief which the ptf. could not waive.—*Anderson v. Dowling*, 11 I. E. R. 590. (R.)

12. A civil-bill decree against an administrator is in the nature of a judgment *de bonis propriis*. The Court, though it will enjoin a creditor from enforcing such a decree against the assets, when a decree to administer them has been pronounced, will not restrain him from enforcing it against the administrator personally.—*Powell v. P.*, 12 I. E. R. 501. (R.)

13. When a tenant of the Court replevied a distress made by the receiver, and the receiver entered a rule to declare in the replevin suit, but subsequently offered the tenant the costs of the rule, which the latter declined to receive, the Court ordered the proceedings in the replevin suit to be stayed, and directed a reference to the Remembrancer to report what sum was due to the tenant: the order to be without prejudice to any question as to the liabilities of the sureties in the replevin suit, or the costs of that suit or of the motion.—*Whitelaw v. Sandys*, 12 I. E. R. 893. (E.E.)

14. By the custom of an Inferior Court, on an affidavit of debt an attachment issued

against the goods of the deft. below, and unless he could procure bail to pay such debt, damages, &c., as should be awarded against him, the deft. below could not enter an appearance or have a trial of the action on the merits. A party so circumstanced filed a bill for an injunction, stating that he was not indebted to the deft. here, who had brought the action in the Inferior Court. *Held*, that the Court had no power to grant the injunction.

*Semble*—The proper course is a writ of error to the Court of Q. B. or C. P.

*Quære*—Whether such a custom be valid?—*M'Anaspie v. Dickson*, 13 I. E. R. 216; 2 I. Jur. 50. (R.)

1. A petition was filed against the public officer and several directors of a Joint-stock Bank, who all resided out of the jurisdiction, for a discovery in aid of a defence to an action at law by the public officer against the ptf., and for an injunction to restrain the action. The injunction was refused because the directors were not parties to the record at law, and an admission by them would not be evidence against the ptf. at law.

*Semble*—The residence of the directors abroad, and the want of power to compel a discovery from them, would be sufficient ground for refusing the injunction.—*Hendrie v. Thompson*, 1 I. C. R. 278. (R.)

2. The general rule is, that though there be a decree to administer assets, a creditor of the testator or intestate will not be restrained by injunction from proceeding at law to make the personal representative liable *de bonis propriis*. But when a legatee, who has proved in the Master's office under the decree, brings an action at law against the executor for the legacy, the Court will enjoin him, though the judgment in the action should be *de bonis propriis*; for the Court, by its decree, has taken upon itself to decide upon the question of assets, without which the ptf. at law cannot recover, and will not permit that question to be tried at law.

To make an executor liable at law for a legacy *de bonis propriis*, there must be an express promise in writing, and assets, or some other consideration.

*Semble*—On a plaint for a legacy, against the deft. as executor, and not averring that the deft. promised in writing to pay the legacy, the judgment should be *de bonis testatoris*.—*Molyneux v. Scott*, 3 I. C. R. 291. (R.)

3. A cause petition had been filed by A., the owner of lands, against B., his agent, praying an account of the moneys received by him. B. then brought an action at law against A. for bills and moneys handed to him, and for salary and receiver's fees. It appearing that these matters were all a part of the same transaction, the petitioner was allowed to amend his petition, setting out these facts, and praying an injunction to stay the proceedings at law. The petitioner giving a consent for judgment in the action, an injunction was

granted to stay the proceedings in this action till the hearing of the cause petition.—*White v. M'Carthy*, 7 I. Jur. 353. (R.)

4. When the Court gave liberty to a party to bring an action at law, in order to try a legal right, and, to the defence pleaded, an equitable replication was by leave of the Court of Law put in, the Court refused to grant an injunction restraining the party from proceeding upon this equitable replication.—*Gatchell v. Geoghegan*, 3 I. Jur. N. S. 172. (R.)

5. R. was tenant for life of money secured by mortgage of property held for lives renewable. The *c. q. trusts* of that mortgage filed a bill to raise the amount due upon it. The mortgagor having died, his interest vested in his heir-at-law, an infant. The Master, in the foreclosure suit, directed a renewal to be obtained. It was arranged that the renewal should be made to R., in trust for the parties interested. A draft renewal was accordingly prepared, containing the usual lessee's covenants, and a recital that it was made to R., merely in pursuance of the Master's report, and in trust for the parties. This was amended by R.'s solicitor inserting a proviso that nothing therein should affect the real or personal estate of R. The evidence showing that both parties believed and intended that the proviso should exonerate R. from personal liability.—*Held*, that C. was entitled to restrain an action brought against him upon the covenant in the lease for payment of rent.—*Reade v. Armstrong*, 7 I. C. R. 266. (C.)—[Affirmed: *ibid*, 375; 3 I. Jur. N. S. 305. (C.A.)]

6. A., being entitled for life, with remainder to her children as she should appoint, to the interest in a chattel lease, at a rent of £63, the legal estate being outstanding in a trustee for her, underleased to B., reserving a rent of £73. 10s., and executed a contemporaneous bond, reciting that A. and her trustee had a power to dispose of the interest in the lease; had entered into an agreement to sell and convey to B. all her interest, for a sum which had been paid; that A. was unable until one of her children should attain age, to make out title; that it had been agreed between A. and B., that A. should execute the under-lease, and that A. within three months after the first of her children attained age, should make out to B. a good title; and that in the meantime, and until such title was made out, A. should accept the rent of £63 in discharge of the rent of £73. 10s. The condition of the bond was, that A. should within three months after the first of her children should attain age, make out a good title to B. A. did not make out a good title, and the lease having been afterwards evicted for non-payment of the rent, A., brought an action for the rent reserved by the under-lease against B.'s assignee. The Court granted an injunction to restrain A. from proceeding in the action.—*Murphy v. Stratton*, 13 I. C. R. 423. (R.)

**XLVI. 12. f. When Money will be ordered into Court on granting an Injunction.**

1. An executor, who has obtained probate, will not be restrained, at the instance of the next-of-kin, from suing for and collecting the debts due to the deceased, though the will may have been impugned in the Ecclesiastical Court in a suit to recal probate. He will, however, be ordered to bring in the money recovered, on security for costs being given by the next-of-kin (a pauper).—*Mullen v. Horner*, Hay. & J. 398. (E.E.)

2. When a party desires to restrain proceedings at law upon a judgment after an execution has been issued, the amount marked on the writ, and the costs at law must generally be lodged in Court, or satisfactorily secured.—*Rogan v. Weir*, S. & Sc. 677. (R.)

3. A., in consideration of being permitted to become an intestate's administrator, agreed to deposit the share of C., a minor, one of the next-of-kin, in the hands of a trustee for him. A. deposited £180 with B. in trust for C., subject to the final settlement of the administration account. C.'s share was afterwards ascertained to be £156. A., proceeded at law to recover the £180 from B., and refused a tender of the difference between £180 and £156. The Court upon a bill filed by C. against A. and B., and before appearance by A., gave B. liberty to lodge the £180 in Court to the credit of the cause; and, upon his so doing restrained A. from proceeding further in his action.—*Fleming v. F.*, 2 Jon. 810. (E.E.)

4. An assignee of a legatee filed a bill against the administrator, pending a suit to establish an alleged will for the preservation of the assets; a receiver, and an account of the personal estate, to compel the administrator to bring in the assets received by him, and to restrain him from further receiving them; and praying that the rights of the ptf. under the will might be ascertained. *Held*, on demurrer, that the relief must be limited to the preservation of the assets, to which an account was also incidental; that the ptf. was not entitled to a declaration of the rights under the will, or to have the assets administered; and that the demurrer having embraced as well the former relief as the latter, was bad, as covering too much.—*Tom v. Deane*, 8 I. E. R. 39. (R.)

5. In 1840 the petitioner contracted to purchase a leasehold interest from the respondent; went into possession, and paid a part of the purchase-money. The contract was not completed, because a recognizance was outstanding, which was to be vacated at the death of a lunatic. He died in 1850, when the petitioner at the respondent's instance, gave a promissory note for the balance of the purchase-money. A sum was found due on foot of the recognizance, for which judgment was entered. The lands were in the meantime evicted for non-payment of rent, but the time for redemption had not expired.

The Court refused an injunction against

proceeding on the promissory note, except upon the terms of lodging the amount of it in Court.—*Carter v. Uniacke*, 4 I. C. R. 30. (R.)

**XLVI. 12. g. In cases of Fraud: on grounds of Public Policy.**

6. The owner of an embarrassed estate executed a bond and warrant of attorney, to confess judgment thereon, to his sister, with the intention of having judgment for a large sum entered in her name, and proceedings taken so as to secure to himself a portion of the rents of his estate, and protect them from creditors, who were proceeding to get into possession. Afterwards a judgment was entered by the attorney of the obligor, who retained the bond in his possession. No further proceedings were taken on the judgment, since the creditors succeeded in extending the portion of the property sought to be protected from their demands. The judgment was assigned. The assignee proceeded at law against the conuzor. An injunction for want of an answer was obtained. On a motion, after answer, to continue the injunction.—*Held*, that though the attempt had proved ineffectual, the transaction was a fraudulent contrivance to delay creditors, such as to prevent the Court from interfering; and any further injunction was refused.—*Bateman v. Ramsay*, S. & Sc. 459. (R.)

7. A person who, without consideration, confesses a judgment for the purpose of thereby withdrawing his property from the demands of his creditor, *ex. gr.*, the creditors of a joint-stock company in which he was a shareholder, has no equity for an injunction to restrain the conuzee proceeding to levy the amount of the judgment, although it never was used for the purpose for which it was confessed.—*M'Curdy v. Martin*, 5 I. E. R. 515. (E.E.)

8. Injunction against proceedings on a judgment granted, after premitting the opportunity of pleading at law, when the neglect to do so was accounted for by the creditor's solicitor having said that he would proceed no further if the lands were not subject to the judgment.

*Semble*—It is good cause against the appointment of a receiver under the Judgment Acts, that the party against whom the judgment was obtained was only a trustee of the lands.—*O'Neill v. Browne*, 9 I. E. R. 131. (C.)

9. By an arrangement for winding up the affairs of a banking company, which had stopped payment, sums were subscribed by some shareholders, and the assets of the bank assigned to T., a shareholder, and to S., who undertook its liabilities. It was part of the arrangement that S., claiming to be a creditor of the bank, should obtain a judgment against the public officer, to be used only to compel non-subscribing shareholders to contribute. S. became bankrupt, and his assignee issued a *sci. fa.* against T. On a bill by T. to restrain him—*Held*, that the judgment being a contrivance to compel the non-subscribing share-

holders indirectly to pay what they, if sued directly, might possibly have equities to resist, the Court would not relieve one party to this contrivance against the other, though suing in breach of faith.

Documents evidencing the arrangement contained an express saving of all of S.'s rights. *Semble*—The arrangement would, notwithstanding, prevent S. asserting his legal rights against T., if the equity depended on the construction only.—*Taylor v. Campbell*, 10 I. E. R. 249. (C.)

#### XLVI. 12. h. In Cases of Interpleader.

1. Upon a motion for an injunction in an interpleader suit, the ptf. need not, by affidavit, verify all the statements in the bill; but one, denying collusion between him and the defft., will suffice.—*Meredyth v. Molloy*, Fl. & K. 195. (R.)

2. A., having received from his father, a few days before his death, money to lodge in his (A.'s) name with bankers, lodged it in the name of his sister B., and received a deposit-receipt, which he retained. After the death of his father, A. took out administration to him, and, as administrator, claimed the money from the bankers. B. and her husband also claimed the money. The bankers, refusing to pay either, each commenced a suit. The bankers filed an injunction and interpleader bill; and the Court continued the injunction until the hearing, there being a question for the hearing of the cause.—*Cochrane v. O'Brien*, 6 I. E. R. 812. (R.)

3. Trustees of policies of assurance filed a bill to ascertain the rights of different claimants of the proceeds of the policies. The Insurance Companies submitted to bring in the amounts due upon the policies which, on account of the conflicting claims, had not been paid. *Held*, that they were bound also to pay interest on the sums assured, but they were allowed their costs.

Some of the respondents had filed a bill in England, for the purpose of enforcing their claims on the fund.

On their application, they were directed to stay proceedings in England, and to have their costs in that suit in the same priority with their demand in this suit.—*French v. Royal Exchange Assurance Company*, 6 I. C. R. 523. (C.)

4. When an interpleader issue has been tried, and the chattels seized have been found to be the property of the execution debtor, the Court will not interfere to restrain the sheriff from selling them.

The sheriff ought not to be made a party to a cause petition for such an injunction.—*Jackson v. Rossiter*, 2 I. Jur. N. S. 411. (R.)

5. Trustees of policies of assurance filed a bill to ascertain the rights of the different claimants to the proceeds of the policies.

The Assurance Company had been unable to pay the amount due, on account of those conflicting claims, and submitted to bring their accounts in. *Held*, varying the order *supra*, vol. 6, p. 523, that they ought not to be charged with interest.—*French v. Royal Exchange Assurance Co.*, 7 I. C. R. 523. (C.A.)

6. L., agent at Belfast for the owner of a ship chartered to that port, had acquired equitable charges on the freight and cargo, and was also agent for the charterers and consignees. On the vessel's arrival he took possession of her, and in his name the cargo was landed and stored with the Harbour Commissioners, wharfingers. Afterwards, a company claiming to be assignees of the ship under a bill of sale, served on them a notice purporting to be under the 25 & 26 Vic., c. 63, s. 68, cautioning them against allowing the cargo to be removed from their wharves or warehouses until the company's lien for freight was discharged. The Commissioners thereupon refused to deliver any portion of the cargo to L., who brought against them an action of trover and detinue to recover it. The Commissioners applied for an order of interpleader; but no rule was made on the motion to show cause against their summoning order being made absolute. The Commissioners then commenced this interpleader suit, and moved for an injunction to stay the proceedings at law. *Held*, that notwithstanding the provisions of the above-mentioned Act, the case properly formed the subject of an interpleader suit; and that this Court's jurisdiction was not affected by the decision of the Court of Law.—*Belfast Harbour Commrs. v. Lawther*, 16 I. C. R. 34. (C.)—[See S. C. 17 I. C. R. 54. (C.)]

#### XLVI. 13. Against Darkening Ancient Lights.

7. Upon premises situated on one side of a street, their owner erected buildings which, when raised to the eave-stone, obstructed an ancient light in an opposite house. That obstruction prevented the owner of this last-mentioned house from using his ancient light in examining colours, &c., for which purpose that light was essential. The Court granted a mandatory injunction to take down the buildings. *Held*, that the Court itself would, without the intervention of a jury, assess the damages.—*Carson v. McKenzie*, 11 I. Jur. N. S. 337. (C.)

#### XLVI. 14. Against Breach of Contract, Covenant, or Trust.

8. A lessee covenanted not to burn any part of the demised premises, under a penalty of £10 an acre, to be recovered as an additional rent, for every acre so burned. *Held*, that he was not entitled to burn on paying the specified sum as liquidated damages; and that the jurisdiction of a Court of Equity to restrain the lessee from burning was not ousted by the imposition of this penalty.—*French v. Macale*, 4 I. E. R. 568; 2 Dr. & War. 269; 1 Con. & L. 459. (C.)

1. *Semble*—That when there is a penalty imposed upon the doing an act which the party has covenanted not to do, relief will not be granted in equity against an action brought for the penalty on a breach of the covenant, if the party persists in continuing the breach.—*Gerrard v. O'Reilly*, 2 Con. & L. 165; 3 Dr. & War. 414. (C.)

2. A Railway Company, having agreed to purchase lands, entered, and carried on their works without the leave of the vendor, or having paid or lodged the money in bank. The Court granted an injunction till the money should be paid.—*Anderson v. N. & W. Ry. Co.* 1 L. Jur. 11. (E.E.)

3. The Corporation of D. were empowered by statutes to levy rates to supply water to the city of D., and to raise a sum by mortgage or debentures on the rates; and they were directed to retain an annual sum and the surplus of the rates, after what should be duly expended for the purposes of the Acts, to create a sinking fund to pay off the sum borrowed. The money directed to be reserved as a sinking fund was not retained; and the Corporation were ordered, by a decree of this Court, to pay off a sum which had been borrowed, which they did, by issuing new debentures on the surplus rates; the M. R. having expressed an opinion, and it having been declared in the decree, that they were the property of the Corporation. They also applied some of the rates in payment of the salaries of retired officers, and interest on a sum borrowed, by which the interest on some of the debentures was decreased. Twelve years after the decree an information was filed to restrain the Corporation from applying the rates in payment of the interest on the debentures, or the salaries of retired officers, or the further sum borrowed. But the Court refused, with costs, an injunction before answer, though expressing a doubt whether there had not been a misapplication of the rates, and though the information charged that there would be no surplus if the purposes of the Acts were properly effected.—*Attorney-General v. The Corporation of Dublin*, 12 I. E. R. 465. (R.)

4. Mines were demised by the ptfs. for a term determinable upon three months' notice. The lease provided that at the end of the term the lessors might purchase all machinery to be erected in the mines, "they having given six months previous notice of their intention," at a fair valuation to be set thereon by two indifferent persons, one of whom should be named by the lessors and the other by the lessees; and if any difference arose between them, then by an umpire to be named by such referees. There was a covenant that if the above notice of surrender was given by the lessees, the machinery should not be removed for six months after notice given, to enable the lessors to find a purchaser for the machinery at a valuation to be fixed as aforesaid. On the 2nd April 1856, the assignees of the lessees served notice of their intention to surrender; and in Sept. 1856 were removing the

machinery from the mines. On the 8th Sept. a petition was filed praying an injunction. *Held*, that the injunction should not be continued beyond the end of six months' from the 2nd April 1856, as the Court had no means of enforcing the sale of the machinery to the lessors, as provided by the lease.—*Hamilton v. Dunsford*, 6 I. C. R. 412. (C.)

5. A., seized in fee of lands situated on both sides of a road, demised those on the west side to J., his executors, &c., for a term of years; and covenanted thereby that he would not convert or permit to be converted any portion of the ground opposite the demised premises, or any part thereof, or any dwelling-house or building to be erected thereon, for any purpose whatsoever, save and except and other than as a private dwelling-house, to be erected and built in the manner in the lease provided.

A. subsequently demised the opposite lands to C., who forthwith built a dwelling-house thereon, and proceeded to build at one side thereof stables fronting J.'s premises. C. had notice of the covenants in the lease of J., who applied for an injunction to prevent the erection of the stables. *Held*, that the word "dwelling-house" included stables; and that the application must be refused, as the building of stables had not been provided against by the words of the instrument.—*Smith v. Crowe*, 10 L. Jur. N. S. 105. (C.)

6. Grant to one and his heirs, of lands in f.-f., "excepting the use and benefit of all mines and minerals that might be found in and upon the granted premises." Fire-clay was found to exist on and under them. On petition for an injunction to restrain the lessees from taking the clay, the injunction was granted so far as regarded the clay taken from a depth by mining apparatus, because it was excepted by the reservation; but the injunction was refused with regard to the surface clay, which was not excepted by the reservation. *Held*, that a map, made in 1609 by virtue of a commission issued by the Crown under the great seal of Ireland in the 7 Jac. 1, and which map was preserved in the State Paper-office in London, was properly receivable in evidence.—*Staples v. Harpur*, 10 I. Jur. N. S. 121. (C.)

#### XLVI. 15. *Against Infringing Copyright and Patent.*

7. This Court will interfere by injunction to protect the copyright of the assignee of the author (a reporter of legal decisions), though, at the time of the alleged piracy, there was not any written assignment, and the assignee had a merely equitable title, and though some of the cases were reported, merely *ex relatione*. The Court will disregard a permission, given by the author, to infringe the copyright, but given after he had parted with his equitable title for value, and it had been stated on the title-page of his work, that it was printed for the equitable assignee of the copyright.—*Hodges v. Welsh*, 2 I. E. R. 268. (R.)

1. The 26 G. 3, c. 57, s. 1, authorised the Crown to grant letters patent for establishing and keeping a theatre in Dublin. Sec. 2 enacted that no person should, for hire, act any play in any theatre in Dublin, excepting such theatre as should be so established by letters patent, under the penalty of forfeiting £300 for every such offence, to be sued for by the common informer.

Under this statute the Crown granted to H. letters patent authorising him to keep, during a certain time, a theatre in Dublin. His Majesty prohibited and forbid all persons whomsoever to keep open, during that time, any theatre in Dublin, and therein to act any play, unless they should be thereunto authorised by his Majesty. *Held*, that the patentee could not maintain a bill for an injunction to restrain unauthorised persons from acting plays in a theatre in Dublin for the keeping of which a patent had not been granted. Such a bill can be sustained only upon the ground of interest in the ptf. The injunction cannot be supported unless the ptf. can maintain an action in the case.—*Calcraft v. West*, 8 I. E. R. 74; 2 Jon. & L. 123. (C.)

2. In granting injunctions to prevent the infringement of trade-marks, the Court exercises its jurisdiction in aid of Courts of Law, i. e., where an action could be maintained in a Court of Law. It does not exercise an independent jurisdiction.—*Foot v. Lea*, 13 I. E. R. 484. (R.)

3. The Court will not, in the first instance, interfere by injunction to restrain the infringement of a patent, unless there has been long and uninterrupted enjoyment under it; but will direct an action to be brought to try the legal right.

Delay in filing the bill is a ground for refusing the injunction.

A patent was obtained in 1846; the alleged infringement took place in 1847; the bill was not filed for more than two years afterwards. The injunction was refused.—*Baxter v. Combe*, 1 I. C. R. 284; 3 I. Jur. 27. (R.)—[*See s. c.*, 3 I. C. R. 245. (R.)—*Affid.* on appeal, 3 I. C. R. 251. (C.)]

4. At common law a painter has, before publication of his picture, a right to prevent any person copying it.

The owner of the picture, who has purchased it from the painter, has the same right. But, after publication, that right is lost.

The sale of a picture is not a publication of it. The publication of a wood engraving in a magazine, with an article describing the picture, is not a publication of the picture itself.

The exhibition of a picture at a public exhibition or gallery, where copying it would not be permitted, is not a publication of the picture; nor is the exhibition of the picture, for the purpose of obtaining subscribers to an engraving of it.

A., the painter of a picture, sold it to B., who, for valuable consideration, agreed to

sell to C. the sole right to make and publish an engraving of the picture, and to exhibit it, for short periods, at any of the principal towns in Great Britain or Ireland, in order that C. might obtain subscribers, and otherwise derive a full advantage in the publication and sale of the engraving. The picture having been exhibited for that purpose, the respondent arranged in his own studio a group which bore an exact resemblance to the picture, and took, for the stereoscope, photographs (coloured so as to correspond with the picture), which he published and sold. *Held*, that C. was entitled to an injunction to restrain the publication and sale of the photographs, if the picture had not previously been published.

It appearing that the picture had been previously exhibited at the Royal Academy, London, and at the Manchester Exhibition of 1857, the Court referred it to the Master to enquire whether there were rules, resolution, bye-laws, or regulations to prevent the taking of copies, sketches or drawings of paintings or works of art sent there for exhibition.—*Turner v. Robinson*, 10 I. C. R. 121. (R.)—[*See*, on appeal, 10 I. C. R. 510; s. c., 5 I. Jur. N. S. 385. (C.A.)]

5. At common law, the owner of a picture has a right, before publication, to prevent any copy being made of it.

When a picture is, with the consent of the owner, exhibited for the purpose of taking subscribers for an engraving to be made from the picture, and with the intimation that it must not be copied, the Court of Chancery may restrain the publication of copies of such picture made by a person whose knowledge of the picture is acquired from such exhibition.—*Turner v. Robinson*, 10 I. C. R. 510; 5 I. Jur. N. S. 385. (C.A.)

#### XLVI. 16. Against setting up Legal Bars and Defences.

6. The bill charged that the ptf.'s ancestor's alleged will was a forgery, and prayed an issue whether it was his will or not, and that the defts. might be restrained from setting up temporary bars. The cause was heard upon sequestration against the devisees named in the will. *Held*, that the Court could only decree the bill to be retained, with liberty to the ptf. to bring an ejectment; and that the defts. be restrained from setting up temporary bars.—*Nelson v. Averell*, 2 Jon. 782. (E.E.)

7. After a decree to account in an administration suit, the Court will restrain a creditor from proceeding in a suit instituted by himself only, when the executor has, in his answer or in some other way, given an account of the assets, and brought the amount into Court.—*Hoops v. Earl of Kingston*, Fl. & K. 246. (R.)

8. When a ptf. by bill states a legal title, and shows the existence of outstanding terms, it is almost of course that the Court will remove temporary bars to enable the ptf. to bring an ejectment.—*Maturin v. Wilson*, 1 I. Jur. 281. (C.)

into pasture land, and that the ground was improved by the waste.—*White v. Walsh*, 1 Jones. 626, n. (E.E.)

1. A lessee for lives renewable for ever will be restrained from committing waste by cutting turf, though it appears that the bog cut out was being converted into pasture land, and that the ground had been improved by the waste.—*Anon.*, 1 Jones, 627, n. (E.E.)

2. A lessee for lives renewable for ever will be restrained from committing waste on the demised premises by cutting turf, though it appears that the tenants had immemorably cut turf.—*Lard Waterpark v. Austen*, 1 Jones, 627, n. (E.E.)

3. The lands of A., whereon there was an open limestone quarry at the date of the demise, were demised for three lives renewable for ever, reserving to the lessor and his heirs all royalties. On motion—*Held*, that the lessee should be restrained by injunction from raising the limestone for sale.—*Purcell v. Nash*, 2 Jones, 116. (E.E.)

4. The Court will not, upon a receiver's application, grant an injunction to restrain a contractor under the 6 & 7 W. 4, c. 116, s. 162, from quarrying, on the lands over which the applicant is receiver, stones for the public works.—*O'Kelly v. Gregg*, Jon. & Car. 76. (E.E.)

5. A landlord filed against his immediate tenant a bill to restrain him from cutting turf for sale on a valuable bog appurtenant to the demised lands. The tenant's answer stated, that he had not ever by himself been in actual occupation of any part of the lands; that he had not by himself or any agent committed the waste charged; and that, if his sub-tenants had cut turf for sale or otherwise, he was unable to restrain them from so doing, as the practice had existed before the lands came into his possession. It did not appear whether these were tenants merely from year to year, or had any greater interest. *Held*, that the injunction could not issue, as the tenants were not before the Court.—*Lord Norbury v. Alleyne*, 1 Dr. & Wal. 387. (C.)

6. A., holding meadows and pasture lands under a lease for lives renewable for ever, demised part of the premises to B. for a similar term, with a covenant to keep and deliver up the premises in tenantable order, &c., and with a power of surrender at the end of every three years. B. assigned his interest. His assignees being about to convert the premises into a public cemetery, A.'s representatives obtained an injunction to prevent them.

*Semble*—At common law, the proposed alteration would amount to waste.—*Hunt v. Browne*, S. & Sc. 179. (R.)

7. The Court will not entertain a motion for an injunction, in the nature of a writ of estrepement, to restrain waste, unless the title is clear.—*Low v. Lucey*, 1 I. E. R. 98. (R.)

8. Ptf. filed a bill for an injunction to restrain deft., their tenant, from breaking up ancient meadows and pasture lands (waiving penalties), and praying compensation for the waste already done. It appeared that deft., when he proposed to take the lands, apprised ptf. that he wanted them for a tillage farm; and that the draft lease, prepared by ptf.'s attorney, when read in the presence of ptf. and deft., contained a clause restraining tillage within certain limits; that deft. refused to agree thereto; and that ptf. consented that it should be struck out. Accordingly, the lease did not contain any clause respecting tillage. *Held*, that the injunction should be refused; ptf. to proceed at law as they might be advised.—*Shew v. Weir*, 1 I. E. R. 218. (R.)

9. A lessee covenanted not to sub-let without consent "in writing, or that he should forfeit and pay the additional rent of £50 per annum;" and also not to cut more turf than should be sufficient for the consumption of himself, his executors, &c., on the demised premises, without the consent in writing, "or that he, &c., should forfeit and pay the additional rent of £10 for every acre which should be cut or made into turf." The lessee's representative sub-let without consent. Ever since then the additional rent of £50 had been regularly paid and received. The lessor's representatives lately filed a bill against the lessee's representatives and their under-tenants for an account, and for an injunction, in the nature of a writ of estrepement; and now moved that deft. be restrained from selling turf off the lands; from burning turf for manure; from cutting the reclaimed meadow-land into turf; and from cutting more turf than the original lease permitted, namely, only a sufficiency for the use of one family. *Held*, that an injunction should be granted until the hearing, to restrain the selling of turf, and burning turf for manure; and also the cutting the reclaimed meadow-land; but refused to restrain the under-tenants from cutting sufficient turf for their own consumption on the premises. The Court observed that there would be a serious question at the hearing.—*Mazwell v. Mitchell*, 1 I. E. R. 359. (R.)

10. When the relation of landlord and tenant exists between parties, the Court sometimes interferes by injunction to restrain waste, though the *locus in quo*, being the landlord's property, is not any part of the demised premises. Unless that relation exists, the Court will not interfere. Therefore, when waste on the demised premises was commenced during the tenancy, and continued, after the tenancy had determined, by persons claiming under the late tenant, the Court, after the determination of the tenancy, refused to grant an injunction.—*Wrixon v. Condran*, 1 I. E. R. 380. (R.)

11. A bill, by the person next in remainder, charged that the tenant for life, who was punishable of waste, and who had power to make leases not punishable of waste, had demised a part of the lands to a third person,

and that such person, in collusion with the tenant for life, was committing waste, by turning up, tilling, and burning the land. The deft. admitted the turning up, &c., but stated it was land which the tenant for life had reclaimed and laid down in grass thirty years before. The Court refused to grant a motion for an injunction.

*Semble*—That such a pasture is not ancient meadow.—*Davies v. D.*, 2 I. E. R. 414. (E.E.)

1. The Court will, upon motion by the receiver, without a bill being filed, grant an injunction to restrain tenants under the Court from committing waste.—*Cronin v. M'Carthy*, Fl. & K. 49. (R.)

2. The Court may interfere at the suit of the Crown to restrain a bishop from wasting the property of the see, or at the suit of the patron of a living, to restrain the incumbent from wasting the glebe-house or lands.

*Semble*—As to the church and church-yard, the Ecclesiastical Court having, *ratione loci*, the proper jurisdiction, this Court has never interfered to restrain the acts of the incumbent with respect to them.—*Earl of Fitzwilliam v. Moore*, 3 I. E. R. 615; Fl. & K. 287. (R.)

3. A receiver was appointed over premises held under a lease containing a covenant declaring the lease void in events therein specified. A tenant held under a sub-lease containing a like covenant. Upon motion by the receiver—*Held*, that the tenant under the sub-lease should be restrained from doing an act whereby his lessor's title might be evicted.—*Mason v. M.*, Fl. & K. 429. (R.)

4. A lessee covenanted not to burn any part of the demised premises, under a penalty of £10 per acre, to be recovered as the reserved rent, for every acre so burned. *Held*, that he was not entitled to burn upon payment of the penalty; and that the jurisdiction of equity to grant an injunction to restrain the lessee from burning, was not ousted by the imposition of the penalty.

The question in such cases is, whether the intention of the parties is, that the deft. should be at liberty to do the act upon payment of the penalty, or that he should not do it under any circumstances; and the imposition of the penalty is merely a measure of the punishment to be inflicted for doing it. In the former case equity will not grant an injunction, but in the latter it will.—*French v. Macale*, 2 Dr. & War. 269; 1 Con. & L. 459; 4 I. E. R. 568. (C.)

5. Injunction to restrain waste issued without bill filed, in a lunacy matter, on application of the receiver.—*In re Chinnerys*, 6 I. E. R. 469; 1 Jon. & L. 90. (C.)

6. When irreparable waste has been committed, and is about being repeated, the Court will, without a positive affidavit of the facts, grant a conditional order for an injunction; and restrain the party in the meantime, if there be danger that the waste will be committed before such affidavit can be procured.—*Beere v. Head*, 7 I. E. R. 60. (R.)

7. An affidavit verifying bill for an injunction to restrain waste by breaking up ancient meadow, should state deponent's knowledge of the land for a considerable period (*semble*, twenty years); and that it had not been in tillage during that time.

Leave given to file affidavit to that effect.—*Creagh v. Carmichael*, 7 I. E. R. 334. (E.E.)

8. The Court will not grant an injunction to restrain waste against persons specifically who are not parties defts. to the bill; but they may be restrained as workmen or servants of the defts., if they fill that character.—*Freeman v. Burke*, 7 I. E. R. 282. (R.)

9. Lessees for lives renewable for ever, without any special circumstances, will be restrained from waste.

A demise of bog, *eo nomine*, along with other lands, does not authorise the lessee to cut turf for sale. *Secus*, when the bog has been demised alone, or has been always cut for sale.

Waste will be restrained in Ch., although the act done may lead to the improvement of the land, if it immediately occasions any damage to the inheritance.

In execution of an arrangement to pay incumbrances, A., owner in fee, conveyed the fee-simple to B., who re-demised for lives renewable for ever to A., at a rent equal to £6 per cent. on his purchase-money, to hold in the same manner as A. then held and enjoyed the same. The lease contained the common covenants, including one to deliver up the premises in repair, except casualties by fire. *Held*, that A. did not retain the rights of an owner in fee subject to the rent, but was restrainable from committing waste.—*Coppinger v. Gubbins*, 9 I. E. R. 304; 3 Jon. & L. 397. (C.)

10. A tenant for lives renewable for ever, having demised for years part of the lands upon which there was at the time an open quarry (which he was in the habit of working for sale), without any reservation or exception in the sub-lease—*Held*, the sub-tenant was not entitled to work the quarry for sale, and that his landlord had the right to enjoin him. There is no analogy between open quarries and mines.—*Mansfield v. Crawford*, 9 I. E. R. 271. (R.)

11. A possessory bill was filed to restrain the deft. from cutting turf for sale, on the allegation that he was tenant to the ptf. of lands adjoining the bog, with a limited permission to cut turf for use in the bog which ptf. claimed as his. On the affidavits showing cause, the tenancy of the lands was admitted; but it appeared that the deft. and his predecessors had long claimed the disputed right over the bog, the ptf.'s title to which was vaguely stated. In 1807 an injunction had been obtained in a similar suit, restraining the tenant from cutting turf at all. *Held*, that an injunction could not be obtained in this suit; as, if the tenant was a mere trespasser, it was not sustainable to establish a disputed right,



there being no triennial possession, and the allegation of a limited permission could not be strengthened by the order of 1807, which set up a different claim.

An order, on showing cause against an injunction obtained on a possessory bill, allowing the cause to stand over with liberty to amend the bill by putting in issue matter not stated in or exactly consistent with it, cannot be made, such a motion being analogous to the final hearing of an ordinary cause.

The rule as to using supplemental affidavits on such motions considered. — *Congleton v. Mitchell*, 12 I. E. R. 34. (C.)

1. To break up a rabbit-warren, unless it be a warren by charter or prescription, is not waste at Common Law, and the Court will not grant an injunction to prevent it.

*Quære*—If the warren be demised as such? — *Lurting v. Conn*, 1 I. C. R. 273; 3 I. Jur. 99. (R.)

2. When lands are under the receiver of the Court of Ch., this Court is unwilling to grant an injunction against waste, except the matter appears to call for an immediate remedy. When such is not the case, the application for an injunction should be made to the Court of Ch.—*In re Brabazon*, 4 I. Jur. 100. (I.E.C.)

3. A tenant held under the Court by lease, with the usual covenant to cultivate in a husbandlike manner and not to commit waste. On a motion by the receiver a conditional order had been granted for an injunction to restrain the tenant from sowing a large quantity of flax, and from breaking up grass land. On motion to show cause, there being contradictory affidavits as to advantage or disadvantage of the mode of tillage, the motion was directed to stand over, with liberty to the receiver to bring an action at law on the covenant, serving notice on the parties interested in the estate; the tenant in the meantime to have liberty to go on with his tillage at his own peril.

A covenant to farm in a husbandlike manner means, according to good husbandry in that part of the country; and though the Court has a right to interfere by injunction, it will not do so in a doubtful case.—*Savage v. O'Connor*, 7 I. Jur. 161. (R.)

4. Demise of a part of the lands of L., together with the bog in the possession of the lessee, situate in the bogs of L. and R. The lessee was in possession of part of the bog of R., in which he had cut turf for his own consumption, but not for sale. *Held*, that the lease did not confer a right to cut turf for sale on the bog of R.—*Fowler v. Blakely*, 13 I. C. R. 58. (R.)

5. Suits for injunctions to restrain waste, when no answer is filed, and the account sought is waived, should not be brought to a hearing by the petitioner, merely for the purpose of getting his costs of suit.—*Harvey v. Ferguson*, 15 I. C. R. 277. (C.)

6. Suits for injunctions to restrain waste should not be brought to a hearing when no account is sought, or the account is waived, if an injunction has been obtained, and the right to continue it is not disputed. If, however, the respondent's conduct forces the case to a hearing, the petitioner will, if successful, be entitled to his costs of suit.

*Semble*—In such suits, when no account is sought, the petitioner should call by notice upon the respondent to state whether he disputes the right to have the injunction continued.—*Dunsany v. Dunne*, 15 I. C. R. 278. (C.)

#### XLVI. 24. In Partnership Matters.

7. When a covenant is, not to do a particular act, and a penalty or forfeiture is annexed to the doing of that act, that does not authorise the covenantor to commit the act. Before the act is done, the Court will restrain him by injunction from doing it. If the act has been done, the penalty must be paid, and the amount is unimportant.—*French v. Macale*, 4 I. E. R. 573; 2 Dr. & War. 269; 1 Con. & L. 459. (C.)

8. A., a shareholder in the A. and C. Bank of Ireland, sold, in 1837, his shares to the Company, who paid him therefor, and entered the sale in their books. The printed deed of transfer required by law was filled up and executed by the ptf., but not by any of the trustees of the bank, and no memorial of transfer was executed. In the register filed in Nov. 1837, A.'s name appeared as having ceased to be a partner, and his name was omitted in the annual register of shareholders filed in the years 1838, '39, '40, '41, and '42. In 1843 A.'s name was replaced on the register of shareholders, in pursuance, as alleged by A., of a fraudulent arrangement between the bank and B., a creditor on foot of debentures issued subsequent to 1837, in order to make A. liable. B. having obtained judgment against the bank on plea of confession, in an action on the debentures, sued out a *sci. fa.* thereon against A. as a shareholder. The Court granted an injunction until answer, to restrain B. from proceeding at law against A. upon the *sci. fa.*, and to restrain the bank from placing A.'s name as a shareholder on the next ensuing annual register.—*Taylor v. Hughes*, 6 I. E. R. 480. (R.)

9. The managing partner of a concern is not entitled to an allowance for carrying on the partnership trade, when there is neither contract between the partners nor a custom of the trade to authorise such allowance.

A partner, who has received his share of the assets, has no equity to insist that the share belonging to his co-partner shall be impounded to answer outstanding demands against the firm, unless he brings his own share into Court for the same purpose.

The bill prayed an account of the partnership property, an injunction to restrain the deft., the managing partner, from interfering with the assets, and a receiver. The Court, upon

motion, granted the injunction, and ordered a receiver to be appointed. This order was varied, so far as it restrained the deft. from collecting the assets, and as to the appointment of a receiver; upon the deft. entering into security by recognizance conditioned to abide the order of the Court touching the partnership property. The deft. having called in and converted into money a large portion of the partnership assets, the ptf. moved that the deft. should lodge the amount in bank. This motion was resisted by the deft., and was refused with costs. A similar motion having been made, founded upon the discharge of the deft., filed under the decree to account, the deft. made an affidavit to resist the motion, giving an uncandid statement of the assets. It afterwards appeared by the report, that, when the first motion was made, the deft. had in his hands money, the produce of the partnership assets, exceeding the amount of the ptf.'s share. The deft. was decreed to pay interest upon the amount of the ptf.'s share from the time he had it in his possession, until paid, at the rate of £5 per cent.—*Hutcheson v. Smith*, 5 I. E. R. 117. (E.E.)

1. A., B., C., and D. were owners of the ship E., and entered into a contract with R., that the owners of the E., so long as she or any vessel supplying her place, remained on the W. line, should pay him one-sixth of the net profits; and that R. should support the interest of the E. and her owners, and any vessel supplying her place on the W. line, and not connect himself with any opposing party.

The agreement provided for the withdrawal of the E., and concluded:—"In which case the interest of the station reverts to R.; and we pledge ourselves not to directly or indirectly connect ourselves with any party injuring his interest in the said line." The agreement was signed by A., B., C., D., and R.

D. retired from the firm, and I., G., and H. became members of it. The M. was substituted for the E.; and K. became a member of the firm, against the wish of R. *Held*, that that agreement could not be specifically enforced against R. by the new firm; and that R. could not be restrained, at suit of the new firm, from working an opposition on the line to the M.—*Grantham v. Redmond*, 8 I. C. R. 449. (C.)

**XLVI. 25. Against Assuming, or Using the same Trade-marks, Names, &c.**

2. In granting injunctions to prevent the infringement of trade-marks, the Court exercises its jurisdiction in aid of Courts of Law, i. e., when an action could be maintained in a Court of Law. It does not exercise an independent jurisdiction.—*Foot v. Lea*, 13 I. E. R. 484. (R.)

8. A firm, having adopted the letters "L.L." to denote a peculiar quality of whiskey sold by them, acquired an exclusive right to the use of those letters as a trade-mark, though they were always preceded by the name of the firm upon the labels issued by it.

In order to prove acquiescence by a firm in the piratical use of their trade-mark, knowledge of such use must be proved. That is not accomplished by proof of the publication of advertisements which would have been an invasion of the rights of the firm, if these advertisements have been issued not steadily or uniformly, but interchangeably with other advertisements in some respects similar, but not infringing the firm's rights.—*Kinahan v. Bolton*, 15 I. C. R. 75. (C.)

4. A partnership deed witnessed that the lands, mills, and machinery, which theretofore had belonged exclusively to M. (one partner) should remain his sole property, subject during the partnership to be used for all partnership purposes; and provided that the retiring partners should, at the end of the partnership, be paid, by M.'s promissory notes, the value of their respective shares in the partnership stock and capital. No mention was made therein of the good will, name of the firm, or trade-marks. After eight years the partnership was dissolved. The outgoing partners insisted that M. should pay them for the name, good will, and trade-marks, at a valuation. *Held*, that M. was entitled to the name, &c., upon paying the outgoing partners pursuant to the deed; but without their being separately valued.

The petition, praying an injunction to restrain M. from using the name, &c., was dismissed with costs.—*Dickson v. M'Master & Co.*, 11 I. Jur. N. S. 202. (C.)—[Affirmed by the Court of C. A. with this variation, that in taking the account, the good will should be valued separately.]

**XLVI. 26. In other Cases.**

5. A vicar, having granted an annuity charged on his benefice, and being entitled to compensation for tithe arrears, under the 3 & 4 W. 4, c. 100, may be restrained from receiving them until answer put in to a bill filed against him for raising the arrears of the annuity.—*Stannus v. Robinson*, H. & J. 622. (E.E.)

6. A mill-stream broke through the bank mearing of deft.'s ground. The stream was escaping into a new channel, and irreparable injury was apprehended. Before appearance, the Court made a conditional order to restrain deft. from preventing ptf., &c., from repairing the bank for the purpose of bringing the stream back into its proper channel; and also to restrain deft. from preventing ptf. from entering on that part of the lands in deft.'s possession which formed part of the bank of the stream, to repair the breach; and also to restrain deft. from cutting, &c., any channel for the water of the said stream on the lands in his possession, whereby the water-course might be diverted from ptf.'s mill, unless cause within six days.—*M'Swiney v. Haynes*, 1 I. E. R. 322. (R.)

7. The solicitor of a deceased client, who acted as such for that client's executrix and devisee, was, at their instance, restrained from acting as solicitor for a creditor in

whose name he had filed a bill to raise the amount of a judgment debt out of the estate of the deceased, though that creditor had been a client of the solicitor before he became concerned for the deceased; and though the solicitor contended that he had been discharged; and insisted that it was not in his power to communicate anything injurious to the estate, since all the material facts and documents had been, as the solicitor alleged, put in issue by a bill previously filed by another creditor of the deceased.—*Biggs v. Head*, 8. & Sc., 335. (R.)

1. Before decree a receiver was appointed over the assets of a company formed under the 6 G. 4, c. 42, which had stopped payment. The Court refused to restrain a creditor from suing out execution under sec. 18 of that Act against the shareholders, upon a judgment obtained against the company.—*Acheson v. Hodges*, Fl. & K. 371. (R.)

2. The Court deals with its tenants as tenants at will. When a tenant has been let into possession under the Court for seven years, or pending the cause, the Court will not grant an injunction to dispossess him, without an affidavit respecting the state of his crops.—*O'Connell v. O'Callaghan*, 8 I. E. R. 199; Long. & T. 157. (E.E.)

3. An injunction was granted to restrain an archbishop from collating, by way of lapse, to a deanery, pending a suit in the Consistorial Court, respecting the presentment by the Chapter.

The Ecclesiastical Court is the proper jurisdiction to apply to in case of injury done by the incumbent to the church; and as it supplies a complete remedy, this Court will not interfere.—*Daly v. Archbp. of Dublin*, Fl. & K. 263. (R.)

4. An application for an injunction to put out of possession a tenant under the Court, the cause having suddenly terminated, must be on notice to the tenant, who is in the nature of a tenant at will, and is entitled to emblements.—*O'Connor v. O'Callaghan*, 8 I. E. R. 199. (E.E.)

5. Injunction granted, upon the application of the receiver, to restrain one tenant of the estate from quarrying upon a private road, part of the premises, which was common to all the tenants.—*Dorman v. D.*, 3 I. E. R. 385. (E.E.)

6. Application by a parishioner for an injunction to restrain a rector from encroaching upon the church-yard and parish burial-ground, without any faculty or license from the ordinary for that purpose, by building a schoolhouse thereon, refused; it appearing, that although no faculty had been formally obtained, the bishop was, in fact, a consenting party; and that from the condition of the proposed site, no irreparable injury could be done; the Ecclesiastical Court having the pro-

per authority, *ratione loci*, to have the building removed, if unlawfully erected, and to punish the person guilty of erecting it.—*Earl of Fitzwilliam v. Moore*, 3 I. E. R. 615; Fl. & K. 287. (R.)

7. The Court would restrain the further prosecution of a suit instituted in the name of an infant, if not likely to be for his benefit. If the next friend be the mere nominee and creature of his solicitor, or have interests adverse to the infants, the Court will remove him and appoint a new one; or if the next friend's solicitor be so identified with adverse interests as to render it impossible or doubtful that he could consistently prosecute the infant's suit with zeal; the Court will restrain him from acting, and require a new solicitor to be appointed.—*Morrison v. Bell*, 5 I. E. R. 354. (R.)

8. A., having become tenant under the Court in trust for B., afterwards denied the trust. Motion, for an injunction to put the *c. q. t.* into possession, refused, with costs.—*Conyers v. Crosbie*, 8 I. E. R. 519. (E.E.)

9. When an injunction or receiver is prayed by the bill, the defts. who are interested in resisting the motion are entitled to the costs of two briefs on the filing of their answers; but the ptf. is not entitled to the costs of briefs unless he has moved or served a *bona fide* notice of motion, or unless some act had been done by the deft., after the briefs were *bona fide* made, which rendered the motion of service of notice unnecessary.

The bill prayed an injunction. Upon the coming in of the answer the solicitor prepared two briefs for the injunction motion. The suit was compromised before the briefs were given out or notice of motion served. *Held*, that the ptf. was not entitled to the costs of the briefs against the deft.—*Broadbent v. Hughes*, 10 I. E. R. 65. (R.)

10. An injunction was refused on a bill, as a bill of relief, because it stated facts amounting to a defence at law, or a bill of discovery, because it prayed relief which ptf. could not waive.—*Anderson v. Dowling*, 11 I. E. R. 590. (R.)

11. The costs of an injunction motion in a possessory suit were given to the ptf., the cause being disallowed. The rule, that the ptf. in such suits is not entitled to costs, applying only to the costs of the suit.—*Coppinger v. Carnegie*, 1 I. Jur. 27. (R.)

12. When a person put into possession of a gate-house as caretaker, refused to give up possession, the Court, for the purpose of trying if such a bill could be sustained, granted a conditional order for an injunction.—*Moore v. Marsh*, 1 I. Jur. 42. (R.)

13. A possessory bill was filed to restrain the deft. from cutting turf *for sale*. The bill alleged that he was the ptf.'s tenant of lands adjoining the bog, which the ptf. claimed as his. The affidavits showing cause admitted

the tenancy; but proved that the deft. and his predecessors had long claimed the disputed right over the bog; the ptf.'s title to which was vaguely stated. In a former like suit, there had been obtained an injunction restraining the tenant from cutting turf *at all*. *Held*, that the injunction could not be granted, since, if the tenant was a mere trespasser, this suit was not sustainable to establish a disputed right; there being no triennial possession, and because the allegation of a limited permission could not be strengthened by the order in the former suit, which set up a different claim.—*Conleton v. Mitchell*, 12 I. E. R. 84. (C.)

1. Leases were made by the Court for a term of seven years, pending a suit. Before its termination the receiver was discharged, and a large annuitant put into possession. The Court refused to break the leases, or grant an injunction to put out the tenants.—*Walcott v. Condon*, 5 I. Jur. 141. (C.)

2. The Court will grant an *ad interim* injunction to restrain a Ry. Co. from carrying out, without parliamentary sanction, a contract to purchase a Canal Company's property, when that purchase would create a monopoly.

An injunction will not be granted to restrain a company from applying to parliament for an Act to enlarge their powers, or to sanction an agreement with any other company; but will be granted to restrain them from using the company's funds to defray the expenses of prosecuting such an application, when a monopoly is likely to be thereby created.—*M'Donnell v. M. Gt. W. Ry. Co.*; *M'Donnell v. Gd. Canal Co.*, 5 I. Jur. 185. (R.)

3. A party obtained a decree against a corporation. The decree not being obeyed, a sequestration issued, under which chattels were seized, which had been purchased with funds, raised under a local Act, for the purpose of carrying its provisions into effect. The Court refused to grant an injunction to compel the sequestrators to restore the chattels to the corporation; and to restrain them from proceeding to seize the rents of real property purchased under the same local Act.—*Keyland v. The Corpn. of Belfast*, 2 I. Jur. N. S. 150. (R.)

4. A tenant for seven years, pending a cause, cropped lands, after they were purchased, but before the purchaser got the injunction to put him into possession. The purchaser went into possession. The Court granted an injunction to restrain the purchaser from interfering with the tenant in saving the crops, upon the terms of the tenant undertaking to abide by any order to be made as to bringing into Court the amount of rent due up to the end of the current year of the tenancy, or the amount for which the crops might be sold, or as to the crops themselves.—*Flanagan v. Seaver*, 8 I. Jur. N. S. 429. (R.)

5. A principal made to his agent two leases, which the Court set aside. The agent sub-leased part of the lands to two tenants. One sub-lease was made before, and the other after the filing of the cause petition, impeaching the original leases; which was not registered as a *lis pendens*, nor was any notice of it served on the sub-tenants. The Court refused an injunction to dispossess them, and put the petitioner's representative into possession; but directed the motion to stand over to let a supplemental petition be filed against the sub-tenants.—*Geoghegan v. Blackstock*, 6 I. Jur. N. S. 28. (R.)

#### XLVII. INQUEST GENERALLY. See LUNACY, IV.

#### XLVIII. INSPECTION OF DEEDS, &C. See BANKRUPTCY, X—PRACTICE, LXXVI, PRODUCTION OF DEEDS.

[See 31st G. O. of 1851; 4th G. O. of Nov. 1852: Ch. (Ir.) Act 1867, sec. 71.]

5. In Feb. 1836 was filed a bill for specific performance of an agreement for a lease. The answer, filed in the same year, insisted that the contract could not be performed, since it exceeded the leasing power. The answer also set out two settlements of the estate, to which, when produced, the deft. craved leave to refer; but did not admit that they were in his possession. No exception was taken to the answer. Issue having been joined, deft. served notice on ptf., in 1837, requiring him to admit one of the settlements, which then lay at his solicitor's office for inspection. After several witnesses had been examined, ptf. moved for liberty to inspect the two deeds relied on in the answer; or, if necessary, to amend his bill, in order to procure from deft. sufficient admissions that the deeds were in his possession. The motion was refused with costs. The ptf., if he wished to raise the question touching his right to inspect the deeds, should have excepted to the answer, because it did not admit that they were in deft.'s possession.—*O'Connell Denny*, 2 I. E. R. 246. (R.)

6. Purchasers of an estate, sold in several lots under a decree, required to compare with the original deeds lodged in the Master's office, for the purposes of the sale, the copies furnished to them, along with the abstract of title. The Court ordered that the deeds should be handed over to ptf.'s solicitor, he undertaking to re-lodge them after making the comparison; and that he should produce them in his office to the several purchasers' solicitors, and permit them to compare these deeds with the copies furnished, or to be furnished, to them.—*Reynolds v. R.*, 6 I. E. R. 75. (R.)

7. Defts., by their answer, admitted that two deeds were in their possession; stated them partly; and referred to them, when produced, for greater certainty. On motion—*Held*, that defts. were bound to produce the deeds for ptf.'s inspection.—*Dundas v. Blake*, 9 I. E. R. 640. (R.); 10 I. E. R. 260. (C.)

**XLIX. INSPECTION, ORDER FOR.** See PRACTICE, PRODUCTION OF DEEDS.

1. A deft. set forth in his answer as matter of defence (it seemed at full length), two documents not alluded to in the bill, which documents would, if correctly stated, defeat the ptf.'s title; and referred to them thus:—"As by said respective articles or instruments, in the possession of this deft., and ready to be produced and proved, may more fully and at large appear." Held, that the ptf. was entitled to inspect them.—*Plumptre v. O'Dell*, 4 I. E. R. 602; Fl. & K. 589. (R.)

2. The Court will order the inspection of documents in the hands of the agent of the commission—if those documents had existence prior to the bankruptcy, and if the party applying shows that an injustice would be done to him if he were not permitted to examine them;—and will direct copies to be furnished by the agent of the Commission to the party requiring them, upon payment of reasonable fees.—*In re Edmonds*, 2 I. Jur. 280. (B.)

**INSUFFICIENCY.** See PRACTICE, MASTER, REFERENCE TO, &c.—PRACTICE, ANSWER.

**L. INTERLOCUTORY ORDER.**

**INTERPLEADER.** See PLEADING, BILL—PRACTICE, BILL OF INTERPLEADER—PRACTICE, EVIDENCE—PRACTICE, COSTS—PRACTICE, PAYMENT INTO COURT.

**LI. INTERROGATORIES.**

*Touching Demurrer to Interrogatories*—See PRACTICE, EVIDENCE.

[See 30 & 81 Vic., c. 44, ss. 61, 72, 87, 138: G. O. (1867), 41-45.]

3. *Semble*—Where a bill is demurrable in substance, by reason of a total want of setting out of title to the relief prayed, the 36th and 79th G. O. enable a deft. to decline or omit answering any interrogatory relating to matters connected with the relief prayed, or the title to it.

*Quere*—Whether in such case deft. might so decline answering other parts of the bill; and whether, if a bill be demurrable on any grounds, he may so decline, according to the decisions of Wigram, V. C., in *Tipping v. Clarke*, 2 Hare, 383, and *Drake v. D.*, 2 Hare, 647; *Kaye v. Wall*, 4 Hare, 127.—*Russell v. Beakey*, 8 I. E. R. 559. (R.)

4. Interrogatories having been annexed to a cause petition without the leave of the Court, an order was made that they should be allowed to stand, reserving the costs occasioned by them until the hearing of the cause. *O'Malley v. Denny*, 1 I. C. R. 118. (R.)

5. A motion for liberty to examine witnesses upon interrogatories, before the hearing of a cause petition, and that a commission should issue for that purpose, was grounded on

the petitioner's solicitor's affidavit, stating that A. and other ~~un~~-named persons, when applied to, declined to volunteer evidence by making affidavits in the case, but that deponent was persuaded that they would attend for examination upon interrogatories. It stated further that some ~~un~~-named witnesses resided in England; that a commission would therefore be requisite; and that the deponent was advised that their evidence was material and necessary to the petitioner's case. Motion refused, with costs; the affidavit being vague and unsatisfactory.—[*Glascok v. Ross*, 1 I. C. R. 50, 57; *Hatchell v. Egglese*, 1 I. C. R. 215, 222, followed.]—*Kirwan v. Lindsay*, 2 I. C. R. 23. (C.)

6. Applications for liberty to file interrogatories must be upon notice.—*Nolan v. Drinan*, 7 I. Jur. 267. (R.)

**LII. INTITULING PLEADINGS.**

7. Depositions wrongly intituled cannot be read: but the party who seeks to use them will be permitted to have them re-sworn, upon terms.—*O'Hara v. Creagh*, 2 I. E. R. 419. (E. E.)

8. A deft. cannot vary the title of the cause in a notice or affidavit used upon a motion in the cause.—*M'Kiernan v. Kernan*, 4 I. E. R. 275. (R.)

9. When an application is made to extend a receiver from one cause to another, the notice of motion and affidavit should be intituled in both causes.—*Tenant v. Watson*, 4 I. E. R. 700. (E.E.)

10. It is not necessary to intitle a petition in the matter of the Act of Parliament under which it is presented. If the petition be intituled in the matter of a wrong Act of Parliament, and the Court can see, from the matter of the petition itself, that it has jurisdiction to make the order prayed, under the authority of a public statute, the reference to the Act in the title will be rejected as surplusage.—*Hunter v. Edmonds*, 6 I. E. R. 123. (E.E.)

11. It is not necessary that the petition or other proceedings under the Judgment Creditors Acts, should be intituled as of those Acts.—*Nagle v. Creagh*, 6 I. E. R. 265. (R.)

12. The Court will not make an order on a petition, presented under an Act of Parliament, unless the petition be intituled in the matter of the proper Act.—*In re French*, 8 I. E. R. 96; 2 Jon. & L. 248. (C.)

**LII.\* IRREGULARITY.**

1. *What constitutes it, generally.*
2. *Its Effect.*
3. *Waiver of.*

LII.\* 1. *What constitutes Irregularity, generally.*

1. If the bill be amended, and notice given that the ptf. does not require an answer to the amendments, the deft., if he desires to answer them, must do so within the time allowed for answering when an answer is required.

In such a case, the ptf. acts irregularly in filing a replication before he has returned to the deft. his copy of the bill amended. An answer filed after such a replication is irregular.

If the deft. is entitled to answer amendments made after his former answer, he may answer fully the case made by the original bill.—*Cathcart v. Hewson*, H. & J. 540. (E.E.)

2. In an interpleader suit, the ptf. obtained an injunction against proceedings at law, upon the terms of paying into Court the rent claimed. One deft. answered; and, before the other answered (there being process against him), entered a conditional rule to dissolve the injunction. *Held*, that the rule was irregular.—*Swanston v. Simpson*, Jo. & Car. 188. (E.E.)

3. Service of the month's notice to answer under the 25th G. O., is irregular, if no proceeding has been taken in the cause for more than twelve months.

A formal amendment of the bill is not a proceeding which will keep alive a cause which is out of Court until service of subpoena to elect.

A plaintiff seeking a decree *pro confesso*, under the 45th G. O., must be prepared to show that all his previous proceedings were perfectly regular.—*Townsend v. Newenham*, S. & Sc. 700. (R.)

4. On the 18th May, a report, finding that the answer to an injunction bill to stay proceedings at law was prolix in certain passages, was sent back to the office to be reviewed, with directions to include therein other passages also as prolix. On the 6th June, the amended report was confirmed, and on the same day was obtained an order to expunge the prolixities. On the 8th, deft. issued and served a conditional order to dissolve the injunction, on the ground of having answered the bill. On the 10th, ptf. served a notice cautioning deft. against proceeding under that order, and requiring him to vacate it. On the 12th, ptf. issued a summons to attend before the officer on the 17th, to have the prolixities expunged. Ptf. moved to set aside the conditional order to dissolve the injunction, as irregularly obtained before the prolix matter was actually expunged. *Held*, that the motion should be refused with costs.

*Semble*—When an answer is reported prolix, it is not necessary to have the prolix matter actually expunged before deft. obtains an order to dissolve the injunction upon the coming in of the answer.—*Barry v. Harrison*, 2 I. E. R. 64. (E.E.)

5. When objections have been taken in the office against the Remembrancer's report, it is irregular to set down the cause to be heard on report and merits, until the report is confirmed, unless the objections to the draft report have been allowed, and the report, as signed, varied accordingly.—*Warren v. Power*, 2 I. E. R. 107. (E.E.)

6. Costs were decreed to be paid by a ptf. to a deft., who died after the decree, but before taxation of the costs. The deft.'s administrator issued a summons to tax. The ptf.'s solicitor attended; and, protesting against the right to tax, reduced the items, but did not apply to the Court within a period fixed by the Master for that purpose. *Held*, that a subpoena, to compel payment of the taxed costs, was not irregular.

If one of several defts. dies after decree, and the cause remains in operation between the ptf. and the other defts., the right to costs decreed to him is not affected by that deft.'s death before taxation.—*Barry v. Stowell*, 3 I. E. R. 146. (C.)

7. When a necessary party is not before the Court, a report of good title, "the ptf. undertaking to file a supplemental bill, and obtain a decree against such party" is irregular.—*Plumptre v. O'Dell*, 4 I. E. R. 602, note. (R.)

8. Husband and wife filed a bill respecting the wife's real estate. Husband died before decree. Thereupon, deft. entered a rule that the widow should revive or continue the cause within ten days, or in default, that the bill be dismissed with costs. *Held*, that that rule was irregular, and should be set aside with costs.—*Johnson v. Biron*, 5 I. E. R. 154. (E.E.)

9. The 12th and 14th G. O. apply to supplemental, as well as to original bills; and when any such bill is filed in violation of those rules, it will be taken off the file of the Court.—*Tommey v. White*, 6 I. E. R. 303. (R.)

10. In a cause in which a minor is concerned it is irregular and improper for the parties or their solicitors to enter into any consent, without disclosing on its face the fact, that one of the parties is a minor. A side-bar rule entered on such a consent, on which that fact does not appear, *Held*, irregular.—*Gatchell v. G.*, 8 I. E. R. 391. (E.E.)

11. Amendments after answer, and new engrossment of the bill, without leave—*Held*, irregular.—*Nolan v. Ball*, 8 I. E. R. 573. (R.)

12. A report of good title, ptf.'s solicitor undertaking to procure a signature, is informal.—*Magawley v. Brady*, 9 I. E. R. 59. (R.)

13. The bill, by the note at foot, required one deft. to answer, though subpoenas to answer were prayed against others, and the interrogating part was not divided or numbered. *Held*, not irregular within G. O. 12.

If the bill be irregular because the interrogating part is not divided or numbered, the

proper course is, to stay the proceedings; but not to move to take the bill off the file.—*Burne v. B.*, 9 I. E. R. 205. (R.)

1. The extension of a receiver in an abated suit against a tenant for life, after his death, to a suit by a creditor on the inheritance, is not irregular.—*Moore v. Marquis of Donegal*, 11 I. E. R. 412. (C.)

2. A bill, filed in 1844, to raise a sum secured on a term created by a settlement of 1773, stated the proceedings in a suit of *A. v. B.* by a prior judgment creditor, and prayed the benefit of the decrees and accounts therein; that the decrees might be carried into execution, so far as necessary for the ptf.'s relief; and a sale of the term. The cause stood over at the hearing, to make two minors parties by supplemental bill. One of them, *X.*, by answer, impeached the decrees in the suit of *A. v. B.*, and both claimed as purchasers for value under a settlement of 1842, made by *W.* At the hearing of the supplemental cause in June 1847, ptf. contended that *X.* could not impeach the decrees, as he claimed under *W.*, who had acquiesced in them; and an order was made that the further hearing of the cause should stand over, with liberty to the ptf. in the meantime to bring before the Court the parties beneficially interested in the decrees in *A. v. B.* The ptf. filed a supplemental bill, setting out the whole of the proceedings in *A. v. B.*, and the suit of 1844; assignments of the judgment and sum decreed in *A. v. B.* for the benefit of *W.*, charging that *W.* and *X.*, and the parties claiming under the assignment in *A.*'s right, could not object to have the decrees carried into execution; and praying that they might be carried into execution against them, and that the ptf. might have the benefit thereof; or, if the Court should be of opinion that they could not be carried into execution, according to the terms thereof, with such modification as to the Court should seem meet; and that ptf.'s claim, and all prior and contemporaneous charges, might be raised by a sale of the term of 1773. The Court refused to take the bill off the file as irregular; but—*Held*, on demurrer, that the order of June 1847, though it authorised the filing of a supplemental bill to bring new parties before the Court, did not warrant the making of a new case; and that the case of estoppel, and the prayer that the decrees might be modified and altered, was a new case and not warranted by the order.

*Semble*—The frame of the suit and relief prayed being altered, all the necessary parties to the suit of 1844 should be parties, particularly the party representing the term of 1773.—*M'Namara v. Blake*, 11 I. E. R. 527. (R.)—[*Affid.*: 12 I. E. R. 862. (C.)]

3. A Court of Equity will not entertain the question of the irregularity of proceedings at law.—*Nugent v. Waters*, 1 I. Jur. 85. (R.)

4. Appearance on the 26th April. Order on the 8th May, staying proceedings until

security, &c. Security given on the 4th Dec. Cause set down *pro confesso* on the 24th Jan.; the 23rd having been a Sunday. *Held*, irregular, the deft. having the whole of the 24th on which to file his answer.—*White v. W.*, 12 I. E. R. 425. (R.)

5. All the parties to an original bill having died, the cause was set down in the names of the parties to a supplemental bill only. *Held*, regular; and that parts of the answer to the original bill could be read as of an answer in the cause at the hearing; and that it was not to be treated as an answer in another cause.—*Anderson v. Pratt*, 12 I. E. R. 603. (C.)

6. If a deft. moves to take a bill off the file for irregularities, which involve questions of pleading, and might have been taken advantage of by plea or demurrer, that is sufficient ground for refusing the motion.

A motion to take a bill off the file for irregularity in being contrary to the 56th G. O., the bill praying to be considered a supplemental bill, and being filed before issue joined, will not be granted if any part of the bill may be considered purely original, and in respect of which relief might be given at the hearing.

An order to dismiss a bill made in a suit abated by the death of a ptf., that circumstance not being properly before the Court, when it made the order, is not a nullity. There should be an order to set it aside.—*Hayes v. Woodley*, 2 I. Jur. 42. (R.)

7. It is irregular for some of several co-ptfs., without the consent of all, to change their solicitor by side-bar order. A special motion should be made.—*Callaghan v. Blake*, 2 I. Jur. 54. (R.)

8. One of several ptfs., who sued in his wife's name, died before the taxation of costs which a decree had given the ptfs. A subpoena for costs was served in the names of all the ptfs., and an attachment issued thereon in the names of the surviving ptfs. *Held*, irregular.—*Wyse v. W.*, 4 I. Jur. 113. (R.)

9. In an administration suit the Court does not, before decree, order the executor or administrator to bring money into Court, unless on a distinct admission that he has assets in hands. In a case referred to the Master, under the Ch. Reg. Act, s. 15, an executor *de son tort*, by his discharge, stated that he had not any sum whatever of assets in his hands; but was in advance beyond any sum which had been realised out of the assets. *Held*, that the Master's order, directing him to bring money into Court, was irregular.—*Glenny v. Woolsey*, 4 I. C. R. 636. (R.)

9. The ptf. propounded a will, and got an order that either party be at liberty to set the cause down for hearing; but did not pay the duty, and declined to act on the order. On that ground the deft. moved to dismiss the suit and condemn the will. *Held*, that the motion was irregular, and that the proper

course was for the deft. himself to pay the duty, take out a copy of the order, and set down the cause.

The rule of the Prerogative Court, that proctors should not in any proceeding refer to private conversations had between them, is still in force, and applies to solicitors.—*Goslin v. G.*, 7 I. Jur. N. S. 306. (P.)

1. *Semble*—A petition by way of peremptory execution in an interest suit is irregular. Having an erroneous title, the petition was dismissed with costs.—*Flood v. Bradley*, 8 I. Jur. N. S. 114. (P.)

### LII.\* 2. *Its Effect.*

2. A conveyance, made under the 21 & 22 Vic., c. 72, is, under sec. 85, "for all purposes conclusive evidence" that all previous proceedings, leading to such conveyance, have been regularly taken.

Proceedings had been taken to sell estates, of which the sale and re-sale had been directed, in a manner which, when presented to the notice of the H. L., was declared to be marked by great irregularity. The complainant, however, had not brought that matter before the Court of Appeal until after the conveyances had been executed. *Held*, that the statute precluded this House from affording to the appellant relief against the consequences of such irregularities.

When the appellant went before the Court of Appeal, his petition was dismissed with costs. The H. L. reversed the order for costs, but affirmed the dismissal of the appeal.—*Power v. Reeves*, 10 H. L. Cas. 645.—[See *In re Power's Est.*, 11 I. C. R. 295. (C.A.)]

### LII.\* 3. *Waiver of.*

3. A motion, to stay proceedings until ptf. residing abroad gave security for costs, was refused, deft. having been aware of ptf.'s non-residence, but having delayed his application until a negotiation opened by him for an amicable settlement had terminated unsuccessfully. Several months had elapsed after the notice to press for his answer, and the further time, to file his answer, given by ptf. had nearly expired. Deft. had therefore waived his objection, since, if he meant to rely on it, he should have come immediately, or at least when he was served with the notice to press.

Ptf. residing abroad, but having an estate and residence at C., in the county of T., being described as of "C. in the county of T.," without other addition, is not a misdescription.—*Watson v. Pim*, 2 I. E. R. 26. (R.)

4. If a party answers an affidavit not filed until after the notice of motion, the irregularity is cured, and he cannot object to its being used on the motion.—*O'Brien v. Peebles*, 7 I. E. R. 558. (R.)

5. Irregularity (if such it was) in not stating in an order for substituted service, where deft.

was to appear, was—*Held*, waived by the common appearance.

*Semble*—The proceedings were regular.—*Johnston v. Tottenham*, 11 I. E. R. 271. (R.)

6. An irregularity in the heading of a cause petition is waived by the filing of affidavits in reply.—*Bell v. M'Carthy*, 8 I. Jur. 190. (C.)

### LIII. ISSUE AND ACTION AT LAW: CASE SENT FOR OPINION OF THE JUDGES. See PRACTICE, COSTS.

[See 21 & 22 Vic., c. 27.]

1. *Form of Issue.*
2. *When directed.*
3. *Issue: Devisavit vel non.*
4. *Practice on, generally: Trial, Verdict: Proceedings on: its Effect.*
5. *Taking pro confesso.*

#### LIII. 1. *Form of Issue.*

[By the Ch. Amendment Act 1858 (21 & 22 Vic., c. 27) power is given to the Ct. of Ch. in Ireland to award and ascertain damages with or without a jury, and to try any question of fact before a jury in the Ct. of Ch.]

7. Ptf. claimed as heir male of R., deceased, stating in his bill that he was R.'s eldest son, born after R.'s marriage with ptf.'s mother, and naming a specific date for the marriage. *Held*, that the question of ptf.'s legitimacy would be satisfactorily determined by an issue in terms, "to try whether he was the heir-at-law of R." &c.

When a Court of Equity directs an issue in a cause in which there are many parties, and selects some to have the conduct of the trial, giving all leave to attend, all are bound by the result.

An order directing an issue, "with the consent of all parties in the cause," is erroneous, so far as it purports to be with the consent of an infant party.

*Quere*—If the infant consents, is he bound?

But if the order for the issue was a right order to be made, if the infant had not consented, it is immaterial whether he ought to be bound by the consent or not, especially as he was relieved from the effect of the consent by being allowed, on coming of age, to make a new defence.—*Malone v. M.*, 8 I. E. R. 586; 2 Dr. & Wal. 491, 536; 8 Cl. & F. 179; West, 637.

8. In referring it to the Master to settle a case for a Court of Law, the Court will not authorise him to issue a commission to examine witnesses, and to ascertain facts to be stated in the case.

Practice in settling a case involving a question of Ecclesiastical Law.—*Hogg v. Garrett*, 2 Dr. & War. 409; 2 Con. & L. 197. (C.)

9. Form of order on an application for liberty to read, on the trial of an issue, depositions, taken in the cause, of a witness whom illness incapacitated from attending the trial.—*Lynch v. L.*, Dr. Rep., temp. Sug. 588. (C.)



1. In a suit in which an assignor and the assignees of an equitable interest are made ptf.s., an issue directed to try the validity of the deed of assignment is improper, as being an issue between co-ptfs., and not between them and the deft.—*Fulham v. M'Carthy*, 1 H. L. Cas. 703; 12 Jur. 757.—[Affg., on the ground of misjoinder of parties, the decision in 9 I. E. R. 620.]

2. Form of issue when the entire will is impeached, on the ground that the testator was not of sane mind; particular devises being also impeached on special grounds.—*Lord Guillamore v. O'Grady*, 2 Jon. & L. 210. (C.)

#### LIII. 2. When Directed.

3. In a renewal suit, when the question concerns the quantity of land demised by the original lease, the Court will order it to be tried by an ejectment, rather than direct an issue.—*Douglas v. M'Causland*, Hayes, 254. (E.E.)

4. The landlord's agent procured from a tenant a conveyance of his farm, under suspicious circumstances. The Court was not satisfied with the evidence given five years afterwards. *Held*, that there must be an issue to enquire whether the deed had been obtained by fraud, duress, imposition, or undue influence.—*Smith v. Ward*, Hay. & J. 705. (E.E.)

5. The bill charged that the ptf.'s ancestor's alleged will was a forgery, and prayed an issue: whether it was his will or not? and that the defts. might be restrained from setting up temporary bars. The cause was heard upon sequestration against the devisees named in the will. *Held*, that the Court could only decree the bill to be retained, with liberty to the ptf. to bring an ejectment; and that the defts. be restrained from setting up temporary bars.—*Nelson v. Averell*, 2 Jon. 782. (E.E.)

6. In a suit by children to enforce payment of their portions, their legitimacy was questioned by the next tenant for life, a deft. A marriage *de facto* was established. *Held*, that it then lay on the party impeaching the marriage to prove it illegal and void; and that the Court, sufficient evidence of a marriage *de facto* having been submitted to it, was competent to decide the question of the marriage for the purposes of the suit, without directing an issue.—*Piers v. Tuite*, 1 Dr. & Wal. 279. (C.)

7. On a bill to carry into effect the trusts of a will, two questions were raised—one of law, respecting the construction of the will, the other of fact, touching ptf.'s legitimacy, to be ascertained by the trial of an issue. The Judge directed the issue to be tried first. *Held*, that, in doing so, he exercised a sound discretion, by declining to decide the legal question until ptf. had es-

tablished his right to ask for that decision, by showing that he filled the character which he assumed.

*Quere*—Whether Lord Eldon meant what is ascribed to him as approving the contrary practice in *Gordon v. G.*, 3 Swanst. 468?

When a Court of Equity directs an issue in a cause in which there are many parties, and selects some to have the conduct of the trial, giving all leave to attend, all are bound by the result.—*Malone v. M.*, 3 I. E. R. 536; 2 Dr. & Wal. 491; 8 Cl. & F. 179; West, 637.

8. A judgment, obtained by confession against an old corporation, after the 16th Feb. 1836, is not conclusive against the new corporation. When the Court doubted whether the demand, on which the judgment was obtained, came within the terms of the 6 & 7 W. 4, c. 100, two burgesses of the new corporation filed an information to stay the issuing of execution against the goods of the corporation upon that judgment. *Held*, that they were entitled to have an issue to try whether or not it was originally a demand such as came within that Act.—*Att.-Gen. v. Corp'n. of Dublin*, 1 Dr. & War. 545. (C.)

9. It being doubtful whether the grant of an annuity was an English or an Irish transaction; and it appearing that the transaction, if English, was void for want of enrolment, the question being a legal one, a case was sent to a Court of Law.—*Ferguson v. Lomax*, 2 Dr. & War. 120. (C.)—[See 3 Dr. & War. 238. (C.)—See the case at Law: 5 I. L. R. 81.]

10. On an information filed to impeach a lease made by a Corporation, of lands which were originally conveyed to them upon trusts for particular purposes, of which trusts the making of the lease was a breach—*Held*, that the lessee was entitled to an issue, to try whether the lands in the lease were the lands so granted in the trust or not.—*Att.-Gen. v. The Corp'n. of Cashel*, 2 Con. & L. 1; 3 Dr. & War. 294. (C.)

11. The Court, in referring it to a Master to settle a case for a Court of Law, will not authorise him to issue a commission to examine witnesses and to ascertain facts to be stated in the Court.

When the question depended upon a point of Ecclesiastical Law, the Lord Chancellor (Sir E. Sugden), directed a case to be submitted to four of the most eminent civilians, here and in England, with liberty for the Court of Law to adopt their opinion.

A Court of Law is confined strictly to the case sent for its opinion.

*Semble*—They are not, as a Court of Law, bound to take notice of what the Ecclesiastical Law on a matter is.—*Hogg v. Garrett*, 3 Dr. & War. 294; 2 Con. & L. 197. (C.)

12. Ptf. *held* entitled to a decree, without an issue at Law, after three trials, and an admission, in the last trial, of the principal disputed fact.—*O'Sullivan v. M'Sweeney*, 2 Con. & L. 486. (C.)

1. The Court will not direct an issue when the question to be tried is, whether a *presumptio juris* has been sufficiently repelled, particularly when there is not much parol evidence.—*Piers v. P.*, 2 H. L. Cas. 383; 13 Jur. 569.—[Rev. 10 I. E. R. 340.]

2. In a suit to recover an ancient rent, the evidence not clearly defining the lands liable, an issue was directed to ascertain the precise lands chargeable with it.—*Archbishop of Dublin v. Lord Trimleston*, 12 I. E. R. 251. (C.)

3. Though the statute, under which proceedings are taken, does not empower the Court to direct an issue or an enquiry touching the facts—*Semble*, that the Court will, to satisfy itself, exercise by either of these methods its inherent jurisdiction.—*Lahiffe v. Gregory*, 4 I. Jur. 97. (C.)

4. Serious questions of fact cannot be satisfactorily determined by the Court in a proceeding by cause petition, without directing an issue.—*Kelly v. Birch*, 3 I. C. R. 478; 7 I. Jur. 78. (C.)

5. The Court will not direct an issue on an allegation by a deft. or respondent, that a person, when he executed a deed, was insane, without any evidence in support of it; as the presumption is in favour of sanity, more especially when there is *prima facie* evidence of sanity, *e. g.*, acting on the deed for a number of years.

In 1822, a reversion and rent were assigned. The rent was paid to the assignee of the reversion until 1846. A cause petition was filed by the assignee of the reversion to administer the lessee's assets. By the discharge it was alleged that the assignor was insane when he made the assignment. *Held*, that the respondent could not require an issue unless evidence was given in support of the allegation.—*Long v. L.*, 4 I. C. R. 106; 7 I. Jur. 81. (B.)

6. The conuzor of a judgment bequeathed all his personal estate specifically, and devised his lands to A. for life, remainder over, and appointed A. his executor, and charged the lands with payment of his debts. After the death of the conuzor, the judgment was assigned to a trustee for A., the assignment stating that it had been paid off out of the proper money of A. The trustee having filed a petition to raise the amount of the judgment out of the lands—*Held*, that the lands and the chattels specifically bequeathed were liable to contribute rateably to the payment of the judgment.

*Sed quare*—Whether the judgment, having been paid off by A., was a subsisting security at law, which could be assigned for his benefit?

*Held*, that the right to raise the judgment out of the lands depended on the legal right; and the Court directed an action at Law to be brought to try it.—*Mannix v. Coates*, 5 I. C. R. 142. (R.)

7. A., entitled to a portion of lands held for lives renewable for ever, under a lease of 1715, which had been renewed in 1787, made a lease for lives, with a covenant for perpetual renewal, to B., in 1795. A. afterwards assigned his interest to C. B. granted a rentcharge, and in 1816 devised his interest to his eldest son E., for life, remainder over. An ejectment was brought for non-payment of rent, in 1848. E. and his under-tenants were served with the ejectment, but none of the persons in remainder. E. gave consent for judgment. The last life in the renewal of 1787 died in 1835. A cause petition was filed in 1856 by the person entitled to the rentcharge, praying that the ejectment might be declared invalid, and for a renewal of the lease of 1795, against C.'s heir-at-law. *Held*, that E., and those entitled in remainder after him to the interest under the lease of 1795, were necessary parties to the suit.

*Semble*—That as E., during his life, represented the entire interest in the lease of 1795, and had given a consent for judgment, the eviction was valid.

But as the question as to the service of the ejectment was a legal question of difficulty, on which two Courts of Law had differed, the Court directed an ejectment to be brought notwithstanding the 22nd G. O. of 1857. *Held*, that if the eviction was valid at law, the petition should be dismissed.—*Phibbs v. Cooper*, 7 I. C. R. 422. (R.)

8. By letters patent of King Charles II, the fishery of the river of Galway from Lough Corrib to the sea was granted to P., under whom the petitioners claimed. The title of the Crown and its grantees to the fishery was deduced from the reign of King John. Acts of ownership, and convictions of persons who had trespassed on the fishery were given in evidence. The title of the petitioners had been established by the verdict of a jury in a prohibition suit at law to which some of the respondents were parties. The respondents admitted the right to a fishery in a part of the river, but contended that in other parts they and the public from time immemorial had exercised a right of angling; and they proved that for many years persons had been in the habit of angling in all parts of the river. The Court granted a perpetual injunction to restrain the respondents from fishing, without directing an issue or an action at law.—*Ashworth v. Browne*, 10 I. C. R. 421. (R.)

9. In a possessory suit issues may be directed.—*O'Neill v. M'Erlaine*, 16 I. C. R. 280. (R.)

10. The L. E. Court having made an absolute order to sell lands, two lessees of a portion claimed to hold under a lease for lives "renewable every thirty-one years after demise of said lives, at three grains of pepper-corn." This lease was impeached upon motion grounded upon (*inter alia*) affidavits of two experts, whose opinion was that the above clause had been interpolated after the execution of the lease. Hargreave, J., declined to grant an

issue, but declared that the lease, when executed, did not contain that clause. *Held*, (reversing that order), that an issue should be granted; because the law presumed that the clause existed when the lease was executed, unless the contrary was proved to a jury's satisfaction.—*Jones's Estate; Jones Montgomery*, 11 I. Jur. N. S. 366. (C.A.)

### LIII. 3. Issue: *Devisavit vel non*.

1. Counsel acting for a minor heir-at-law are justified in exercising their discretion whether or not he ought to take an issue of *devisavit vel non*?—*Knipe v. M'Mahon*, 4 Dr. & War. 295. (C.)

2. In cases relating to the devise of real estates, the Court intervenes only by reason of the existence of some impediment to proceeding at law, in order to have the rights of the parties submitted, by means of that intervention, to a legal issue before a jury. The Court cannot decide against the verdict of a jury, otherwise than by granting a new trial.

According to the earlier authorities, the Court would not bind the inheritance by one trial; but there is now no absolute rule requiring the Court as of course to grant a second trial of an issue *devisavit vel non*, unless it is satisfied that a second trial may afford more satisfactory grounds for the final adjudication between the parties.

Although, to sustain a case of fraud, and to show that a will has been made under coercion and influence, the evidence must be pointed to the very *factum* of the will, and directly show that the instrument the validity of which is disputed was executed under pressure of coercion and undue influence, the jury may, from circumstantial evidence, or from inference and presumption from such evidence, come to the conclusion that coercion and undue influence existed.

When the Judge who tried the case expressed himself not dissatisfied with a verdict in an issue *devisavit vel non*, finding against the will, and the Court concurred in the verdict, and no new evidence had been discovered, although some existed, which the party had not availed himself of, the Court refused to grant a new trial.—*Rosborough v. Boyse*, 3 I. C. R. 489; 6 I. Jur. 249. (C.)

8. When an heir-at-law files a bill to impeach a will (alleged to have been obtained by undue influence or fraud) of real estate, the Court of Ch. may, at its discretion, direct an issue *devisavit vel non*; or may merely remove obstacles which impede the heir in asserting his legal title.

The House of Lords will not interfere with the exercise of that discretion, unless it appears that injustice has been, or is likely to be worked thereby.—*Boyse v. Rosborough*, 2 I. Jur. N. S. 265. (H.L.)—[S. c., 6 H. Lds. Cas. 2.]

4. The Court may grant a new trial of an issue *devisavit vel non*, on the ground of misdirection by the Judge, though no exception was taken to his charge at the trial.—*Slack v. Busted*, 6 I. C. R. 1; 2 I. Jur. N. S. 93. (R.)

5. E., seized of lands subject to mortgages, devised them to T., in whom the mortgages became vested. *Held*, that the Court had jurisdiction in a suit instituted by the heir of E., praying the ordinary redemption relief and an issue *devisavit vel non*, to grant such an issue.—*Egmont v. Darrell*, 14 I. C. R. 564. (C.)

### LIII. 4. Practice on generally: Trial: Verdict: Proceedings on: its Effect.

6. When a Court of Equity directs an issue in a cause in which there are many parties, and selects some of them to conduct the trial, giving all leave to attend, all are bound by the result.

An order directing an issue "with the consent of all parties in the cause" is erroneous, so far as it purports to be with the consent of an infant party.

*Quare*—If the infant consents, is he bound?

But if the order for the issue was a right order to be made, if the infant had not consented, it is immaterial whether he ought to be bound by the consent or not, especially as he was relieved from the effect of the consent by being allowed, on coming of age, to make a new defence.

*Quare*—Is it clear on the authorities that an infant deft., in a case such as this, is entitled, after coming of age, to file a new answer, and make a new defence?—*Malone v. M.*, 3 I. E. R. 536; 2 Dr. & Wal. 491, 536; 8 Cl. & F. 179; West, 637.

7. The former practice as to striking juries is still to be followed, notwithstanding the C. L. P. Act (16 & 17 Vic., c. 113, sec. 112.)—that is, to bring the special jurors' list to the Master for the purpose of drawing the names to be inserted in the panel, the parties attending while the forty-eight names are being selected.—*King v. K.*, 6 I. Jur. 129. (C.)

8. When the debtor against whom proceedings have been taken, under sec. 104, answers to a good defence on the merits, and states facts from which the Court may infer that there is a serious question to be tried, the Court will not compel him to enter into a bond until after the time within which the action at law may be tried.—*In re M'Auley*, 8 I. C. R. 212. (B.)

9. When the Judge of the Court of Probate directs issues respecting testamentary papers, the Court of Appeal will not vary his order, merely on the ground that the issues directed do not exclude all consideration of questions at law.—*Newton v. N.*, 11 I. C. R. 239; 6 I. Jur. N. S. 1. (C.A.)

### LIII. 5. Taking pro confesso.

10. An issue directed, by consent, to be tried by civil-bill appeal.—*Harris v. Cullen*, 1 I. E. R. 90. (C.)

11. A lease, made before the Statute of Frauds, and now lost, being proved to have contained an agreement respecting the amount

of a fine to be paid, "upon the renewing of any life or lives," and having been seven times renewed, an issue was directed to try whether, at or before the making of the lease, there was an agreement for a lease for lives renewable for ever; and a second issue to try whether such lease contained any clause or covenant relating to a renewal, and independent of the stipulation touching the amount of fines.—*Nangle v. Smith*, 1 I. E. R. 119. (C.)

**LIV. JUDGMENT. See JUDGMENT—PRACTICE DECREE—PRACTICE, HEARING, &c.—PRACTICE, SUBPENA.**

**LIV. a. Landed Estates Court.**

[I. E. Court Act, 12 & 13 Vic., c. 77; L. E. Court Act, 21 & 22 Vic., c. 72.]

1. Jurisdiction.
2. Owner.
  - a. Who is.
  - b. His Rights, Liabilities, &c.
3. Petition, Preparing, Intituling, &c.
4. Sale, Order for: *Staying Proceedings on, Carriage of: Bidders: Re-sale.*
5. Service of Notice, Process, &c.
6. Abatement.
7. Incumbrancers.
  - a. Who are, &c.
  - b. Settling Schedule of.
8. Purchasers' Rights, Liabilities, &c.
9. Affidavits.
10. Costs.
11. Re-hearing and Appeal.

**LIV. a. 1. Jurisdiction.**

1. The Court is not bound to make an order for sale under the Incumbered Estates Act, if it would not decree a sale in a plenary suit.

Therefore, where by a deed between father and son, for large consideration from the son, his object being to preserve B. in the family, the lands of A. and B. were conveyed to a trustee in trust to sell A. in the first instance to pay off incumbrances and debts of the father; and as to B., subject to so much of the debts and incumbrances as should remain unpaid by the sale of A., in trust to raise a certain sum to pay the charges and incumbrances, and subject thereto to the father for life, remainder to the son in fee; the Court refused to make an order for the sale of B. on the father's petition, a part of A. remaining unsold.—*Ex parte Kennedy*, 11 I. E. R. 171. (R.)

2. Petition for a sale under the I. E. Act. A receiver was appointed. Motion that the Master, on an undertaking being lodged in his office, might set the house and lands, as the depreciation of property was so great, and the incumbrances amounted to £5600, on lands of which the rental was only £400, besides which an annuity affected them. Under those special circumstances the motion was granted, although the Legislature's intention was to bring the proceedings to as speedy a conclusion as possible.—*Ex parte Johnson*, 1 I. Jur. 182. (R.)

3. The Court refused to make an order on the petition when a decree had been obtained in the Court of Ch., declaring, in the absence of those interested in remainder, a deed fraudulent and void.

*Semle*—That in order to avoid clashing of jurisdiction, when a disputed suit is determined in a Court of Equity, as to one party, this Court will not entertain a petition when the question, as to parties not before the Court of Equity, must be tried in this Court *de novo*, and be as to them a new suit.—*In re Carr*, 2 I. Jur. 6. (I.E.C.)

4. The conuzor of a judgment being tenant for life of an estate in strict settlement, with ultimate remainder to himself and his heirs in tail male, a sale was refused. *Held*, that the above limitations, without even taking into account the effect of remaining intermediate uses, did not coalesce, within the meaning of the rule in *Shelley's case*, so as to constitute the respondent an owner of land within the 54th sec. The Court has not jurisdiction to convert defeasible into absolute titles.—*In re Whalley*, 2 I. Jur. 7. (I.E.C.)

5. Selling under proceedings as against some of the owners.—*In re Bodkin*, 2 I. Jur. 14. (I.E.C.)

6. A suit was instituted in the Court of Ch. for the sale of lands, and a petition presented in this Court for a sale of the same lands, a portion of which was not within the jurisdiction of the Commissioners. They ordered a sale of the lands within their jurisdiction, and granted a certificate that it would be for the benefit of all parties that the cause should proceed as to the portion which was not within their jurisdiction.—*In re Biggs*, 2 I. Jur. 28. (I.E.C.)

7. The owner showed as cause against a conditional order to sell, that he was improving the estate for the purpose of a sale; that the improvements would greatly increase the value; and further that, property being depreciated, the estate would sell at a gross under-value. Cause disallowed with costs, though a large majority of the creditors supported the application.—*In re The Earl of Portarlington*, 2 I. Jur. 45. (I.E.C.)

8. When a portion of the premises was intermixed with other premises, which the Court had not jurisdiction to sell, the Court refused to make the conditional order absolute, as to those premises which were intermixed, and over which they had jurisdiction.—*In re Cairncross*, 2 I. Jur. 69. (I.E.C.)

9. When, by a fatality, no notice was served to make absolute the conditional order, and cause had been allowed under the 68th G. Rule, the Court, on application by the petitioner in a proper case, made a new conditional order; cause to be shown forthwith.

It is the practice of this Court to allow affidavits to be used in reply, unless the

opposite party be thereby surprised; in which event the case will be allowed to stand for rebutting affidavits.

An agreement had been entered into by petitioner and respondent, whereby the petitioner was appointed for one year to receive the rents as attorney for the respondent. He distrained for rent after the period for which he was appointed had expired, the respondent being himself then entitled to recover them. It was stated that, in consequence, the respondent was unable to get in the rents, which were his sole means of keeping down the interest of charges for which the petition for a sale was presented. *Held* that this was not a sufficient cause.—*In re Wall*, 2 I. Jur. 92. (I.E.C.)

1. When a mortgage deed contains a clause that if the rent is three months in arrear the mortgagee shall have power to sell, it is not cause against a conditional order for sale, that a receiver had fraudulently so mismanaged the property as to allow the interest on the mortgage to fall in arrear.—*In re Lane*, 2 I. Jur. 93. (I.E.C.)

2. A sub-lease, containing a *t. q.* covenant for renewal of lands held under a bishop's lease, though the sub-lessee may obtain the fee under the Church Temporalities Acts (3 & 4 W. 4, c. 37, and 6 & 7 W. 4, c. 99), is not a church-lease within the 12 & 13 Vic., c. 77, s. 54.

Such a lease, being a lease for an absolute term of years, with a covenant for perpetual renewal, is a perpetuity within that sec.

If there be a doubt as to the jurisdiction of the Commissioners to sell the land or lease included in the petition, they will not order a sale, though their opinion be in favour of the right to sell.

When the lease is not one of the classes mentioned in the 12 & 13 Vic., c. 77, s. 54, were the Commissioners to sell, their decision might not be conclusive, and the purchaser might be evicted by judgment of a Court of Law.—*In re Slacks*, 2 I. Jur. 157. (I.E.C.)

3. Though the Court can sell property in lots under the 12 & 13 Vic., c. 77, s. 24, it has not jurisdiction under the 37th sec. to apportion the head-rent between the several lots, unless the petition seek only a sale of part of the lease, or show a *bona fide* intention to sell a part only.—*In re Wrixon*, 2 I. Jur. 167. (I.E.C.)

4. This Court will not sell land for the purpose of paying off the arrears of a *f. f.* rent payable thereout.—*In re Tipping*, 2 I. Jur. 172. (I.E.C.)

5. When one undivided moiety was held by the respondent in fee, lessee for life of the other moiety, the Court refused an application on behalf of the respondent to sell, under the 12 & 13 Vic., c. 77, s. 36, his life interest in the second moiety.—*In re Synge*, 2 I. Jur. 175. (I.E.C.)

6. The Court will not sell discharged of a dower, when a decree in the Court of Ch. for sale of the lands contained no direction to sell discharged of it.—*In re Thornhill*, 2 I. Jur. 212. (I.E.C.)

7. In 1806, T. mortgaged D. and K. in fee to F., to secure moneys (and interest thereon) advanced by F., who, in 1826, filed a bill to raise the amount; but omitted all mention of K. In 1830, a final decree ordered a sale of D.

By indenture of 1836, and various mesne assignments, D., with all the benefit of the decree, became vested in the present petitioner, who, in 1837, filed a bill to carry the decree into execution. A final decree for sale was made in 1844. A receiver under the Court had been in possession of D.; but K. had always remained in the owner's possession.

The petitioner, these facts having been proved, moved to make absolute the order to sell K.; but the cause shown was allowed, with costs.—*In re Davis's Estate*, 3 I. Jur. 143. (I.E.C.)

8. Under the 37th sec. of the I. E. C. Act the Court has a discretionary power to apportion the head rent; but will not exercise it unless satisfied that the landlord will, not only suffer no loss, but be put to no serious inconvenience.

*Semble*—The spirit of the sec. is, that the Court shall apportion "head rents," and not "rack rents."—*In re Hughes's Estate*, 3 I. Jur. 152. (I.E.C.)

9. A bond, with warrant of attorney, was given to secure money. On the bond the parties endorsed that, although it was made payable in twelve months, the creditor agreed to accept payment by instalments until the whole debt, with interest, should have been discharged; but if any instalment should not be paid as therein specified, "or within the space of two months respectively, provided demand thereof should be previously made by the said, &c.; or upon such demand being made after the expiration of said two months, then this agreement to be wholly null and void."

A small arrear became due. It was very difficult to serve the owner with notice, as he was absent from Ireland. A petition to sell property omitted all mention of the endorsement. These facts were shown as cause against making absolute the order for sale. *Held*, that the property should be sold.—*In re Rogers's Estate*, 3 I. Jur. 192. (I.E.C.)

10. When a lease, manifestly under the value, was made, which the Court felt bound to sell discharged of, they sold subject to the sub-lease, directing the tenant to attorn to the purchaser.—*In re Darcy*, 3 I. Jur. 404. (I.E.C.)

11. When lands are under the receiver of the Court of Ch., this Court is unwilling to grant an injunction against waste, unless an immediate remedy appears to be called for. If the

case is not urgent, the application should be made to the Court of Ch.—*In re Brabazon*, 4 I. Jur. 100. (I.E.C.)

1. The Court has not jurisdiction to sell lands held for three lives or 99 years, whichever should last the longest.—*In re Assignee of Fuller*, 4 I. Jur. 183. (I.E.C.)—[See Digest, p. 30, 5 I. Jur. for this case. *Quære* page in 4 I. Jur.]

2. When there were prior and puisne incumbrances affecting the inheritance, and an annuity of intermediate priority affecting only the life estate, the Court referred it to the Commissioner in Chamber to value and ascertain, and direct that a portion of the estate might be sold sufficient to discharge the prior incumbrances; such lands to be sold discharged of the annuity; and declared that the residue should be sold subject to such annuity.—*In re St. George*, 4 I. Jur. 183. (I.E.C.)

3. In 1853, A. purchased lands at a sale in the I. E. Court. The conveyance purported to give him the fee and inheritance of 1085 acres of the lands of B., described by reference to a map annexed to the conveyance, and in exact conformity with the rental, subject to a lease for lives renewable for ever. In 1854, A. purchased, likewise, at a sale in the I. E. Court, the lessee's interest in B., which the Commissioners conveyed to him as "the lands expressed to be demised by a certain lease," with the exception of 90 acres demised by a later lease. The conveyance purported to give 1085 acres. The late lessee, in the matter of whose estate the interest in the lease had been sold refused to give the purchaser possession of 45, part of the 1085 acres, on the ground that they were comprised in the 90 acres excepted in the conveyance. Commissioner Hargreave having refused an application for an injunction to put the purchaser into possession of the 45 acres, A. brought his ejectment on the title, and a verdict was found against him. The verdict was set aside by the C. P., on the ground of misdirection. A second trial was had, with a similar verdict; and, a bill of exceptions having been taken, the exceptions were allowed by the same Court, on the ground that A. was entitled to the 45 acres in dispute, if they were not comprised in the later lease. *Held*, that the Court would not interfere to prevent the legal operation of their own conveyance; and that, without deciding the question of jurisdiction, such jurisdiction, if it existed, should be used most sparingly.

*Semble*—When the purchase is infected with fraud, the equitable jurisdiction of the Court will attach to restrain the purchaser from profiting by his fraud.—*In re Gould's Estate*, 2 I. Jur. N. S. 387. (I.E.C.)

4. The Court has not jurisdiction to order a party to repay a sum over-paid to him, if the payment was made out of Court.—*De Chabot's Estate*, 6 I. Jur. N. S. 142. (I.E.C.)

5. Although the L. E. Court cannot act in opposition to, but is bound by, a final decree

in Ch. (*In re Lanauze*, 11 I. E. B. 19), yet when that decree has prejudiced the rights of minors, the L. E. Court will retain the purchase-money to enable them to obtain redress in Ch.—*In re Hunt's Estate*, 11 I. C. B. 299; 6 I. Jur. N. S. 163. (L.E.C.)

6. The Court will not sell a right of way of which the existence is not clearly proved. When it is disputed, the alleged owner must establish it by an action at law.—*In re Hoare's Estate*, 6 I. Jur. N. S. 183. (L.E.C.)

7. The Court will not permit a married woman to dispose of any reversionary interest to which she may be entitled in a fund in Court.—*In re Mahon*, 6 I. Jur. N. S. 184. (L.E.C.)

8. The Court will not sell when the owner<sup>a</sup> is not in possession of the lands, nor is any party deriving under him. The owner must, by action at law or otherwise, recover the possession before an order for sale will be made, or a petition entertained.

The Court will not sell the lands subject to an under-lease, when the lessee is not in possession thereunder.

A like practice prevails as to incorporeal hereditaments, rights, and easements.—*In re Hendrick*, 6 I. Jur. N. S. 242, 243. (L.E.C.)

9. A tenant, A., claiming a lease of lands part of this estate, and not being in possession, the Court refused to recognise the lease, stating that A. must first recover possession at law.

To an action of ejectment then brought, defence was taken, as to part of the lands, by two other tenants on the estate. No defence was taken to the residue. For the residue, A. marked judgment. On his motion, the Court allowed the lease as to that portion; but *held* that, not having defended the action was a breach of duty by the solicitor for the petitioner; and that he would be liable for the loss sustained by the estate, if the creditors applied to that effect.—*In re Ronayne's Estate*, 6 I. Jur. N. S. 318. (L.E.C.)

10. Lands subject to heavy charges were settled, A. being made tenant for life. He incumbered the life estate. A puisne creditor filed a petition for sale. A. and the prior creditors showed cause against the order for sale; questioning the Court's jurisdiction. *Held*, that it had jurisdiction to sell, and would sell, protecting the interests of the prior life estate creditors so far as possible, and giving the owner an opportunity to relieve the fee from incumbrances, before the sale of the life estate.—*In re Earl of Limerick's Estate*, 7 I. Jur. N. S. 65. (L.E.C.)

11. A tenant for life of freehold estates, with power to appoint amongst his children, devised the estates to trustees to sell, and to divide the price among the children in specified shares. Order for sale granted upon the petition of the trustees.—*In re Blackley's Estate*, 7 I. Jur. N. S. 68. (L.E.C.)

1. A lessee in a perpetuity lease mortgaged his interest by assignment. Subsequently in 1831 mortgagor and mortgagee demised a part to C. for lives renewable for ever, at a yearly rent of £6, which was expressly reserved to the mortgagor; and afterwards, in 1836, demised the whole in perpetuity to D. at £55 rent, saving the existing under-leases. C. paid no rent from 1839. In 1861 D. brought ejectment to recover the rent; but failed, as the rent was reserved to the mortgagor, who had no estate at law.

The Court ordered D.'s interest to be sold, and the petitioner sought to sell it subject to C.'s lease. C. objected; because the rent, being reserved to the mortgagor, was a mere rentcharge, barred by non-payment for over twenty-years; because on the true construction of the deed of 1836 the reversion expectant on the lease of 1831 did not pass to D. Because even if the reversion passed, the rent did not pass, it not being a rent-service incident to the reversion, but a mere rentcharge requiring a separate grant, and the deed of 1836 contained no mention of the rent. *Held*, that the rent, though reserved to the wrong person, was reserved by lease for the use and occupation of land, and continued payable as long as that use and occupation under the lease continued; and that C., the tenant, could not in the L. E. Court raise the question of construction on the deed of 1836, that question of title being for the Court alone.

The tenant cannot look farther than is necessary to preserve his lease, nor do more than insist that the lands, if sold, shall be sold subject to his lease; but has no right to question the Court's jurisdiction to sell the lands.—*In re M'Auley's Estate*, 7 I. Jur. N. S. 414. (L.E.C.)

2. The L. E. Court has power to sell the interest created by a lease containing a covenant against assignment, when the lease has been deposited by way of equitable mortgage.—*Ex parte Domville*, 14 I. C. R. 19. (C.A.)

3. An order for the sale of lands having been made, the owner accepted a private offer, "subject to the approbation of the Court," but subsequently discovering that the yearly rental of the lands in respect of which the offer had been made, had been considerably undervalued, sought to have the approbation of the Court withheld. Whereas the proposer sought to be declared the purchaser of the lands, or at least to have their sale postponed, there being other lands ordered to be sold in the same matter, which were adequate to discharge the incumbrances. *Held*, that this was not a case in which the Court had power to enforce specific performance, but would exercise its discretion to postpone the sale of the lands upon the express understanding that *bona fide* proceedings should be instituted upon the private contract.—*In re Tottenham's Estate*, 15 I. C. R. 308. (L.E.C.)

4. A., entitled to a leasehold and fee-simple estates, devised the latter upon trust for his eldest grandson, B., for life, if he attained

twenty-three; remainder to his sons in tail. If B. should not attain twenty-three, then upon trust for whichever of A.'s younger grandsons first attained twenty-three, for life; like remainder to his sons; remainder over. Having directed payment out of his leasehold estates of several legacies and annuities, A. bequeathed his residuary estate (which included his leasehold estates) to his seven younger grandsons, share and share alike. B. attained twenty-three, and died in 1849 without issue. By deed, reciting that A., by will, after devising several legacies, had bequeathed the residue of his property, comprising (among others) leasehold interests, to his seven youngest grandsons; and that C., one of them, was entitled thereunder to a seventh share of A.'s residuary estate, consisting (among others) of the lands thereinafter mentioned; C. granted D. all his seventh share of A.'s residuary estate, and in particular all his estate and interest in his seventh share of the leasehold estates (which were specified), "and all the estate and interest of him, the said C., therein, or in any other lands which were part of the residuary estate of" A., unto D., his heirs, &c. *Held*, that C.'s contingent reversionary interest in the fee-simple estates passed thereunder.

E., another of A.'s grandsons, the solicitor employed to prepare that deed, purchased D.'s interest thereunder; and bought from his other brothers their respective shares in A.'s residuary estate. A judgment creditor of E. presented to the L. E. Court a petition to sell E.'s lands, including the fee-simple estates devised by A. *Semble*—That the Court had not jurisdiction to declare that C.'s reversionary interest in the fee-simple estates did not, by reason of E.'s fraud in preparing that deed, pass under it.—*In re Rorke's Estate*, 9 I. Jur. N. S. 409. (C.A.)

5. On the 19th April 1864, the Court of B. & I. granted protection from process to the person and property of K., a trader, unable to fulfil his engagements with his creditors. On the 21st April, that order being still in force, and K.'s property being in possession of the Off. Ass., R., a creditor who had full notice of the previous proceedings, entered judgment against K. in an action commenced before the 19th April. On the 23rd April, R. registered that judgment as a mortgage. On the 14th June, K.'s proposed composition was accepted by his creditors, and approved by the Judge. On the 11th October, the arrangement proceedings not having been finally completed, R. petitioned the L. E. Court to sell the lands mentioned in the judgment-mortgage. The conditional order to sell was made absolute in Jan. 1865. *Held*, that since the estate was in the Off. Assignee's possession and under the protection of the Court of B. & I., at the time when the judgment was registered as a mortgage, it was premature to make absolute the order for sale while the arrangement proceedings were still pending.

That absolute order was therefore set aside, without prejudice to R.'s right to renew his application to the L. E. Court to make

absolute the conditional order; and R. was given liberty to apply, so soon as the Court of B. & I. should have determined K's application for a certificate.—*In re Kennedy's Estate*, 17 I. C. R. 104. (C.A.)

1. A policy of insurance on A.'s life was assigned as collateral security for money secured by mortgage of A.'s lands, which were subsequently sold in the L. E. Court. The policy having been for some time kept up out of the rents and profits of those lands, the L. E. Court ordered it to be sold for the benefit of A.'s unpaid creditors. *Held*, that the L. E. Court had jurisdiction to make that order.—*In re Lynch's Estate*, 17 I. C. R. 113; 10 I. Jur. N. S. 17. (C.A.)

LIV. a. 2. *Owner.*

a. *Who is.*

b. *His Rights, Liabilities, &c.*

2. When the owner is himself in possession of a portion of the land sought to be sold, on showing cause, under the 22nd sec., that half the net yearly income of such land or lease exceeds the interest of the incumbrance, the Court will allow him an occupation rent.—*In re O'Hea*, 2 I. Jur. 111. (I.E.C.)

LIV. a. 3. *Petition: Preparing, Intituling, &c.*

3. When there exists doubt as to the owner, the petition should be specially entitled in the names of those in whom the property appears to be vested.

When the petition is prepared with insufficient care respecting the title of the owner and the description of the lands, leave to amend will not be given: the petition will be dismissed.—*In re Kennedy*, 2 I. Jur. 122. (I.E.C.)

4. When there is doubt as to the owner, the petition should be specially entitled in the names of the parties in whom the property appears to be vested.

When there is not sufficient care in the preparation of the petition as to the title of the owner and the description of the lands, leave will not be given to amend; but the petition will be dismissed.—*In re Bourke*, 2 I. Jur. 122. (I.E.C.)

5. *Quare*—If there has been no laches on the applicant's part, will the I. E. Court dismiss, under the 12 & 13 Vic., c. 77, s. 18, a petition presented before the arrival of the time limited by the Court of Ch. for payment of a sum, on non-payment of which the bill in that Court was directed to stand dismissed with costs?—*In re Ashe*, 2 I. Jur. 186. (I.E.C.)

6. A petition was filed to sell premises, the subject of proceedings in the Bankruptcy Court, but did not rely on the order to sell made by that Court. This Court refused to transfer the proceeds of the sale here to the assignee, until the specific incumbrances

had been discharged.—*Welply v. M'Namara*, 6 I. Jur. N. S. 47. (L.E.C.)

7. A dismissed petition cannot, even by consent, be reinstated. A new petition must be presented.—*In re Balfé's Estate*, 6 I. Jur. N. S. 47. (L.E.C.)

LIV. a. 4. *Sale, Order for; Staying Proceedings on; Carriage of; Bidders; Re-sale.*

8. The owner of three classes of estates obtained a conditional order to sell the entire.

Another petitioner, whose incumbrance affected only one class, moved to make absolute his conditional order for sale. The Court stayed all proceedings on his petition; but gave him his costs; the owner undertaking to prosecute his petition with effect.—*In re Green*, 2 I. Jur. 28. (I.E.C.)

9. Two suits were instituted in Ch. In the first the ptfs. in the second suit were defts., and in it their rights might have been fully ascertained. The second suit was plainly unnecessary, and was expensively conducted. The ptfs. in the second cause having presented a petition for a sale, the Court, on application by the owner, who had also presented a petition, gave the carriage of the proceedings to the ptf. in the first cause, though not properly before the Court.—*In re Wall*, 2 I. Jur. 44. (I.E.C.)

10. When, on a motion to show cause, neither the party showing cause nor the petitioner appears, the party serving the notice is at liberty to enter a side-bar rule allowing the cause.—*In re Foster*, 2 I. Jur. 132. (I.E.C.)

11. The practice of the I. E. Court is to recognise only the actual bidder, when he bids in his own name. When he bids, with consent, in another person's name, the Court holds both accountable, unless the bidder has previously declared to the Court that he bids only as a trustee.—*In re Stirling's Estate*, 3 I. Jur. 229. (I.E.C.)

12. A sale by one Commissioner is always subject to a motion to the Full Court against its confirmation. If no such motion is made, the conveyance executed by two Commissioners is the final confirmation.

The solicitor having the carriage of the proceedings is entitled to his costs, in any motion relating to the confirmation of the sale; but, unless his conduct is impugned, he will not be allowed the costs of counsel.—*In re the Earl of Kingston's Estate*, 3 I. Jur. 404. (I.E.C.)

13. The owner employed an improper person to bid. The bidder failed to lodge earnest money; and another person was declared purchaser. The owner satisfied the Court that the bidder had been *bona fide* instructed to bid. Thereupon the Court directed the property to be re-sold upon the terms of the



owner lodging within one week £1000, and undertaking to bid £9000, and pay all the declared purchaser's costs and expenses.—*In re Waller*, 4 I. Jur. 15. (I.E.C.)

1. Motion by the owner to effectuate an agreement to sell the lands for a sum which would leave payable to him a balance of £1000, after satisfying all incumbrances; and to transfer the carriage of the proceedings from the petitioner to the owner's solicitor. No interest was due.

Motion granted; petitioner's costs already incurred to be paid.—*In re Bryan*, 4 I. Jur. 76. (I.E.C.)

2. The Court will direct the petitioner to assign his securities on being paid principal and interest before the sale, a sufficient undertaking to pay the costs of the proceedings being given; but the carriage of the proceedings will not, as of course, be thereupon transferred to the owner. The Court will direct the matter to be entered in the chamber list, to consider who is the proper party to have the carriage of the proceedings.—*In re Kearney's Estate*, 6 I. Jur. N. S. 89. (L.E.C.)

3. Lands sought to be partitioned are not liable to duty when they form the subject of a petition for sale under the Act, or when they have previously been sold by the Court. A conveyance from the Court to a purchaser, under the 47th section of the Act, is considered equivalent to a sale.—*In re De Moleyns' Estate*, 6 I. Jur. N. S. 112. (L.E.C.)

4. When the estate is charged with an annuity, subsequent creditors have a right to have the estate sold subject thereto; but if it is sold discharged therefrom, the Court will direct the annuity to be valued so as to release the funds for payment of subsequent charges.—*In re Walsh's Estate*, 6 I. Jur. N. S. 165. (L.E.C.)

5. A creditor has a right to summon, by motion in chamber, the solicitor having the carriage of the proceedings, before the Judge, to account for any apparent delay; but that motion should not be mixed up with a motion for the carriage of the proceedings on the ground of delay.—*In re Tibeau*, 6 I. Jur. N. S. 243. (L.E.C.)

6. A motion for the carriage of the proceedings cannot be made before an absolute order to sell has been pronounced.

There being a large arrear of interest due on the petitioner's demand, the Court refused to transfer the carriage of the proceedings to the owner.

Such interest being in arrear, the Court will not grant to the owner, as against the petitioner, any indulgence.—*In re Tottenham's Estate*, 7 I. Jur. N. S. 87. (L.E.C.)

7. The solicitor having the carriage of the proceedings is the only person who can take any active steps towards the sale in a matter,

unless the Court in any particular matter directs otherwise.—*In re Frewen's Assignees*, 7 I. Jur. N. S. 88. (L.E.C.)

8. A petition for specific performance of a contract to sell an estate does not prevent a creditor on the estate from filing a petition for sale to realise his debt, since the proceedings in the former case will not necessarily eventuate in payment of the debt.

When there is unnecessary delay in a proceeding to carry into effect a contract for sale of lands, the incumbrancer's remedy is, to file a petition for sale to pay off his incumbrance.

The practice adopted in an ordinary case of a petition to sell, of applying for carriage of the proceedings, there being unnecessary delay, appears to be inapplicable to the case of a petition to carry into effect a contract for sale.—*In re Fenton's Estate*, 7 I. Jur. N. S. 161. (L.E.C.)

9. An estate, to which equities were attached, was sold discharged therefrom, in the I. E. Court.

Judge Dobbs refused, with costs, an application to set aside the sale, though no conveyance had been made. *Held*, that the application should have been granted.—*In re Devereux's Estate*, 10 I. Jur. N. S. 101. (C.A.)

10. The L. E. Court made an absolute order to sell leasehold premises on a petition presented by a judgment mortgagee, who had registered the judgment as a mortgage, at a time when the estate, of which the premises formed a part, was in possession of the official assignees, and under the protection of the Court of Ch. *Held*, that the order for the sale should be set aside.—*In re Kennedy's Estate*, 10 I. Jur. N. S. 213. (C.A.)

#### LIV. a. 5. Service of Notice: Process, &c.

11. Service of a conditional order for sale having been substituted by leave of the Court on the attorney of the principal owner, who had left the country, the Court appointed a guardian on whom service might be substituted for minor owners who also were out of the country, and whose interest was the same as his.—*In re Purcell*, 2 I. Jur. 14. (I.E.C.)

12. A notice to show cause should state plainly the matter intended to be relied upon as cause, and not refer merely to a bill, answer, and decree filed in a particular suit.—*In re Knox*, 2 I. Jur. 147. (I.E.C.)

13. A purchaser professing to reside in England, and failing to complete his purchase, a conditional order for an attachment was granted: to be made absolute if the price was not paid before a specified time.

A letter directed to the professed address was returned through the Dead Letter-office, but the real address was unknown. Publication of the conditional order in an Irish newspaper, and in an English paper circulating in the neighbourhood of the professed residence,

deemed good service of the order.—*In re Wall's Estate*, 3 I. Jur. 191. (I.E.C.)

1. When funds are realised by a sale directed by this Court, the mortgagee cannot insist upon his common law right to receive six months' notice.

*Semle*—The proceedings in this Court will be deemed to constitute such notice.—*In re Lighton*, 4 I. Jur. 35. (I.E.C.)

2. The Court refused a motion to rescind a side-bar order, obtained under the 18th Gen. Rule, allowing the cause shown against a conditional order for sale, the notice to set aside not being served till nearly two months after the side-bar order was obtained.

Such an order will not be rescinded unless notice of motion for that purpose is served immediately on the petitioner's solicitor becoming aware of the order.—*In re Finlay's Estate*, 7 I. Jur. N. S. 389. (L.E.C.)

3. Liberty must be obtained before notice of a re-hearing is served.—*In re Johnstone's Estate*, 7 I. Jur. N. S. 36. (L.E.C.)

#### LIV. a. 6. *Abatement.*

4. When a petitioner dies, and there is no person before the Court in a position to represent the deceased, the Court will not continue the proceedings under the 12 & 13 Vic., c. 77, s. 39.—*In re Smith*, 2 I. Jur. 175. (I.E.C.)

#### LIV. a. 7. *Incumbrancers.*

- a. *Who are, &c.*
- b. *Settling Schedule of, &c.*

#### LIV. a. 7. a. *Who are Incumbrancers, &c.*

5. The lands in this matter were conveyed by a deed (executed by the owner, and one of the creditors), upon trust (among other things), to collect the rents, &c., and thereout to pay the interest and principal, as therein mentioned, to the scheduled creditors. *Held*, that such creditors are "incumbrancers" within the meaning of the Incumbered Estates Act; and that such lands are under a "receiver" within the meaning of the 22nd sec. of that Act.—*In re Roche's Estate*, 3 I. Jur. 409. (I.E.C.)

6. Mortgagees and petitioners moved for a conveyance of the estates (which had not been offered for sale, or advertised) to them, in consideration of their demand. The Court granted the motion.—*In re Lane's Estate*, 4 I. Jur. 65. (I.E.C.)

7. When there are debts affecting the inheritance, a creditor, having a judgment affecting the life estate, is not an "incumbrancer" within the 12 & 13 Vic., c. 77; and is not entitled to present a petition to this Court to sell the inheritance.—*In re the Earl of Glengall's Estate*, 4 I. Jur. 65. (I.E.C.)

8. When there are several general creditors, and there is a surplus after payment of the specific charges on the estate, the Court will not, though the owner consent, entertain an application for a general administration of the estate; but the general creditors must proceed in Ch., and the fund will be retained in Court to give them an opportunity to do so.

When a claim is filed, and inserted on the final schedule as a specific charge upon the estate, but the claimant fails to prove it as a specific charge, the Court will not permit him to maintain his priority as a specific incumbrancer as against general creditors, even when no objection has been filed to the claim.—*In re Assignee of Bateman*, 6 I. Jur. N. S. 162. (L.E.C.)

9. A creditor has a right to summon, by motion in Chamber, the solicitor having the carriage of the proceedings, before the Judge, to account for any apparent delay; but that motion should not be mixed up with a motion for the carriage of the proceedings on the ground of delay.—*In re Tibeando*, 6 I. Jur. N. S. 243. (L.E.C.)

10. A tenant, A., claimed a lease of part of the estate. Not being in possession, however, the Court refused to recognise the lease, stating that A. must first recover possession at law.

A. brought an ejectment. Two other tenants on the estate took defence for part of the lands which A. sought to recover. For the residue no defence was taken, and A. marked judgment for it. On his motion—*Held*, that the leases to that portion should be allowed.

*Held*, that, in not having defended the action, the petitioner's solicitor had been guilty of a breach of duty; and that he would be liable for the loss sustained by the estate, if the creditors made an application to that effect.—*In re Ronayne's Estate*, 6 I. Jur. N. S. 318. (L.E.C.)

11. When mortgaged lands form the subject of a petition for sale, and the day for repaying the mortgage money has not arrived, the mortgagee is entitled to have the lands sold subject to his mortgage; but the Court will not so sell them, if the redemption day is near, and the security is ample.

The mortgagee cannot, on this ground, show cause against the order for sale; the proper time for his intervention is, on the settlement of the rental before the Examiner.—*In re Burke's Estate*, 7 I. Jur. N. S. 35. (L.E.C.)

12. A petition for specific performance of a contract to sell an estate does not prevent a creditor on the estate from filing a petition for sale to realise his debt, since the proceedings in the former case will not necessarily result in payment of his debt.—*In re Fenton's Estate*, 7 I. Jur. N. S. 161. (L.E.C.)

13. A mortgagee proved under the arrangement clauses. The case having been turned into bankruptcy, his proof was—*Held*, not an

abandonment, but an establishment of his right; the mortgaged property having been valued, and credit given for its worth.

This does not contravene the L. E. Court rule, that a specific incumbrancer, proving in an arrangement matter as a general creditor, cannot afterwards claim in bankruptcy on foot of his specific charge.—*Re Wilson*, 7 I. Jur. N. S. 328. (B.)

1. The Court will not carry out a contract for sale entered into by the owner, when the charges on the lands exceed the purchase-money, unless the incumbrancers consent: 45th Gen. Rule.—*In re Cornwall's Estate*, 7 I. Jur. N. S. 388. (L.E.C.)

2. The affidavit to register a judgment as a mortgage thus described the lands:—"The lands of C., C., and K., situate in the baronies of A. and M., and county of L." *Held*, not a compliance with the 13 & 14 Vic., c. 29, because that Act requires that, when the lands are situate in two or more baronies, &c., the same shall be *distinctly* stated.

The affidavit stated the amount of the judgment to be £71. 15s. 9d., besides £6. 4s. 8d., costs. At the moment of filing the affidavit, the costs, though ascertained, had not been inserted in the judgment roll, a blank having been left for the costs, which was filled up after the filing of the affidavit. Therefore the roll was perfect when the motion was heard, and the affidavit accorded with the roll. *Held*, that the Court would not enquire into the intermediate state of the roll, since it had been perfected properly and in conformity with the Court's practice.—*In re H. Morrow's Estate*, 7 I. Jur. N. S. 403. (L.E.C.)

3. A judgment creditor on a life estate having procured the assignment of incumbrances on the fee, the tenant for life sought to enforce his right to redeem the latter as against his creditor. *Held*, that his creditor's right in this respect was paramount to his own.—*In re Cassan's Estate*, 15 I. C. R. 313. (L.E.C.)

#### LIV. a. 7. b. *Settling Schedule of, &c.*

4. On the final settlement of the schedule of incumbrances, the owner cannot object to the validity of an incumbrance included in the schedule to his petition for sale.—*Edgeworth's Estate*; *in re Davis*, 6 I. Jur. N. S. 10. (C.A.)

5. If the final schedule is not lodged, the judgment creditor, who has obtained the charging order, should file a claim based thereon; and give notice thereof to the debtor, and to the solicitor having the carriage of the proceedings.

If the schedule has been lodged but not settled, the creditor should serve a notice of motion to be heard on the hearing of the final schedule; that he be inserted in the schedule in his proper priority as a claimant on the sum coming to the judgment debtor.—*In re Read's Estate*, 6 I. Jur. N. S. 69. (L.E.C.)

6. An owner included, in the schedule to his petition to sell his estates, judgments as valid charges thereon. Upon the settlement of the final schedule—*Held*, that as the owner could not dispute their validity, so, his administrator and general creditors had no right to impeach them.—*In re Read and others*, 6 I. Jur. N. S. 161. (L.E.C.)

7. In a marriage settlement, a husband covenanted with his trustees, that his heirs, executors, &c., would, from his death, pay his wife a jointure of £40 a-year; and pay them £400 for the benefit of the children, if any. The husband became indebted to one of the trustees, who entered up judgment against him, and insured the husband's life for its amount. Upon sale of the trust-property—*Held*, that the assignee of that judgment was entitled to be placed upon the final schedule of incumbrances in priority to the settlor's wife and children; and that, in considering dealings between a trustee and his c. g. t., the length of time during which the trustee's acts have been acquiesced in with the knowledge of the c. g. t. is to be taken into account in favour of the trustee.

*Ennis v. Smith*, Jon. & Ca. 400, followed.

Evidence rejected by the Master in the early stages of a suit cannot be used upon appeal; nor can its rejection be questioned unless made a ground of appeal.—*In re McKenna's Estate*, 6 I. Jur. N. S. 330. (C.A.)

8. Four judgments affecting B.'s estate were purchased by A., his solicitor, for less than the amounts due thereon. Two of them were assigned to him by a deed in which B. joined. A. bought the third shortly after B.'s death; and the fourth while he had carriage of the proceedings in a suit to administer B.'s estate, sold in the L. E. Court. On settlement of the final schedule—*Held*, that A. could not stand thereon as a creditor in respect of the judgments for more than he paid, with interest, and the costs of the assignments.—*In re Johnstone's Estate*, 7 I. Jur. N. S. 36. (L.E.C.)

9. The owners of the K. and S. estates (held by the same title), having contracted to sell S., by private sale, filed a petition in the I. E. Court, to sell K. On the settlement of the final schedule, E., a mortgagee of both K. and S., filed an objection claiming to be entitled to priority to the L. & C. Bank. The I. E. Court overruled that objection. Its decision was affirmed by the Court of Appeal in Ch. Both decisions were subsequently reversed in the House of Lords.

Pending the decision in the House of Lords the contract for the sale of S. was abandoned, and the owners filed a petition for the sale thereof in the I. E. Court. On the final schedule of incumbrances, E.'s mortgage was postponed to the claim of the L. and C. Bank. E. did not file any objection, deeming it useless to do so, in consequence of the previous decisions, and pending the decision in the House of Lords.

After the decision in the House of Lords in his favour, E. applied to the L. E. Court to

have the final schedules in both matters amended, by inserting his mortgage in its proper priority. That Court refused so to amend the final schedule of the S. estate, on the ground that E. had filed no objection to that schedule. *Held* (reversing the decision below), that E. had an equity to have his objection to the schedule in the first matter treated as an objection to the schedule in the second matter, and that the latter schedule should be amended accordingly.—*In re Burmester's Estate*, 14 I. C. R. 48. (C.A.)

1. Upon a motion allowed to be made, after settlement of the final schedule of incumbrances in the L. E. Court, an order postponed an unregistered judgment to a registered deed, and to several intermediate registered judgments. Soon afterwards the owner of the unregistered judgment arranged with the owner of the registered deed, that the latter should withdraw his claim, and consent that the order should be rescinded. *Held* (reversing the decision of a Judge of the L. E. Court), that the order was not a final adjudication of the priorities of the parties, equivalent to a decree in Chancery; that it ought to be rescinded, and the priorities placed in the order in which they originally stood on the first schedule.—*In re Scott's Estate*, 14 I. C. R. 57. (C.A.)

2. A Judge of the L. E. Court has not jurisdiction to permit any party to file, after the specified time has expired, an objection to a final schedule of incumbrances.

An incumbrancer on the final schedule noticed a prior incumbrancer, claiming under a judgment mortgage, that, on the hearing of the final schedule, he would be required to produce proof of his judgment mortgage, and that it was duly registered so as to be a charge upon the lands.

The judgment mortgagees produced a certified copy of the affidavit made to register the judgment as a mortgage. The affidavit was right in point of form. No objection was filed. *Held*, sufficient proof of the validity of the judgment mortgage.—*In re Flood's Estate*, 17 I. C. R. 116; 11 I. Jur. N. S. 43. (C.A.)

#### LIV. a. 8. Purchaser's Rights, Liabilities, &c.

3. When the petitioner is a prior mortgagee over a property, and there is no probability of its ever paying him, and consequently, puisne creditors have no interest in it, the Court, on application, will convey it to the petitioner, treating him as mortgagee in possession, and giving him merely a parliamentary title.—*In re Joyce's Estate*, 4 I. Jur. 16. (I.E.C.)

4. When lands are sold under the L. E. Court, and the time for lodging the purchase-money is extended on the terms of the purchaser paying interest on the purchase-money from the time when it should have been lodged, he will be entitled to all rents accruing due after the date of the sale. If the tenants in such case have paid rents accruing due after the sale, to a receiver, previously appointed by an incumbrancer on the lands, the receiver

will be ordered to refund them to the tenants, and to have credit for the same in passing his next account, even though the order discharging the receiver was not served till after receipt of the rents.—*Hoops v. Kingston*, 5 I. Jur. 231. (R.)

5. *Semble*—When a purchase is infected with fraud, the Court's equitable jurisdiction will attach to restrain the purchaser from profiting by his fraud.—*In re Gould's Estate*, 2 I. Jur. N. S. 387. (I.E.C.)

6. Parties, acting in trust for themselves and others, were declared purchasers by the Commissioners. The purchasers did not enter any declaration of trust in the Commissioner's book, but it appeared to be well understood between the owner of the estate, upon whose petition it was sold, and the purchasers, that they were purchasers in trust merely. Several of the *c. q. trusts* declined to complete the purchase. The purchasers were unable to do so; and a conditional order for attachment was made absolute by the Commissioners in Chamber. Upon appeal from that order—*Held*, that the practice of the Court, which makes purchasers upon the Commissioners' books responsible for the amount of the purchase-money, must be upheld to the full extent.—*In re Knox's Estate*, 8 I. Jur. N. S. 202. (I.E.C.)

7. All charges on an estate having been satisfied, the residue of the funds was paid to the owner. It subsequently appeared that the purchaser was clearly entitled to compensation on account of an error in the rental. On discovery of the error, the purchaser applied to the Court, which ordered the owner to bring back the sum to which the purchaser was declared entitled.—*In re Pell's Estate*, 6 I. Jur. N. S. 88. (I.E.C.)

8. Notwithstanding that the purchaser resides near, and knows the lands, the Court will grant compensation for an error in the acreage; but will not give it for a misrepresentation as to value; though it might discharge him on that ground if the misrepresentation amounted to fraud.—*In re Egan's Estate*, 6 I. Jur. N. S. 90. (I.E.C.)

9. The Court refused to grant compensation for an error in the rental which had been corrected before the sale, when the correction had been published before, and notified by the Court at the sale.—*In re Browne's Estate*, 6 I. Jur. N. S. 142. (I.E.C.)—[*Affd.*: *ibid*, 328. (C.A.)]

10. A rental simply stated that there was a valuable corn-mill on the lands. The tenant, under the purchaser's notice to quit, carried away the water-wheel, going-gear, three pairs of stones, flour-dressing machinery, &c. The Court gave compensation for two pairs of stones, because the purchaser was entitled to assume that he would get the stones as a part of the mill; and the tenant, having put up those two pair, was entitled to remove

them. Compensation for the rest of the machinery was refused; as to part, because it formed portion of the freehold, and the purchaser should have prevented the tenant from removing it; as to the rest, because the Court had not any jurisdiction to sell it, and did not purport to sell it.

On a compensation motion, the Court will not allow the costs of creditors opposing the motion, out of the funds, when the estate is duly protected on the motion by the solicitor having the carriage of the proceedings.—*Clendinning v. Brett*, 6 I. Jur. N. S. 166. (L.E.C.)

1. A rental made no mention of an award in respect of drainage works made before the sale. The tenant, though primarily liable to pay the charge, had a clause of surrender at the end of every seven years. A sum was ordered to be retained in Court, and invested in government stock as an indemnity to the purchaser in the event of the tenant making default in paying the charge.

If the rental over-states a tenant's rent, the purchaser is entitled to compensation; which will not, however, be given for an error in the acreage, when the deficiency does not exceed one per cent. on the number of acres purchased.—*In re Browne's Estate*, 6 I. Jur. N. S. 185. (L.E.C.)

2. When a purchaser elects not to be discharged, but to apply for compensation, he must be content with the amount of his actual loss; and cannot complain of misrepresentation of value, which is only ground for discharge. In cases of over-statements of rents payable under tenancies from year to year, the Court taking into account the tenant's power to quit, allows a year and a-half's rent computed on the over-statement.—*In re Usher's Estate*, 9 I. Jur. N. S. 58. (L.E.C.)

3. One moiety of a f.-f. rent was put up for sale, but the purchaser misunderstood the description in the rental, and whilst bidding considered he was bidding for the whole rent, and not a half only. The Court having regard to the fact that the sum bid was manifestly excessive, discharged the purchaser on the terms of his lodging in Court a sum sufficient to meet the expenses of another sale, and undertaking to lodge any further sum the Court might require, and paying the owner's costs of the motion.—*In re Browne & Blackie's Estate*, 9 I. Jur. N. S. 59. (L.E.C.)

4. In converting a lease for lives renewable for ever, the L. E. Court will not make any substantial increase in the rent by reason of the commutation of the covenant giving the landlord the right of pre-emption.—*In re Jackson*, 11 I. C. B. 145. (L.E.C.)

#### LIV. a. 9. Affidavits.

5. It is the practice of this Court to allow affidavits to be used in reply, unless the opposite party be thereby surprised.

If the opposite party be thereby surprised, the case will be permitted to stand over to give an opportunity of making rebutting affidavits.—*In re Wall*, 2 I. Jur. 92. (I.E.C.)

6. When a supplemental affidavit, without the admission of which the ends of justice would have been frustrated, was sworn on the evening preceding the motion, the Court offered to let the motion stand over, in order that the affidavit might be used at the hearing, if its reception was objected to now.—*In re Bodkin's Estate*, 3 I. Jur. 101. (I.E.C.)

#### LIV. a. 10. Costs.

7. Petition under the I. E. Act. Motion that the solicitor who prepared it should be allowed a fee larger than the ordinary one, as the petition was of greater length than usual. The Court refused to give any direction; but concurred in Master O'Dwyer's opinion that a fee for counsel should be allowed on petitions under this Act, they being in the nature of pleadings.—*In re Darcy*, 1 I. Jur. 212. (R.)

8. The abstract of title to a petition stated, contrary to the fact, that a jointure was secured by a trust term; and the petition stated that a greater sum was due for arrears of jointure than was so really; the petitioner was declared disentitled to costs as against the fund.—*In re Purcell*, 2 I. Jur. 100. (I.E.C.)

9. If a married woman, having separate property, petitions under the 12 & 13 Vic., c. 77, s. 38, as a *femme sole*, her solicitor will be personally responsible for the costs of the proceedings.—*In re Knox*, 2 I. Jur. 147. (I.E.C.)

10. A motion was discharged with costs, which had not been paid when it was renewed. It was allowed to be moved upon the solicitor's personal undertaking to pay them.

Afterwards liberty to withdraw it was given, the solicitor making the costs a lien upon other costs due to him.—*In re Murphy*, 3 I. Jur. 105. (I.E.C.)

11. Motion allowed to be moved, though discharged upon a previous day with costs, which were still unpaid.—*In re Sweeny*, 3 I. Jur. 105. (I.E.C.)

12. The solicitor having the carriage of the proceedings is entitled to his costs in any motion relating to the confirmation of the sale, but will not, unless his conduct is impugned, be allowed the costs of counsel.—*In re The Earl of Kingston's Estate*, 3 I. Jur. 404. (I.E.C.)

13. This Court referred a case to the C. P. for the opinion of that Court upon a point of law.

The successful party now moved to be allowed the costs of two counsel upon the arguments in this Court and in the C. P., the case having been important.

The Court allowed the costs of one counsel here, and of two in the C. P.—*In re Whitsitt*, 4 I. Jur. 183. (I.E.C.)

1. A bill was filed against A. and B., and referred to the Master to ascertain the rights of parties, and to apportion the funds accordingly. He reported that on the 27th July 1819, there remained due to ptfs. in a previous cause, on foot of the demand therein decreed to them, a sum which, with post costs in said cause, amounted to the sum specified; and that for payment of said sum with subsequent interest, the funds mentioned in the decree in the present cause, as then remaining in the Bank of Ireland to the credit of the previous cause, were applicable. *Held*, that in the construction of this order the words "subsequent interest" did not apply to post costs.

That it is not open to counsel, upon appeal from the ruling of a Commissioner in Chamber, to argue questions which had not been raised below, or did not appear upon the notice.—*In re Brownrigg's Estate*, 2 I. Jur. N. S. 363. (I.E.C.)

2. When a petition is filed to sell an undivided share of any land, which is afterwards partitioned by order of the Court, the lien given by the partition order on the unsold portion for its proportion of the partition costs is a charge bearing interest at the rate of £5 per cent. per annum from the date of the order.—*Fox v. Wybrants*, 6 I. Jur. N. S. 165. (L.E.C.)

3. On a compensation motion, the Court will not allow, out of the funds, the costs of creditors opposing the motion, when the estate is duly protected by the solicitor having the carriage of the proceedings.—*Clendinning v. Brett*, 6 I. Jur. N. S. 166. (L.E.C.)

4. A prior creditor allowed proceedings to be carried on to a sale; showed no cause against the order for sale; and pressed the petitioner on to a sale. The Court allowed the petitioner the general costs of the proceedings in the first priority, although the funds realised by the sale did not extend to the petitioner's demand.

When the order is to sell a life estate, there being charges on the fee, the costs of the proceedings will not be allowed in a higher priority than the demand.

The rule has not been applied to the case in which the petitioner is the owner. He will be allowed his costs of the proceedings out of the funds, though no surplus remains after payment of the charges.—*In re Kennedy's Estate*, 7 I. Jur. N. S. 34. (L.E.C.)

5. Lien for costs claimed by solicitor, upon deeds lodged in Court, it not being intended to proceed with the petition for sale of lands. Notice of motion served by the solicitor for an order directing the keeper of the deeds to hand them back. *Held*, that the proper course would have been to have served notice of motion for an order declaring the solicitor entitled to a lien, and for liberty to file a claim setting forth the particulars to be vouched before the Examiner; and in event of the sum found to be due not being paid, for an order

to continue, and take the carriage of the proceedings.—*In re Kelly's Estate*, 9 I. Jur. N. S. 59. (L.E.C.)

6. When cause, shown by different parties, who represent but one estate, is allowed, the costs awarded are to be paid to the party who first shows cause.—*In re Greene's Estate*, 14 I. C. R. 325; 8 I. Jur. 348. (L.E.C.)

7. When an administrator has recovered a chattel interest in lands by a decree declaring his costs to be duly charged on the estate, his solicitor cannot file a petition in his own name to realise his own portion of those costs.—*In re M'Alister's Estate*, 16 I. C. R. 184. (L.E.C.)

#### LIV. a. 11. *Re-hearing and Appeal.*

8. It is not open to counsel, on appeal from the ruling of a Commissioner in Chamber, to argue questions not raised below, and not appearing in the notice.—*In re Brownrigg's Estate*, 2 I. Jur. N. S. 363. (I.E.C.)

9. A motion to re-hear an order or decision must be made within three months, and liberty must be obtained before notice of the re-hearing is served.

The application for liberty to re-hear may be made *ex parte*.—*In re Johnstone's Estate*, 7 I. Jur. N. S. 36. (L.E.C.)

LETTER MISSIVE. *See* LETTER MISSIVE.

MASTER. *See* OFFICERS OF COURT.

MASTER EXTRAORDINARY. *See* PRACTICE, OFFICERS OF COURT.

[Name changed to "Commissioners to administer Oaths in Chancery in Ireland," 30 & 31 Vic., c. 44, s. 75.]

LIV. MASTER, PROCEEDINGS BEFORE. *See* ACCOUNT, VIII.—PRACTICE, CHARGE AND DISCHARGE—PRACTICE, COSTS—PRACTICE, EVIDENCE — PRACTICE, STATE OF FACTS.

[Office of Master (except Receiver Master) abolished; 30 & 31 Vic., c. 44, ss. 27-51; Masters' powers transferred to the Judges; 30 & 31 Vic., c. 44, ss. 143, 144.]

10. The Master has jurisdiction to appoint a rent bailiff to assist the receiver, or a caretaker of plantations, if he conceives it for the benefit of the estate. The Court will not entertain such a motion.—*Newton v. Obre*, S. & Sc. 137. (R.)

11. The Master has not jurisdiction to tax costs under G. O. 201, except with the consent of both solicitor and client.—*Massy v. Millar*, S. & Sc. 425. (R.)

12. After decretal order, a third party coming into the Master's office by consent *pro interesse*

*suo*, and then requiring strict proof of a deed previously admitted, may, it seems, have an enquiry, and put the parties to strict proof; but at the peril of costs, if the deed be finally proved as admitted.—*Booth v. Purser*, 1 I. E. R. 40. (C.)

1. The Master has jurisdiction, under G. R. 185, to direct proceedings to be taken against a party who, having been let into possession by a minor's father, refused after his death to surrender the possession.—*In re Hunt*, Fl. & K. 276. (R.)

2. Under G. O. 201, the Master has jurisdiction to tax mere conveyancing costs between solicitor and client.—*Re Smith's Trustees*, Fl. & K. 627. (R.)

3. Under an order referring it to the Master to enquire and report the parties' rights to a surplus fund (residue of the purchase-money of deft.'s real estate, sold under the decree for non-payment of a charge by title paramount), and of all persons having any charge or lien affecting it (the Master publishing advertisements for that purpose), it appeared that the sum, if any, due to one of the claimants could not be ascertained without taking a long and complicated account. The Master was of opinion that the order of reference did not authorise him to take that account. He refused to take it. Pending the reference, the Court, on motion, ordered that the Master should be a liberty to take the account, and gave further directions on the subject.—*Sullivan v. Delany*, 6 I. E. R. 370. (R.)

4. The Master has jurisdiction, under G. O. 117, to transfer the carriage of the decree.—*Forbes v. Pearson*, 8 I. E. R. 35. (R.)

5. The Master has not jurisdiction to direct a receiver to proceed by civil-bill to recover arrears of rent.—*Hamilton v. Jackson*, 8 I. E. R. 581. (R.)

6. The respondent is not precluded from relying on the 3 & 4 W. 4, c. 27, s. 42, in the office, as a bar to more than six years' arrears of interest being recovered, though he did not rely on it in showing cause against the conditional order, and though the sum stated in the order was much more than the principal, with six years' interest.—*Costelloe v. Burke*, 2 Jon. & L. 665. (C.)

7. The Court must give credit to whatever the Master reports as having occurred in his presence.—*Walmsley v. W.*, 3 Jon. & L. 556. (C.)

8. After the report and final decree, the Court will, at the instance of the party having the carriage, permit judgment creditors concurring in the sale, to come in and prove their demands, with liberty to surcharge, and falsify the accounts already taken, it being for all parties' advantage, and to save the expense and delay of a supplemental suit.—*Clarke v. Jessop*, 10 I. E. R. 40. (R.)

9. The sanction of the Master is not necessary to a petition under the Ch. Reg. Act 1850, s. 11, when a party interested, but not a petitioner, is under any of the disabilities mentioned in that sec.

Whether the rights of persons under such disabilities should be bound adversely, must be considered in each case.

It is indispensable in every petition under that sec. that the documents relied on should be fully set out in the petition, or that copies of such documents should be furnished to the Court and the parties.

A petition under that sec. prayed a declaration of the invalidity of an appointment under a power, and of the validity of a subsequent appointment. *Held*, that the donee of the power and an appointee (a *femme covert*), whose husband was a party, were necessary parties.—*In re O'Reilly*, 1 I. C. R. 208; 3 I. Jur. 208. (C.)—[*See s. c.*, 1 I. C. R. 497. (C.)]

#### LVI. MASTER, REFERENCE TO: HIS REPORT AND CERTIFICATE. *See ACCOUNT.*

##### 1. *Reference to.*

a. *On what facts enquiry is made: when reference will be directed.*

1. *Generally, his Jurisdiction.*

2. *Respecting Infants, &c.*

3. *In Matters Testamentary.*

4. *Preliminary Enquiries.*

b. *Proceedings on.*

c. *Respecting Title.*

d. *Respecting Scandal, Impertinence, Insufficiency, and Prolixity.*

e. *Whether two Suits are for the same objects.*

f. *Whether the Suit is for Infant's Benefit.*

g. *To Appoint Guardian and Maintenance, Trustees, &c.*

h. *In Cases of Foreclosure and Redemption of Mortgage.*

##### 2. *Master's Report and Certificate.*

a. *Its Form.*

b. *Settlement and Signature of: their Effect.*

c. *Filing and Obtaining: in what time.*

d. *Review and Amendment of.*

e. *Confirmation of: its Effect.*

f. *Separate Report: what Acts may be done without waiting for General Report.*

g. *Certificate: when Necessary.*

h. *Exceptions to.*

1. *General Orders.*

2. *When Proper or Necessary: Obtaining Leave.*

3. *Their Form.*

4. *Deposit on.*

5. *Time for Filing: its Effect.*

6. *Setting Down, Hearing, and Arguing.*

7. *Allowance of: Overruling: Effect of.*

LVI. 1. *Reference to Master.*

a. *On what Facts Enquiry is made: when a Reference will be directed.*

1. *Generally.*
2. *Respecting Infants, &c.*
3. *In Matters Testamentary.*
4. *Preliminary Enquiries.*

b. *Proceedings on.*

c. *Respecting Title.*

d. *Respecting Scandal, Impertinence, and Insufficiency.*

e. *Whether two Suits are for the same Object.*

f. *Whether the Suit is for Infant's Benefit.*

g. *To Appoint Guardian and Maintenance, Trustees, &c.*

h. *In Cases of Foreclosure and Redemption of Mortgage.*

LVI. 1. a. 1. *On what Facts Enquiry is made: when a Reference will be directed: generally.*

[See 30 & 31 Vic., c. 44, s. 51.]

1. A direction to trustees to spend at their discretion "in the service of" the testator's "Lord and Master, and, I trust, Redeemer," £2000 annually, until the testator's son attained age—*Held*, a good charitable bequest.

From its temporary character, and the discretion intended to be given to the trustees, the Court declined to refer it to the Master to approve of a scheme.—*Lady Powerscourt v. Lord Powerscourt*, Beat. Rep. 572. (C.)

2. The Court will appoint a receiver under the 5 & 6 W. 4, c. 55, over a reversion in fee expectant on a term of years. Against an application for a receiver, respondent showed as cause that the conuzor had, before the rendition of the judgment, conveyed all his estates to respondent. It was alleged that the conveyance was voluntary, and void as against creditors. *Held*, that an enquiry into the consideration for the deed should be directed.—*Costello v. Jones*, 2 Jones, 352. (E.E.)

8. A purchaser under the decree having, under colour of the injunction to put him into possession, dispossessed persons who claimed adversely to the title of the parties in the cause, the Court ordered a writ of restitution to issue to restore them to the possession; and referred it to the officer to ascertain the amount of damages sustained by them in consequence of the ouster. The purchaser was ordered to pay such damages, with full costs; the applicants undertaking not to bring an action.—*Anderson v. Barry*, 2 Jon. 631. (E.E.)

4. In proper cases the Court will refer it to the Remembrancer to settle conditions of sale.—*Bennett v. Beamish*, Jon. & Car. 178. (E.E.)

5. On the receiver's affidavit stating the facts fully, and on notice to all the parties in the cause, and no objection raised, an order will be made for the receiver to accept a surrender, &c., from an insolvent tenant, without

putting the parties to the expense of a reference.—*Davidson v. Armstrong*, S. & Sc. 135. (R.)

6. In a possessory suit, if there is a clear contradiction touching an important fact in conflicting affidavits, a reference to the Master will be made on the subject. Bills praying an injunction generally require an answer.—*Sinclair v. Marquis of Donegal*, S. & Sc. 374. (R.)

7. There was a decree to sell the whole lands. A reference to settle conditions of sale of a moiety was refused, because, when a good title can be made only as to a moiety, the Court cannot, on motion, direct that moiety only to be sold when a decree to sell the whole has been made. The proper course, is to set down the cause for further directions. The Court will not set up for sale lands the title to which it knows is bad.

*Semble*—If the owner, and the creditors interested in the produce, do not object, the Court will allow a party to apply to stand in the place of a purchaser discharged because of bad title.—*Piers v. P.*, S. & Sc. 414. (R.) —[*Affd.*: 1 Dr. & Wal. 265. (C.)]

8. A reference touching the propriety of abating the tenants' rents, and forgiving their arrears, applied for by the receiver *alone*, was refused; but was afterwards granted upon the concurrence of the parties.—*Evans v. Taylor*, S. & Sc. 681. (R.)

9. A reference—to determine whether a receiver over impropriate tithes should proceed against the defaulters by bill in equity or otherwise?—was granted upon the receiver's motion; the ptf. concurring.—*Callaghan v. Reardon*, S. & Sc. 682. (R.)—[See *Callaghan v. Reardon*, 1 Cr. & Dix, Notes of Cas. 231. (R.)]

10. A reference—whether any sum should be expended in repairing premises held under the Court?—was refused; because *prima facie* a tenant is bound to repair the demised premises, and the motion was a voluntary application on the receiver's part.—*The Duke of Dorset v. Crosbie*, S. & Sc. 683. (R.)

11. A motion on the receiver's part, for a reference, whether it would be for the parties' benefit that proceedings should be taken to impeach certain leases, refused; it not being part of a receiver's duty to bring forward such a motion.—*Clarke v. Fisher*, S. & Sc. 684. (R.)

12. A tenant applied for a reference, whether a composition should be accepted for the arrears of his rent? granted at his expense, and upon other very strict and special terms.—*Fitzgibbon v. Flynn*, S. & Sc. 687. (R.)

13. There was in Court a clear surplus fund produced by a sale under a decree in a foreclosure suit. The Court, on motion of ptf., a



creditor by judgment subsequent to his mortgage, referred it to the Remembrancer to enquire and report who was entitled to the surplus, and whether the ptf. had any and what lien upon it; and, if so, whether there were any, and what prior liens thereon?—*Mackay v. Martins*, 1 I. E. R. 331. (E.E.)

1. The receiver, under the Sheriffs Act, applied for an attachment against a tenant for not paying rent. It appeared that the respondent leased the premises to the tenant, and that a declaration of trust was entered into, contemporaneously, to the effect that the tenant held in trust for A., who had an incumbrance affecting the respondent's estate prior to any of the judgments which formed the subject matter of the petitioner's claims. The Court directed a reference to the Remembrancer to enquire and report as to A.'s right.—*Monaghan v. Kirwan*, 2 I. E. R. 408. (E.E.)

2. A creditor who, by lying by, permits the executor, having then assets to pay debts, to pay a legacy, does not thereby lose his right to compel that legatee to contribute to pay his debt, if the executor afterwards wastes the assets. But the executor's assets must first be resorted to. His insolvency not having been proved,—*Held*, that the legatee was entitled to an enquiry on the point, even after a decree to account, and a report under it.—*Mannix v. Drinan*, 3 I. E. R. 108. (C.)

3. On motion on a landlord's behalf for liberty to proceed at law, notwithstanding the appointment of a receiver, the Court will not enter into any question of equities between the landlord and tenant; but will, in a proper case, refer it to the Master to enquire and report whether any proceedings should be taken in defending the ejectment, or in relation thereto.—*Cramer v. Griffith*, 3 I. E. R. 230. (R.)

4. In a suit for an account of an intestate's personalty, the bill sought to charge the administrator with wilful default, and contained charges to that effect. The decree directed ordinary accounts only. *Held*, that the Court would, nevertheless, direct an enquiry respecting wilful default, if there appeared on the Master's report facts to warrant it.—*Cuffe v. C.*, 3 I. E. R. 469. (C.)

5. Motion, for a reference to the Master to ascertain the amount of interest due upon a demand since the date of the allocating report, refused; because an affidavit ascertaining the sum suffices.—*Mahon v. Dawson*, Fl. & K. 178. (R.)

6. In proceedings under the 5 & 6 W. 4, c. 55, the Court will not refer it to the Master to ascertain the priorities of the different judgment creditors, but will itself decide the question upon motion to draw out of Court the money brought in by the receiver.—*Hinton v. Gill*, Fl. & K. 183. (R.)

7. On a bill filed to impeach a voluntary settlement as void against creditors, ptf. proved the existence of only one debt, and that of small amount, of the date of the settlement. There were not circumstances to induce the Court to suspect that the settlor was then largely indebted. An enquiry respecting the amount of his debts then was refused.—*Manders v. M.*, 4 I. E. R. 434. (E.E.)

8. The Court, having continued an injunction to the hearing, on the terms of ptf. entering into security by recognizance for meane rates, made an order, as in the cause, after the bill had been dismissed at the hearing, referring it to the Master to enquire and report the amount which ptf. was liable to pay for meane rates, so as to enable deft. to obtain an order on ptf. to pay the sum due, and, in default, to put the recognizance in suit.—*Callaghan v. C.*, 4 I. E. R. 441. (R.)

9. When estates and other property, forming a mixed fund, are settled, subject to a power of appointment, the Court, when the parties entitled to that fund are numerous, will not, as against a purchaser of part thereof, in which purchase one object of the fund acquiesced, act as against that purchaser, without knowing all the dispositions of that fund, and will direct enquiries accordingly.—*Thompson v. Simpson*, 1 Dr. & War. 459. (C.)

10. In a suit to rectify an instrument, deft. is entitled to an enquiry respecting the nature and existence of all written documents bearing upon the question, and deposed to be in existence, but not produced.—*Mortimer v. Shortall*, 2 Dr. & War. 363: 1 Con. & L. 417. (C.)

11. When a question arises in consequence of estates in Scotland being devised to A., the Court will not adjudicate upon that question until it has been ascertained, by reference to a Master, whether the estates did pass by the Scotch laws.—*M'Call v. M'C.*, 2 Con. & L. 184. (C.)

12. A direction, touching the charitable trusts upon which real property devised is to be applied, contained in a codicil, referred to by the will, but not attested, does not bind the Master upon a reference to settle a scheme. If proper, it should be adopted by him.—*Att.-Gen. v. Madden*, 2 Con. & L. 519. (C.)

13. A reference, to ascertain what sum is due from an infant for penal fines for a non-renewal, cannot be obtained on petition. A bill must be filed.—*In re Colthurst*, 5 I. E. R. 322; 3 Dr. & War. 35; 2 Con. & L. 35. (C.)—[*Revg.*, 4 I. E. R. 444; Fl. & K. 515. (R.)]

14. Under an order of reference to the Master, to enquire and report the rights of the parties to a surplus fund (residue of the purchase-money of the deft.'s real estate, sold under the decree to pay a charge by title paramount), and of all persons having any charge or lien affecting the same; the Master

publishing advertisements for that purpose. It appeared that the sum (if any) due to one of the claimants could not be ascertained without taking a long and complicated account; and the Master, being of opinion that the order of reference did not authorise the taking of such an account, refused to take it. On motion, pending the reference, the Court ordered the Master to take the account, and gave further directions on the subject.—*Sullivan v. Delany*, 6 I. E. R. 370. (R.)

1. A bill prayed accounts, and an injunction to restrain the deft. from proceeding in an ejectment, because one of the lives, upon which the ptf.'s interest depended, still existed.

*Semble*—There could not be an absolute decree for ptf.s. without having previously had an enquiry as to the existence of the alleged subsisting life.—*O'Donnell v. Nolan*, 4 Dr. & War. 153. (C.)

2. The Masters have not jurisdiction to examine *viva voce* any of the parties in the cause.—*Cashel v. Kelly*, Dr. Rep., *temp.* Sugden, 262. (C.)

3. S. was entitled with her brother and four sisters, to a lease for 31 years, as one of the next-of-kin to her mother, one of whose personal representatives she was. The landlord made a lease for 51 years, expressed to be made in consideration of the surrender of the former lease. It described the lands as late in the possession of the mother, and then in the possession of S. and one of her sisters, her co-administratrix. An endorsement on the lease stated, that it was made in trust for S. and her brother and sisters. S. married. The landlord leased to her husband the same lands for 40 years, to commence after the expiration of the 51 years. *Held*, that the new lease was a graft.

Although a ptf. is bound to prove his whole case at the hearing, yet, if there be no failure of title, but an omission in the proof of it, the Court may, in its discretion, direct a reference to the Master to enquire into it.—*McAlister v. Walsh*, 8 I. E. R. 250. (C.)

4. When an incumbrancer, to whom money was ordered to be paid, before payment assigns his charge, the assignee cannot obtain an order for payment of the sum ordered, to himself, upon affidavit merely; but must take a reference at his own expense.—*Huggard v. Lynch*, 8 I. E. R. 511. (E.E.)

5. A petition, in 1844, under the 1 W. 4., c. 69, stated that, in 1823, V. devised real estate to a trustee to pay debts; and, after payment thereof, in trust for the petitioner; that V. died in 1824; and that thereupon the petitioner entered; that many years ago the petitioner and the trustee sold part of the estate, and paid all the debts; that the trustee had died; and that his heir was a minor. The petition prayed a conveyance of the legal estate.

The Court directed enquiries—whether the minor was a trustee for the petitioner alone, discharged of debts and the trusts of the will.—*In re Barry*, 2 Jon. & L. 1. (C.)

6. V. devised a house in trust for, and appointed it to the use of a charity school for females. In time, the premises became ruinous, and unsuited for the purpose of such a school; but were valuable for commercial purposes. There was no fund for repairing the house.

The trustees presented a petition under the 52 G. 3, c. 100. The Court refused to refer it to the Master to enquire whether it would be for the benefit of the charity to sell the house; but granted a reference, whether it would benefit the charity to set the house, and apply the rent in procuring a suitable place for carrying on the school?—*In re Suir Island Female Charity School*, 2 Jon. & L. 171. (C.)

7. In a suit against trustees by a husband, who covenanted to effect a policy of insurance with a respectable Insurance Company, and to assign the same to trustees; but who insured with a Friendly Society, the rules of which subjected the insured to the danger of expulsion, and did not allow an assignment, but allowed a nomination, nearly tantamount to it; and whose capital was not proved; it was referred to the Master to ascertain whether the covenant was fulfilled; the ptf. to pay the costs.

*Semble*—The covenant was not fulfilled.—*Courtenay v. C.*, 9 I. E. R. 329; 3 Jon. & L. 519. (C.)

8. When a bill is filed to raise two charges, the prior charge affecting the inheritance, and the puisne affecting a term, it will be referred to the Master to enquire and report how much of the produce of the sale, after paying the prior charge, represents the produce of the sale of the term.—*Hutton v. Mayne*, 9 I. E. R. 348; 3 Jon. & L. 586. (C.)

9. An application to transfer the carriage of the proceedings from a party in the cause, is for the Master, in the first instance, under the 117th G. O. This Court will not entertain it except on appeal.—*Lindsay v. Spotinwood*, 10 I. E. R. 5. (R.)

10. When a final decree is made at the original hearing of a cause set down to be heard *pro confesso*, for the amount claimed by the bill, liberty will be reserved thereby to the deft., if he disputes the amount claimed, to apply to the Court for a reference to enquire and report the amount due on the securities.

A cause was set down to be heard *pro confesso*. A personal decree was granted against an executor, the bill stating that he had received assets and promised to pay.—*Buist v. St. Lawrence*, 10 I. E. R. 425. (R.)

11. The appointment of a person as receiver over a kind of property the management of which he does not understand, with

an undertaking to act under the direction of a person who does understand it, is improper.

The appointment of a receiver who acts under the directions of a deft. is objectionable.

A reference to appoint a receiver sent back to the Master, though the Master's selection had been affirmed by the Master of the Rolls.—*Lupton v. Stephenson*, 11 I. E. R. 484. (C.)

1. Motion, before hearing, for a reference to ascertain priorities and take accounts, refused; it appearing that there was another suit for a sale of the same lands set down for hearing in the Chancellor's list, in which the same accounts must be taken.—*M'Dermott v. O'Connell*, 1 I. Jur. 106. (R.)

2. Under a common order, directing the reference of a solicitor's bill for taxation, the Taxing Master has no jurisdiction to decide a question of retainer.—*Belas v. Norris*, 1 I. Jur. 267. (R.)

3. When a receiver dies, it is of course, to obtain an order of reference for the appointment of a new receiver.—*Wright v. O'Brien*, 2 I. Jur. 20. (R.)

4. Bill filed to raise a charge; plea of another suit pending. The plea, not having been set down for argument, was deemed allowed. The deft., who pleaded, moved to dismiss the bill for want of prosecution. The ptf. was permitted to take an order of reference to the Master to ascertain the truth of the plea, although the time for setting down the plea for argument had expired.—*Sadler v. Whalley*, 2 I. Jur. 171. (R.)

5. A reference to the Master was granted to enquire whether the receiver might not be permitted to give security by the British Guarantee Association.—*Hobhouse v. Hamilton*, 2 I. Jur. 172. (R.)—[See *Wise v. O'Grady*, 2 I. Jur. 212. (R.)]

6. The Court will not in future entertain an application touching payment, by the purchaser, of costs occasioned by his overruled objections to title. The Master has jurisdiction under the 4 & 5 W. 4, c. 78, s. 12, to determine the question of costs.—*Neville v. Fitzgerald*, 2 I. Jur. 256. (R.)

7. Reference to enquire whether the purchaser under a decree had been put into possession of all the lands. Report: that he was entitled to £60 compensation, which he moved should be allocated to him, with costs of the motion and reference.

Cross-motion: that he should pay ptf.'s costs of a prior reference on which his objections to the title had been overruled.

The Master certified that there were not any grounds to justify those objections.

The Court declared that the 4 & 5 W. 4, c. 78, s. 12, gave the Masters jurisdiction to decide such questions of costs.—*Beddy v. Smith*, 2 I. Jur. 266. (R.)

8. When a tenant of the Court replevied a distress made by the receiver, who entered a rule to declare in the replevin suit, but subsequently offered the tenant the costs of the rule, which the latter declined to receive, the Court ordered the proceedings in the replevin suit to be stayed; and directed a reference to the Remembrancer to report what sum was due to the tenant: the order to be without prejudice to any question as to the liabilities of the sureties in the replevin suit, or the costs of that suit, or of the motion.—*White-law v. Sandy*, 12 I. E. R. 398. (E.E.)

9. The particulars of sale stated that the timber on the estate would be included in the purchase. To the timber on a very small portion of the lands no title was made. There being no misrepresentation, the Court referred it to the Master to enquire whether the timber on that portion was material to the possession and enjoyment of the estate?—*Stewart v. The Marquis of Conyngham*, 1 I. C. R. 534. (R.)

10. When the Master reports bad title on but one of several objections thereto, it is proper to send the case back to the Master to review his report, with a direction, that he shall regard the decision of the Court.—*Gray v. Strangman*, 5 I. Jur. 113. (C.)

11. The Irish Drainage Act, 5 & 6 Vic., c. 89, ss. 76, 79, gives the costs of the investment in government stock of the purchase-money of lands taken by the Commissioners of Public Works, as well as the costs of a subsequent purchase of lands.

The Court will not refer it to a Master to approve of a purchase, unless a particular purchase is stated.—*King v. The Commrs. of Pub. Works*, 2 I. Jur. N. S. 76. (R.)

12. The Masters have jurisdiction to make orders for substitution of service in 15th sec. cases.

In those cases the M. R. will not make such orders.—*Splaine v. S.*, 3 I. Jur. N. S. 816. (R.)

13. A widow filed a bill for dower against allenees of her husband. To make out her title to dower, the petitioner was obliged to give in evidence a deed, conveying the estate to the person from whom her husband claimed, and reciting that the legal estate was outstanding in trustees. The petitioner also gave in evidence orders of the Court of Ch., to show that such recital was mistaken. *Held*, that she was entitled to a reference to ascertain of what lands she was dowable.—*Kernaghan v. McNally*, 11 I. C. R. 52; 5 I. Jur. N. S. 51. (C.A.)

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1. The Masters have not jurisdiction to re-hear causes referred to them under the 15th sec.—[*Nison v. Peard*, 12 I. C. R. 30, is overruled by *Sloan v. M'Callen*, 8 I. Jur. N. S. 201].—*Cooke v. Franklin*, 16 I. C. R. 469. (R.)

LVI. 1. a. 2. *Respecting Infants, &c.*

2. A female minor, having married without assent of the Court, applied with her husband, that the funds to which she was entitled should be transferred to him, he undertaking to make a proper settlement. The parties being poor, the Court dispensed with a reference; and upon the production of a draft settlement, which the Court approved of, and the husband undertaking to execute it, made the order.—*In re Bakers*, 8 I. E. R. 108. (R.)

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The case does not fall within the 28th G. O. of March 1843.—*Hutchell v. Sutton*, 2 Jon. & L. 21. (C.)

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8. When a second incumbrancer's demand would have exhausted the entire fund in a creditor's suit, the Court refused to allow him to pay off the first incumbrance and take a conveyance without the expense of a sale. All parties consenting, it was referred to the Master to ascertain the value of the debt and estate; and if it would not be beneficial to have a sale, directed the conveyance to be made as asked.—*Lynch v. Kelly*, 9 I. E. R. 342; 3 Jon. & L. 626. (C.)

9. On appeals respecting receivers' accounts, it is the practice in this country to entertain objections to the amount of the items, though the Master may have adopted no erroneous principle.—*Beytagh v. Concannon*, 10 I. E. R. 351. (C.)

10. The original decree, pronounced before the G. O. of 1843, contained no directions to take an account of subsequent incumbrances. A decree on a bill of supplement and revivor, made in 1846, also omitted to direct such an account. The Court refused to amend the latter decree, under the 103rd G. O., by adding the direction, as it is not matter of form.

*Quære*—Whether the 102nd G. O. applies to supplemental suits?—*Bradley v. Davis*, 11 I. E. R. 134. (C.)

11. An order made on petition under the 102nd G. O. should contain a direction to the Master to advertise for creditors, when the original decree only directed an account of incumbrances prior to and contemporaneous with the ptf.'s demand.—*Plumtre v. O'Dell*, 12 I. E. R. 308. (R.)

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When objections are argued in the office, the Master should make a ruling under the 4 & 5 W. 4, c. 78, s. 12, touching the costs. If he reserves that question, the M. R. will not make any order concerning them, except upon a special certificate of the Master.—*Pepper v. Foster*, 5 I. Jur. 177. (R.)

13. In 1810, two judgments on a joint and several bond against D. and B., to secure £2200, and, in 1812, another judgment to secure £1000 against D., were executed by X., as trustee for the Mayo Infirmary. In 1819, a joint and several bond to secure £3200 was executed by D. and B. to X., who gave warrants to satisfy the judgments. In 1823, two deeds were executed by D. and B.; by the first of which they conveyed lands in trust, to sell with their consent, or the consent of the survivor, and to stand possessed of the purchase-money, on trusts declared by the second deed, viz., to apply £8275 as D. and B. should appoint; in default of appointment, to pay £3000 due to X., the trustee of the Mayo Infirmary (a party to the deed in another character), on a judgment against D. and B., and to pay the surplus, after payment of legacies, to B. and his heirs; and, until the sale took place, to pay the rents as D. and B. should jointly appoint; in default of appointment, to keep down the interest on the £3200, and the legacies, and to pay the surplus to D. for life, and, after his death, to B., his executors, &c. No sale was had. In 1826, D. died. In 1827, X. died, without having entered judgment on the bond of 1819, and

an undertaking to act under the direction of a person who does understand it, is improper.

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12. When objections to a Master's report are filed, and allowed, the objector, if he neglects to get a Master's order for payment to him of the costs occasioned by the objections, and subsequently moves the Rolls for payment of them, must pay the costs of the motion, even though allowed costs of the objections.

When objections are argued in the office, the Master should make a ruling under the 4 & 5 W. 4, c. 78, s. 12, touching the costs. If he reserves that question, the M. R. will not make any order concerning them, except upon a special certificate of the Master.—*Pepper v. Foster*, 5 I. Jur. 177. (R.)

13. In 1810, two judgments on a joint and several bond against D. and B., to secure £2200, and, in 1812, another judgment to secure £1000 against D., were executed by X., as trustee for the Mayo Infirmary. In 1819, a joint and several bond to secure £3200 was executed by D. and B. to X., who gave warrants to satisfy the judgments. In 1823, two deeds were executed by D. and B.; by the first of which they conveyed lands in trust, to sell with their consent, or the consent of the survivor, and to stand possessed of the purchase-money, on trusts declared by the second deed, viz., to apply £8275 as D. and B. should appoint; in default of appointment, to pay £3000 due to X., the trustee of the Mayo Infirmary (a party to the deed in another character), on a judgment against D. and B., and to pay the surplus, after payment of legacies, to B. and his heirs; and, until the sale took place, to pay the rents as D. and B. should jointly appoint; in default of appointment, to keep down the interest on the £3200, and the legacies, and to pay the surplus to D. for life, and, after his death, to B., his executors, &c. No sale was had. In 1826, D. died. In 1827, X. died, without having entered judgment on the bond of 1819, and

before the judgments of 1810 and 1812 were satisfied. In 1832, B. and the trustees of the deed of 1821 mortgaged to the ptfs., who had notice of the deed of 1823, but not of the bond of 1819; and who, without enquiring whether the £3200 had been paid to the Mayo Infirmary, merely required the judgments, of 1810 and 1812, which they supposed to be the judgment referred to by the deed of 1823, to be satisfied. Judgment was entered on the bond of 1819 in 1838, and assigned to A., in trust for the Mayo Infirmary. A., in a foreclosure suit, filed by the ptfs., proved the judgment, and was, by the final decree, decreed to be paid. The executor of X., after the decree, obtained permission to prove his claim under the deed of 1823, on the usual terms of making up a report at his own expense. *Held*, on objections to the report, that the order was irregular, and that the report could not be confirmed on motion, as that would vary the final decree, by reporting to the executor of A., as trustee of the Mayo Infirmary in the priority of 1823, the same demand which had been decreed to A. as trustee of the Mayo Infirmary in the priority of 1838.

That a trust was created by the deed of 1823 in favour of X., on which the £3200 was charged on the lands.

That the ptfs. had notice that the £3200 was due to the Mayo Infirmary under the deed of 1823; and, having neglected to enquire whether it had been paid, could not ward off the claim, by reason of the inaccuracy in the description of the security under which it arose.

That X. having executed the deed, though not made a party thereto, as trustee for the Mayo Infirmary, the doctrine of *Garrard v. Lord Lauderdale* (3 Sim. 1) did not apply, and that he might have enforced the trust created in him.—*Gurney v. Lord Oranmore*, 4 I. C. R. 470. (R.)

1. An appeal does not properly lie upon the *rulings* of a Master. The *order* itself ought to be made up before the appeal is brought.—*Jones v. Stokes*, 2 I. Jur. N. S. 42. (R.)

2. The Court will not hear an appeal against a Master's *rulings* in a 15th section case. The *order* must be made up.—*Cullen v. Nicholson*, 3 I. Jur. N. S. 212. (R.)

3. In a suit by bill and answer after decree, the solicitor for the deft. died. No solicitor had been named in his place. The Court, on the application of the deft. having the carriage of the proceedings, allowed him to proceed in the suit before the Master, serving the other defts. (and such as resided out of the jurisdiction by substitution of service or otherwise) as the Master should direct.—*De Morin v. Henry*, 5 I. Jur. N. S. 300. (R.)

4. Evidence, rejected by the Master in the early stages of a suit, cannot be used upon appeal; nor can its rejection be questioned

unless made a ground of appeal.—*In re M'Kenna's Estate*, 6 I. Jur. N. S. 330. (C.A.)

5. Under the 51st G. O. of the 19th of May 1857, if the final order in a cause petition be not obtained within the time limited by the Master, the petition is not dismissed without an order to that effect.—[*Moore v. Keogh*, 10 I. C. R. 501, not followed.]—*Corker v. C.*, 15 I. C. R. 304. (C.A.)

#### LVI. 1. c. Reference as to Title.

6. Though the purchaser objects that there are several outstanding judgments not proved in the cause, this Court will, at the instance of the party having the carriage of the decree, refer it to the Master to ascertain the sums due thereunder, and to allocate the purchase-money, without prejudice to the purchasers insisting that it shall not be paid out until a clear title shall have been made, and under peril of the costs of reference in default of such title being made.—*Greene v. Elliott*, 1 I. E. R. 207. (R.)

7. In future, the Court will, in cases of specific performance, add to the reference as to whether a good title can be made, a direction to the Master to enquire and report at what time a good title was shown.—*Enraght v. Fitzgerald*, 2 Dr. & War. 43; 1 Con. & L. 181. (C.)

8. The Court will not order a reference to a Master to ascertain the amount of interest accrued due upon a demand since the date of the allocating report; an affidavit ascertaining that sum being sufficient.—*Mahon v. Dawson*, Fl. & K. 178. (R.)

9. In proceedings under 5 & 6 W. 4, c. 55, the Court will not refer it to the Master to ascertain the priority of the different judgment creditors, but will itself decide the question upon motion to draw the money brought in by the receiver.—*Hinton v. Gill*, Fl. & K. 183. (R.)

10. When a party objects to a Master's report touching title, the proper course is, to file exceptions, and set them down in the cause list for hearing.

After proceeding before the Master on a reference touching title, the ptf. cannot rely on the purchaser's previous acts as binding him to his purchase, notwithstanding a report of bad title.—*Harwood v. Bland*, Fl. & K. 540. (R.)

11. The Court will not entertain an application that further searches should be furnished to a purchaser. That application should be made to the Master in Ch.—*Lawler v. Drew*, 7 I. E. R. 202. (R.)

12. Although a ptf. is bound to prove his whole case at the hearing, yet, if there be no failure of title, but an omission in the proof of it, the Court may in its discretion direct a reference to the Master to enquire into it.—*M'Alister v. Walsh*, 8 I. E. R. 250. (C.)

1. After exceptions have been allowed to the Master's report of good title, in a suit for specific performance, the practice is, not to discharge the purchaser; but, at ptf.'s request, to refer it back to the Master to receive his report, and to enquire whether a good title can be made to the lands.—*Stewart v. Marquis of Conyngham*, 1 I. C. R. 584. (R.)

LVI. 1. d. *Respecting Scandal, Impertinence, Prolixity, and Insufficiency.*

2. The ptf. being resident out of the jurisdiction, and his bill having been reported prolix, the Court restrained him from proceeding in the cause until he paid the costs of the reference, and the report of prolixity, though the deft. had neglected to compel him to give security for costs.—*La Touche v. Lawlor*, 2 Jon. 629. (E.E.)

3. If a party suffers the Court to make an order upon an affidavit, he cannot afterwards refer it for prolixity, though he himself has not taken any subsequent step in the cause.—*Robinson v. Warner, Jo. & Car.* 50. (E.E.)

4. The limitation of the time within which a pleading should be referred for impertinence and prolixity under G. R. 61, of 1834, does not extend to objections for scandal, as to which the Court will extend the time as much as possible.—*Everard v. ———*, 1 I. E. R. 421. (R.)

5. Under the circumstances, the Court ordered a reference, to enquire and report whether it would be for the infant's benefit that the suit should be defended in his name, or in that of his trustee; and, if to be defended, what funds were properly applicable to the defence; but, if not to be defended, on what terms it should be settled amicably?—*Hare v. Mountcashel*, 2 I. E. R. 241. (R.)

LVI. 1. e. *Whether two Suits are for the same object.*

6. The 19th G. O. of Nov. 1834, respecting plea and demurrer, does not apply to a plea of the pendency of another suit for the same subject-matter, when the only question respecting the plea touches its truth.

Such a plea should not be set down for argument; but the ptf. should serve notice of a motion to refer to the Master the question of fact:—Whether the two suits are for the same subject-matter?—*Howlett v. Lambert*, 3 I. E. R. 472. (R.)

LVI. 1. f. *Whether the Suit is for Infant's Benefit.*

[See GUARDIAN.—INFANT.]

LVI. 1. g. *To Appoint Guardian and Maintenance, Trustees, &c.*

[See GUARDIAN.]

LVI. 1. h. *In cases of Foreclosure and Redemption of Mortgage.*

LVI. 2. *Master's Report and Certificate.*

- a. *Its Form.*
- b. *Settlement and Signature of: their Effect.*
- c. *Filing and Obtaining: in what time.*
- d. *Review and Amendment of.*
- e. *Confirmation of: its Effect.*
- f. *Separate Report: what acts may be done without waiting for general Report.*
- g. *Certificate, when necessary.*
- h. *Exceptions to,*
  1. *General Orders.*
  2. *When Proper or Necessary: obtaining Leave.*
  3. *Their Form.*
  4. *Deposit on.*
  5. *Time for Filing: its Effect.*
  6. *Setting Down, Hearing, and Arguing.*
  7. *Allowance of: Overruling: Effect of.*

LVI. 2. a. *Form of Master's Report or Certificate.*  
[See 30 & 31 Vic., c. 44, ss. 32-39, as to Certificate of Chief Clerk.]

7. When lands are decreed to be sold subject to an annuity, that is conclusive evidence that the annuity is prior to the claims of all persons claiming under the decree. A report, on the reference to ascertain priorities, found that the arrears of the annuity were posterior to some of these claims. *Held*, erroneous, and varied accordingly.—*Sparrow v. Cooper*, 1 Jones, 72. (E.E.)

8. When it has been referred to the Master to report whether an infant is a trustee within 1 W. 4, c. 60, the report should state the Master's reasons for coming to the conclusion that he is a trustee.—*In re Purdon*, 1 Dr. & War. 500. (C.)

9. The respondent, in the affidavit made by him to show cause against the appointment of a receiver upon a judgment on a bond in a penal sum, admitted that the entire sum due by him on foot of the judgment was a specified sum, exceeding the amount of the principal mentioned in the bond, and six years' interest thereon; and did not rely on the 3 & 4 W. 4, c. 27, s. 42, as a bar. *Held*, that a report, finding that the principal, with six years' interest thereon only, was due on foot of the judgment, was erroneous, it being contrary to the admission in the affidavit.—*Tristram v. Harte*, 3 I. E. R. 386; Long. & T. 186. (E.E.)

10. It was referred to the Master to enquire and report whether there was any and what sum due on foot of a judgment, and whether



a fund in Court in a cause, to which the judgment creditor in question was not a party, and allocated by the report under the decree, to a demand on foot of a subsequent judgment, was properly applicable (having regard to the decree) to pay the sum, if any, which might be due on foot of the judgment. The Master, by his report, found a variety of facts, whereby it appeared that there was a serious question whether or not the demand was barred by the 3 & 4 W. 4, c. 27, s. 40, and further found the sum due, if the demand was not barred; but whether it was barred or not, and if not barred, whether the fund in Court was applicable to it (having regard to the decree), he submitted for the consideration of the Court, as questions of difficulty, on which he had not taken upon himself to decide. *Held*, that this report was irregular; that, pursuant to the order of reference, the Master ought to have decided one way or other, to the best of his ability, and have given the Court, and the suitors concerned, the benefit of his judgment.—*Barrett v. Bermingham*, 4 I. E. R. 537. (R.) [See Fl. & K. 656.]

1. When a necessary party is not before the Court, a report of good title, the ptf. undertaking to file a supplemental bill, and obtain a decree against such party, is irregular.—*Plumptre v. O'Dell*, 4 I. E. R. 602. (R.)

2. A minor, ward of Court, was entitled to the fee of lands, subject to a lease for lives renewable for ever upon the payment of a fine of £15 on the fall of each life. He was also entitled to a sub-lease in the same lands, granted by the first lessee, for lives renewable for ever upon payment of a fine of £15 on the fall of each life. The sub-lease contained a proviso, that if the sub-lessee should neglect to nominate a new life, and pay the fine within six months after the fall of each life, he should pay a fine of twenty shillings for every month during which he should so neglect to pay. No renewal of either lease had been taken out from the time the minor's ancestor had become entitled both to the fee and to the sub-lease, a period of nearly thirty years. A petition was presented in the minor matter by the first lessee, praying a reference to the Master to ascertain whether it would be for the benefit of the minor that a renewal should be executed of the first lease, and that he should accept a renewal of the sub-lease; and for an account of what was due for rent and renewal fines; and an order was made accordingly. Subsequently, a second petition was pre-ented by the same person, praying for an account of what was due for renewal fines, septennial fines, and penal rent, by the minor, and an order of reference was made upon that petition, in the same terms as the former order. *Held*, that the Master was not warranted under those orders in taking an account of penal rent.—*In re Colthurst*, 5 I. E. R. 322; 3 Dr. & War. 85; 2 Con. & L. 35. (C.)—[Rev. 4 I. E. R. 444; Fl. & K. 515. (R.)]

3. A bill was filed by the representatives of the mortgagor of a chattel interest, against

the representative of the mortgagee, who, as well as the debt., had been in possession for some time in respect of two mortgages from the same person, praying an account of the sums due on foot of the mortgages; and also an account of the rents and profits received by the mortgagee and the debt., respectively, whilst in possession; and for redemption. The debt., by answer, set up an account stated and settled between the mortgagor and mortgagee, but at the hearing gave no evidence in support of it, save a recital in the second mortgage deed, that a sum was then due on foot of the former mortgage. The decree directed an account in general terms of the sums due on foot of the two mortgages. The Master's report found, that the ptf. was bound by the stated and settled account. *Held*, that he was wrong, as a general account had been directed, and no special direction to adopt this recital, as a stated and settled account.—*Fitzpatrick v. Mahony*, 1 Jon. & L. 84. (C.)

4. Under a decree for an account of the personal estate of a deceased person, who died seized of real estates, the Master should take an account of the rents of the real estate which were due at the death.

A report, finding the amount of the personal estate, but not including an account of such rents, will be imperfect.—*Bowen v. Evans*, 6 I. E. R. 569; 1 Jon. & L. 178. (C.)—[*Affd.*: 2 H. L. Cas. 257.]

5. A report of good title, ptf.'s solicitor undertaking to procure a signature, is informal.—*Magawley v. Brady*, 9 I. E. R. 59. (R.)

#### LVI. 2. b. Settlement and Signature of Report.

6. *Semble*—That although the Master's report in favour of a judgment creditor may not constitute an acknowledgment, yet it confers a new right to receive the money, and thus forms a new terminus, whence the bar of the statute will run.—*Barrett v. Bermingham*, 4 I. E. R. 537; Fl. & K. 556. (R.)

7. A report of good title, ptf.'s solicitor undertaking to procure a signature, is informal.—*Magawley v. Brady*, 9 I. E. R. 59. (R.)

8. A fee to counsel for setting a draft report, is not allowed in taxation of costs between party and party.

In allowing the costs of attested copies, it is discretionary with the Taxing Master whether he will allow for the copy of the whole or a part only of a document.

Practice before the 1st G. O. of April 1847, as to fees to counsel in the Master's office.—*Clanmorris v. Mahon*, 10 I. E. R. 144. (C.)

#### LVI. 2. c. Filing and Obtaining: in what time.

9. Under a decree to account a creditor filed a charge on foot of a judgment. The charge was disallowed, because barred by the Statute of Limitations. The creditor then issued a *sci. fa.* against the inheritor the

conuzor's heir. The fund being deficient, no defence was taken to the *sci. fa.*; and the judgment was revived. The creditor then got permission to file a charge, and obtain a report at her own expense, but the Court directed the officer, in considering the Statute of Limitations, not to act upon the judgment of revivor, so far as regarded the rights of the other creditors who had proved under the decree.—*Browne v. Lynch, Jo. & Ca.* 195. (E.E.)

#### LVI. 2. d. Review and Amendment of Master's Report.

1. A report was directed to be amended according to the final decree, by substituting a statement that the debt was seized in fee of premises decreed to be sold, instead of for lives renewable for ever.—*Hatchell v. Lord Cremorne, S. & Sc.* 675. (R.)

2. After a final decree pronounced but not served, the Court permitted the ptf. to amend his charge and proceed before the Remembrancer, the Remembrancer to be at liberty to amend his report if he should think fit; and the Registrar to be at liberty to amend the decree, according to the amendment of the report; all to be done at ptf.'s expense.—*Cotter v. Murphy, Jo. & Ca.* 245. (E.E.)

3. The Court will not direct the Remembrancer to amend his report, when it is correct according to the state of the matters at the time of the making thereof.—*Kavenagh v. Murphy, Jo. & Ca.* 273. (E.E.)

4. A judgment creditor having obtained a decree for sale in the Court of Ch., the lands having been sold under a prior decree of the Court of Exchequer, was allowed to file a charge under the decree to account in the Exchequer, on foot of his demand as decreed in Ch.; and the Remembrancer and Registrar were directed to amend the report and final decree by inserting his demand when proved.—*Pidgeon v. D'Alton, Jo. & Ca.* 276. (E.E.)

5. Respondent, in his affidavit to show cause against the appointment of a receiver upon a judgment on a bond in a penal sum, admitted that the entire sum due by him on foot of the judgment was a specified sum exceeding the principal in the bond, with six years' interest, and did not rely on the 3 & 4 W. 4, c. 27, s. 42, as a bar. A report found that the principal, with six years' interest only, was due on foot of the judgment. *Held*, erroneous, the report being contrary to the admission in the affidavit.—*Tristram v. Harte, 3 I. E. R.* 386; *Long & T.* 186. (E.E.)

6. A party quarrelling with a report of bad title should move to set it aside, not to send it back to the officer to be reviewed.

The notice of motion should state the grounds upon which the party seeks to set aside the report.—*Vincent v. Thwaites, 4 I. E. R.* 689. (E.E.)

7. The Court will not review a Master's taxation of costs unless he has erred in principle.—*Darley v. Nicholson, 2 Dr. & War.* 86; *1 Con. & L.* 391. (C.)

8. The Master may, in the exercise of a sound discretion, refuse to declare the highest bidder to be tenant of lands set up to be let under the Court. But when the Master did not declare the highest bidder to be the tenant, the Court, upon the bidder's application, reviewed the circumstances of the case, and declared him to be tenant at the rent offered by him.—*In re Costellos Minors, ex parte Dillon, 2 Jon. & L.* 245. (C.)

9. When, by mistake in the draft report under a decree to account, a judgment was entered as of 1834 instead of 1833, and the Master seeing it so entered found the priorities accordingly, and a final decree was made confirming it—*Held*, that the error could not be corrected under the 103rd G. O.: but liberty was given to go before the Master to have the report amended *nunc pro tunc*.—*O'Brien v. Creagh, 8 I. E. R.* 557. (C.)

10. The Court must give credit to what the Master reports as having occurred in his presence.—*Walmsley v. W., 3 Jon. & L.* 556. (C.)

11. This Court has power on motion to review a report confirmed by the operation of the 137th G. O.—*Evans v. O'Dell, 11 I. E. R.* 340. (R.)

12. The Court will review the exercise of the Master's discretion in reports under the 145th & 146th G. Os. It is the Court's duty to consider both the state of the property, and the interests of the parties.—*Hutchins v. H., 1 I. C. R.* 146; *3 I. Jur.* 232. (C.)

13. The Master's report, unobjected to, stood confirmed by lapse of time. A case having subsequently been decided overruling the principle of the report, the Court, upon motion, sent the report back to the Master for reconsideration.

*Semble*—Exceptions are unnecessary if the objections to a report appear on its face.—*Vignoles v. V., 4 I. Jur.* 123. (R.)

14. In an administration suit, the bill did not seek to charge the executors with wilful default; and the decree directed only the ordinary accounts. Facts appeared upon the Master's report sufficient to warrant such an enquiry. *Held*, that the report could not be sent back to the Master with a direction to enquire as to wilful default.—*Irwin v. Knor, 3 I. Jur. N. S.* 8. (C.)

15. There being several objections to the title, and the Master having reported a bad title on but one, the proper course is to send the case back to the Master to review his report, directing him to have regard to the decision of the Court.—*Gray v. Strangman, 5 I. Jur.* 118. (C.)

1. The Court, adopting the rule at law on a motion to set aside a verdict as against the weight of evidence, will not on appeal reverse the Master's decision on a question of fact, or direct a further enquiry, merely because a doubt may exist that the decision was right.—*Gillespie v. Croker*, 15 I. C. R. 182. (R.)

**LVI. 2. e. Confirmation of Report: its Effect.**

2. The Master reported that the Ecclesiastical Commissioners for Ireland were proper persons to be appointed new trustees of properties devised for charitable purposes.

Form of order, confirming this report, and appointing them to be such trustees.—*In re Gore's Charity*, Dr. Rep. temp. Sug. 536. (C.)

3. Pursuant to an order of reference in a minor matter, to report the nature and amount of the minor's fortune, the Master reported according to his construction of a will. The Court refused to declare the rights of the claimants under the will, or to confirm the report.—*In re Corkers*, 3 Jon. & L. 377. (C.)

4. The Court must give credit to what the Master reports as having occurred in his presence.—*Walmsley v. W.*, 3 Jon. & L. 556. (C.)

5. A purchase deed contained a covenant for quiet enjoyment, free from quit-rent and crown-rent. A contemporaneous deed of indemnity conveyed lands to a trustee and his heirs, upon trust, to permit the vendors and their heirs to take the rents and profits, until the purchaser and his heirs, or any person deriving under him, should be molested, &c., by reason of judgments and incumbrances, or any of them, or any judgment or incumbrance affecting the lands, or any of them, or until some suit at Law or in Equity should be commenced or proceeded on against the purchaser, his heirs, or assigns, or the purchased lands and premises, or any part thereof, for the recovery of or on account of the said or any other incumbrance or incumbrances; and immediately after any such molestation, &c., out of the rents of the indemnity lands, by sale, &c., of a competent part thereof, to raise and levy from time to time, such sums as might be sufficient to discharge the said and all other incumbrances affecting, or that might affect, the lands. In 1827, quit-rent and crown-rent were claimed, and paid out of the purchased lands. In 1828, the indemnity lands were mortgaged by persons claiming under the vendors. In 1839, a report finding that there were no incumbrances, except those named in the report on the indemnity lands, was made, and confirmed by a decree in a suit in which the sums then paid for quit-rent and crown-rent might have been, but were not claimed. In 1858, an order permitted the owner of the purchased lands to go before the Master, and file a charge in respect of his demand for quit-rent and crown-rent, accrued since the date of the report and decree. *Held*, that the claimant was not precluded by the finding in the report and decree from proving his demand.

That the demand was not barred by the Statute of Limitations.

That the trust in the indemnity deed to indemnify the purchaser was not void for remoteness.—*Massy v. O'Dell*, 10 I. C. R. 22. (R.)

**LVI. 2. f. Separate Report: what acts may be done without waiting for the General Report.**

6. In 1800, Blackacre was sold by A. to B. A., by the deed of purchase, covenanted for quiet enjoyment against quit-rents and all other incumbrances. By deed of even date, A. conveyed G. and other lands to C., as trustee, on trust, to indemnify B. against all incumbrances affecting Blackacre, which was liable to quit-rents amounting to £16 per annum. In 1835 the bill was filed in this suit, praying a sale of G. and other lands, to pay incumbrances prior and subsequent to the sale in 1800. D., the heir of B., was made a deft. in that suit, as mortgagee of certain of the lands comprised in the deed of indemnity, and also as purchaser; and the deeds of purchase and indemnity were put in issue in the cause. D., by answer, did not make any claim in respect of quit-rents issuing out of Blackacre. In 1839 a report and final decree for sale was made. In 1858, there being a fund in the I. E. Court, the produce of G., which the Commissioner declined to make applicable to payment of quit-rent, F., the heir, and personal representative of B. and D., applied in this Court, alleging that D. and F. had, since 1827, and down to 1857, paid quit-rents, contrary to the covenant; and asking leave to go in before the Master and obtain a separate report as to his rights against the fund in Court, under the deed of indemnity. Counsel on behalf of F., waiving all right to prove for payments made anterior to the date of the final decree.—*Held*, that F. was entitled to go in before the Master and prove his claim in respect of payments since the date of the order, without prejudice to any defence arising out of the construction of the deeds.—*Massy v. O'Dell*, 3 I. Jur. N. S. 360. (R.)

**LVI. 2. g. Certificate, when Necessary.**

**LVI. 2. h. Exceptions to.**

1. General Orders.
2. When Proper and Necessary: Obtaining Court's Leave.
3. Form of.
4. Deposit on.
5. Time for Filing: Effect of Filing.
6. Setting Down, Hearing, and Arguing.
7. Allowance of, or Overruling: Effect of.

**LVI. 2. h. 1. General Orders.**

7. The selection of a commissioner to take evidence is vested in the discretion of the Master. The Court will not vary his appoint-

ment on a charge that the commissioner is interested in the success of the ptf., because of his friendship for ptf.'s solicitor, payment of whose costs depends upon his succeeding in the suit.

G. O. 105, in limiting the discretion of the Master, applies to cases in which an examination of witnesses is to be held in one place only.—*Malone v. O'Connor*, S. & Sc. 429. (R.)

LVI. 2. h. 2. *When Exceptions are Proper or Necessary: Obtaining Leave.*

1. J. devised all his estates, real and personal, to trustees, first, to pay all his debts, &c., then to the use of his son, C., for life, remainder to C.'s issue; if C. died without issue, to W. for life; remainder to such of W.'s children as should be living at her death, in equal shares. C. died without issue. W. had several children alive. In a suit by J.'s creditors to carry into execution the trusts to pay debts, and praying a sale of the real estate, it was set up for sale. Three of the children were then out of the jurisdiction. The highest bidder excepted to the report of good title, on the ground that the absent children would not join in the conveyance, and were not bound by the decree. *Held*, that the exceptions were irregular, being exceptions—not to the title, but to the conveyance; but that the purchaser would not be compelled to complete his purchase, since the objection for want of parties was fatal.—*Oldham v. Wilkins*, 1 I. E. R. 59. (R.)

2. At the hearing, an incumbrancer set up a claim to priority inconsistent with the Master's finding. *Held*, that though, if the right claimed would follow necessarily on the reported facts, the Court would act upon it, without any exception having been taken, it would not do so if the right would have been liable to be encountered before the Master by evidence, if claimed before him.—*Brownlow v. Earl of Meath*, 2 I. E. R. 383; 2 Dr. & Wal. 674. (C.)

3. When a party objects to a Master's report touching title, the proper course is, to file exceptions, and set them down in the cause list for hearing.

After proceeding before the Master on a reference touching title, the ptf. cannot rely on previous acts of the purchaser, as binding him to his purchase, notwithstanding a report of bad title.—*Harwood v. Bland*, Fl. & K. 540. (R.)

4. J., possessed of a term of years in A., died intestate, and indebted, in 1791, leaving two children, H. and T. Without obtaining administration, H. entered on A., and acted as sole owner thereof. In 1802, he obtained administration to J., and died in 1809. Soon after J.'s death, T. went to reside in England where he died in 1805, without having claimed any interest in A. In 1807 there was filed against H. a bill to foreclose a mortgage of A. After H.'s death, that suit was altered into one to admin-

ister his assets. T.'s personal representative was not a party thereto, nor was any claim advanced by him, or on his behalf, to a moiety of A., after payment of J.'s debts, until 1818. *Held*, that under a decree to take an account of H.'s personal estate, the Remembrancer was not warranted in reporting that the whole of A. was H.'s personal estate.—*Scott v. Knox*, 4 I. E. R. 397. (E.E.)

5. Leave given to file exceptions *nunc pro tunc*, on payment of costs, under peculiar circumstances.—*Marjoribanks v. Hovenden*, 8 I. E. R. 317. (C.)

6. Exceptions by parties not interested in supporting them, though so taken to save expense, are objectionable.—*Smith v. Chichester*, 12 I. E. R. 519. (C.)

7. An objection in point of law, patent on the report, may be taken at the hearing on further directions, though no exception has been filed.—*Finucane v. Studdert*, 1 I. C. R. 140; 3 I. Jur. 114. (C.)

8. *Semble*—Exceptions are unnecessary if the objections to a report appear on its face.—*Vignoles v. V.*, 4 I. Jur. 123. (R.)

LVI. 2. h. 3. *Form of Exceptions to Master's Report.*

9. Exceptions to report should not be prolix or argumentative; but should state concisely the fault imputed to the report.

When wilful default is not referred by the decretal order—*Semble*, no exception can be taken to the report for not finding it.—*Booth v. Purser*, 1 I. E. R. 34. (C.)

10. It is right that a general objection should be taken to a report, in addition to objections specially pointing out the questions intended to be raised; as such general objection may prevent the Court being embarrassed by any technical difficulty arising from the frame of the special objections. But the attention of the Master should be called by objections to the points upon which the report is complained of; and the Court should be enabled from reading the objections to understand the precise grounds upon which it is contended that the report is erroneous. It is quite impossible from reading these objections to understand what were the points raised before the Master. I wish however to be understood, that I do not desire to encourage a course sometimes adopted, and even more objectionable, of filing a vast number of objections to the report, raising the same points.—*Gardiner v. Blesinton*, 1 I. C. R. 68; 3 I. Jur. 116. (R.)

11. Objections and exceptions to reports should state the exact proposition which the Court is called on to decide.

When a receiver is appointed over tithe rentcharge, the funds realised by him are applicable in the first instance to the repairs of

the church.—*Cullen v. The Dean and Chapter of Killaloe*, 2 I. C. R. 183. (R.)

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LVI. 2. h. 3. *Form of.*

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LVI. 2. h. 4. *Deposit on.*

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LVI. 2. h. 5. *Time for Filing: its Effect.*

1. Leave given to file an exception to the officer's report (of bad title) *nunc pro tunc*.—*Conyers v. Crosbie*, 7 I. E. R. 301. (E.E.)

2. In a rental under which lands were sold, a part was thus described:—"Term for which demised; under an article of agreement for lease for four lives, bearing date 1804, and one year." The sale took place in Jan. 1845. On the 9th of April the purchaser's solicitor received a copy of the article, and then first discovered that the agreement was for a lease to commence after the expiration of a then subsisting lease, which did not expire until 1843. On the 24th of Oct. he lodged objections to the title, and subsequently swore that he was misled by the statement in the rental. *Held*, affirming the report, that the mis-statement was ground for discharging the purchaser, not for compensation. That the delay in lodging the objection disentitled the purchaser to his costs.—*Martin v. Cotter*, 9 I. E. R. 44. (R.)

3. Lands were set up as held under a clear and indefeasible title in fee. It appeared that they had been conveyed forty years before, reserving a right to cut turf and quarry limestone, to tenants of another estate, although the right had never been since exercised, and there were no turf-bogs worked or quarries open on the estate. It did not appear that there might not be turf, and there was no proof that there was not limestone. *Held*, a good objection to the title, and the purchaser discharged.

The rental at the sale contained an obscure statement, leaving it doubtful whether a tenant held for lives named in 1804 or 1843; it proved to be the latter, and the purchaser swore he had been misled. *Held*, a sufficient ground for discharging the purchaser.

A delay of seven months *held* no waiver of an objection to the title, which turned upon a question of fact.

Observations on clearing a title by showing the non-existence of rights under a reservation or onerous covenant not stated; and on the duty of being careful and explicit in preparing for a sale.—*Martin v. Cotter*, 9 I. E. R. 351; 3 Jon. & L. 496. (C.)

4. The time for appealing from a Master's order is to be reckoned from the date of its signature.—*Cooke v. Franklin*, 16 I. C. R. 469. (R.)

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LVI. 2. h. 6. *Setting Down, Hearing, and Arguing.*

5. When the report of the Master, under an order to take preliminary accounts under the 36th G. O. is excepted to, the exceptions are to be brought before the Rolls; and not set down to be heard before the Lord Chancellor.—*Leech v. Law*, 11 I. E. R. 186. (C.)

6. The person filing exceptions is bound to have an office copy of the exceptions in Court when they are to be argued.—*Bohan v. Cambie*, 10 I. C. R. 466. (C.)

7. Exceptions to a Master's report cannot be opened by senior counsel without a junior.—*Brereton v. Barry*, 14 I. C. R. 374; 8 I. Jur. N. S. 226. (C.)

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LVI. 2. h. 7. *Allowance of, or Overruling; Effect of.*

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LVII. MESSENGER. *See* BANKRUPTCY, VI. [Statutes: 20 & 21 Vic., c. 60, ss. 62, 69-76: 30 & 31 Vic., c. 44, s. 84.]

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LVII.\* MISNOMER. *See* AMENDMENT, and the References there given.

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LVIII. MOTION. *See* PRACTICE EVIDENCE, and the several Titles which form the subjects of MOTIONS.

[*See* G. Reg. of M. R. and V. C., Feb. 27, 1868.]

1. *Generally.*
  2. *What may be Effected by.*
  3. *Notice of.*
  4. *Motion of Course: what is Effected by.*
  5. *When and how made.*
  6. *Form of: Proceedings on.*
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LVIII. 1. *Generally.*

[*See* 30 & 31 Vic., c. 44, ss. 68, 69, 85, 86, 91, 109, 142, 157, 161, 170: G. O. (1867), 34, 91-97, 106, 108, 110, 112, 113, 117, 118-120, 122, 123, 125, 126, 136, 138, 139, 141, 143, 168, 215, 240, 258.]

8. A consent cannot be used upon a motion unless it appears to be stamped by the Clerk of Appearances.—*Haigs v. —*, S. & Sc. 136. (R.)

9. Future practice as to calling on, out of the regular course, motions in the vacation list.—*Ponsonby v. P.*, S. & Sc. 426. (R.)

10. A motion for an order upon a receiver, to pay over a sum in his hands, is not strictly a money motion. Such a motion was moved, when the Court was in money motions, in the absence of counsel who had a brief to oppose it. The motion was re-heard.—*Anon.*, 2 I. E. R. 417. (E.E.)

1. The Court will not hear a motion founded on documents. Counsel must be furnished with a brief, and the solicitor be in attendance with the documents.—*Curtis v. Darcy*, 6 I. E. R. 149. (R.)

2. When there is a notice of motion served for the hearing of the cause, it is in the discretion of the Court whether the motion or the cause shall first be heard.—*Stock v. Aylward*, 8 I. C. R. 429; *Dr. Rep. temp. Napier*, 378. (C.)

#### LVIII. 2. *What may be effected by Motion.*

3. The application to restrain a solicitor from acting against a former client may be made by motion in the cause in respect of which such injunction is sought. It need not, necessarily, be made by petition.—*Biggs v. Head*, S. & Sc. 335. (R.)

4. Decree to sell the whole lands. Reference, to settle conditions of sale of a moiety, refused; because, when a good title can be made to a moiety only, the Court cannot, on motion, direct that moiety only to be sold, when a decree to sell the whole has been made. The proper course is to set down the cause for further directions.—*Piers v. P.*, S. & Sc. 414. (R.)—[Affirmed: *Dr. & Wal.* 265. (C.)]

5. On motion, the Court will order a sheriff to pay such a sum of money as it appears has been lost in consequence of his refusing or neglecting to execute, with due diligence, an attachment issued out of this Court and directed to him.—*In re Comyns*, 1 I. E. R. 72. (R.)

6. An application under 1 W. 4, c. 60, to appoint a person to convey, in the place of an absent trustee, who had been discharged by a decree, ought to be by motion in the cause in which the decree was pronounced, a petition for that purpose being unnecessary.—*Callaghan v. Egan*, 1 Dr. & Wal. 187. (C.)

7. When it appears by the bill, that the ptfs. are resident out of the jurisdiction, the motion, that proceedings may be stayed until the ptfs. give security for costs, is a motion of course.—*Yarborough v. Brazier*, 2 I. E. R. 463. (R.)

8. In proceedings under the 5 & 6 W. 4, c. 55, the Court will not refer it to the Master to ascertain the priorities of the different judgment creditors, but will of itself decide the question upon motion to draw out the money brought in by the receiver.—*Hinton v. Gill*, Fl. & K. 183. (R.)

9. The Court will not appoint a Commissioner Extraordinary, unless a petition has first been presented.—*In re Armistead*, 2 Dr. & War. 55. (C.)

10. A judgment creditor obtained a charging order on funds reported to his debtor in the cause. After the expiration of the six months

from the date of the order, the Court directed the funds to be transferred to the creditor, on motion, without a bill having been filed.—*Burke v. B.*, 7 I. E. R. 174. (R.)

11. The Court will not entertain an application that further searches shall be furnished to a purchaser. That application should be made to the Master.—*Lalor v. Drew*, 7 I. E. R. 202. (R.)

12. It is not necessary to present a petition for an order for liberty enrol a decree, if six months have elapsed from its making. The application may be made by motion on notice in the cause.—[See G. O. 103; Ch: G. O. 95. (E.E.)] *Lord Trimleston v. Farrell*, 1 Jon. & L. 161. (C.)

13. After notice of motion by deft. to dissolve an injunction on an answer filed, ptf., on the eve of the vacation after H. T., filed exceptions to the answer. The Court refused to entertain the motion.

*Quære*—In cases of waste, can deft. move to dissolve the injunction?—*Persse v. Queely*, 9 I. E. R. 151. (R.)

14. Though a bill has been filed on the authority of a reported decision, which is afterwards reversed, the Court has not jurisdiction, on motion, under G. R. 82, to order that the bill shall be dismissed, without costs.—*Cronin v. Murphy*, 1 I. C. R. 233. (R.)

15. The application for leave to enrol a decree pronounced more than six months before, may be made either by motion or petition.—*Hamilton v. H.*, 1 I. C. R. 253. (C.)

16. A., having filed a cause petition against B. his tenant, to enjoin him from using the demised premises as a shop, contrary to his covenant, was evicted by his head landlord, in consequence of a breach of the same covenant contained in the head lease. A. applied to have his petition dismissed without costs, as further proceedings were useless. *Held*, that the costs of the cause petition could not be in such a case decided on motion.—*Fortune v. Doyle*, 5 I. Jur. 58. (R.)

17. A sum having been lodged in Court as security for costs, a motion to increase it, because it was insufficient to cover the costs already incurred, was refused with costs.—*Shannon v. Fagan*, 2 I. Jur. N. S. 74. (C.)

#### LVIII. 3. *Notice of Motion.*

[See 30 & 31 Vic., c. 44, s. 85: G. O. (1867), 91-97, 106, 110, 112, 113, 118, 119, 120, 122, 125, 136, 138, 143, 168.]

18. Notice of motion for liberty to issue and execute a sequestration upon a decree, is not necessary.—*Monk v. Lawlor*, 1 Jones, 554. (E.E.)

19. Notice need not be given to every deft. of a motion to take a bill *pro confesso* under G. O. 46, against another deft. If the deft. against whom the motion is made has ap-

peared, or adopted an appearance, it is right to give his solicitor notice.—*Denis v. Deane*, S. & Sc. 127. (R.)

1. Notice of motion to take a bill as confessed against some defts. under the 46th G. O., need not be given to another deft. for whom a parliamentary appearance has been entered.—*Tarrant v. Allen*, S. & Sc. 676. (R.)

2. When, during more than a year, no proceeding in a cause has been taken, the notice of a motion to dismiss the bill under the 93rd G. O. must be served upon the ptf. personally.—*Nolan v. Adamson*, S. & Sc. 701. (R.)

3. A notice of motion should state fully the matter of the application, so that if the Court says, "Be it so," the officer may be enabled, by following the notice, to frame the order. A notice of motion was for leave "to amend in the several particulars specified in an affidavit:" the Court refused to make any order.—*Curren v. Walsh*, 1 I. E. R. 200. (R.)

4. When a notice of a motion is personally served on a party out of Court, it should be of a motion to be made on a particular day, and not "on the first opportunity."—*Creed v. C.*, 2 I. E. R. 32. (R.)

5. Notice of a motion for liberty to execute a sequestration upon a decree, is necessary, when it is sought to execute it against lands.—*Welsh v. W.*, 2 I. E. R. 360. (E.E.)

6. A motion, to renew an order in a cause, must be upon notice.—*Brown v. Lynch*, 2 I. E. R. 411. (E.E.)

7. A motion, on behalf of sequestrators, to lodge money, must be on notice.—*Byrne v. Langmore*, 2 I. E. R. 411. (E.E.)

8. A notice of motion, to have a receiver's account sent back to be reviewed, must specify the items objected to. To refer for them to the affidavit to be used upon the motion, does not suffice. A motion to vacate the recognizance, at the same time that the receiver applies to be discharged, is premature.—*D'Arcy v. Sherry*, 2 I. E. R. 411. (E.E.)

9. A notice of a money motion, moveable the last of the eight equity days, is too late. It must be served in time to be moved on the last day but one.—*O'Ferrall v. Madden*, 2 I. E. R. 416. (E.E.)

10. On an application for liberty to issue a sequestration for the costs of dismissing a bill, if the applicant be proceeding against personal property, notice of the motion need not be given.

*Secus*—When the applicant is proceeding against real property.—*O'Brien v. Foley*, 2 I. E. R. 418. (E.E.)

11. A motion, to invest the one-fourth of the purchase-money in  $\frac{1}{2}$  per cent. stock, must be upon notice.—*Lee v. Poole*, 2 I. E. R. 419. (E.E.)

12. If deft. have not appeared, it is not necessary to give him notice of a motion for liberty to execute a sequestration on the decree against deft.'s real estate. The motion will not be granted, if the annual value of the real estate be not stated in the affidavit.—*Edwards v. Plunkett*, 3 I. E. R. 502. (E.E.)

13. The notice of motion to make a consent a rule of Court should set forth the substance of the consent.—*Smith v. Martin*, 4 I. E. R. 168. (R.)

14. A party, moving to set aside proceedings, as irregular, is not bound to specify in his notice the particular irregularity complained of.—*Heron v. Stokes*, 4 I. E. R. 277. (C.)

15. A party, moving to set aside the Master's report of bad title, should specify in the notice of motion the grounds upon which he seeks to set aside the report.—*Vincent v. Thwaites*, 4 I. E. R. 689. (E.E.)

16. A party served with a notice of motion, though not interested in the subject matter of the motion, is nevertheless entitled to the costs of appearing.—*Tubateau v. Warburton*, 4 Dr. & War. 267. (C.)

17. A motion, to restrain ptf. from proceeding until he gives security for costs, must be upon notice.—*Nugent v. Hill*, 7 I. E. R. 90. (R.)

18. An application for an attachment against a party, for not executing the purchase-deed pursuant to the decree, should be on notice. The order will be absolute in the first instance.—*Brennan v. Carroll*, 7 I. E. R. 196. (R.)

19. An application that a party in the suit may be at liberty to bid at the sale must be on notice.—*Clarke v. Dobbin*, 8 I. E. R. 111. (R.)

20. Motion to discharge a receiver over premises, in which the respondent's interest had expired, must be on notice to respondent.—*Johnston v. Henderson*, 8 I. E. R. 521. (E.E.)

21. Every notice of motion should state the name of the solicitor to whom it is addressed, as well as the parties for whom they act.—*Dower v. Roxane*, 1 I. Jur. 58. (R.)

22. Every notice of motion for a particular day should state that the motion would be moved at the sitting of the Court.—*Graves v. G.*, 1 I. Jur. 155. (R.)

23. Motion that several documents mentioned in the notice, being in the Master's office, might be read at the hearing; and that the deft. should deposit with the Registrar, to be read in evidence at the hearing, the deeds and documents mentioned in the notice. Mo-

tion refused with costs, the notice being irregular; but without prejudice to the service of a proper notice specifying the documents in a schedule.—*Donegal v. Gregg*, 1 I. Jur. 201. (R.)

1. A notice of motion for liberty to amend is no answer to a motion to dismiss the bill for want of prosecution under the 82nd G. O. (1843).—*Mark v. Willington*, 11 I. E. R. 269; *Seaver v. Fivey*, 1 I. Jur. 258. (R.)

2. If a cause is out of Court, it is sufficient, in the Exchequer, to serve the notice to have the bill dismissed for want of prosecution, upon the solicitor. *Secus*—At the Rolls.—*Dogherty v. D.*, 2 I. Jur. 110. (E.E.)

3. A notice to show cause should state plainly the matter intended to be relied upon as cause, and not merely refer to a bill, answer, and decree filed in a particular suit.—*In re Knox*, 2 I. Jur. 147. (I.E.C.)

4. When a respondent has not appeared in a 15th sec. cause petition, a motion for an order of reference to appoint a receiver is not an *ex parte* application to be moved at the Master's sitting.

How notice of such a motion should be served and listed.—*Frankan v. O'Neill*, 5 I. Jur. 358. (M.O.)

5. A notice of motion must be properly entitled in the matter of the statute under which the application is made.—*Foster v. Higgins*, 2 I. Jur. N. S. 75. (R.)

6. When it is sought to substitute service of the summons and notice of a cause petition upon a party out of the jurisdiction, by serving his solicitor on record in other matters, notice of the motion should be served on the solicitor.—*Bradford v. Roche*, 3 I. Jur. N. S. 75. (R.)

7. A party, who desires to serve, out of Term, a notice of motion, must apply to the Court for liberty to do so, on an affidavit stating the pressing circumstances which necessitate the motion.—*Pilsworth v. Nash and Nolan*, 4 I. Jur. N. S. 78. (P.)

8. A motion to transfer to the jurisdiction of the Assistant-Barrister a suit commenced in the Probate Court, and over which, if not commenced there, he would, under the terms of the Act, have had jurisdiction, should be made on notice to the opposite party.—*In re O'Donnell*, 4 I. Jur. N. S. 303. (P.)

9. To a plea denying that A. had died intestate, and propounding a will; the ptf., without serving notice, moved for leave to file special replications. *Held*, that the deft. should be served with two clear days' notice of the motion.—*Meek v. M.*, 5 I. Jur. N. S. 42. (P.)

10. To a notice of motion asking costs, the opposite party replied by a counter-notice, offering what was sought, except costs, about

which it said nothing. The Court gave the moving party the costs properly and necessarily incurred by him up to the service of the counter-notice.

There is no such thing as a general authority to file petitions. When a suit is instituted in the name of a next friend, the authority from him should be filed according to the 3rd G. O. of 19th May 1857.—*Geoghegan v. Harding*, 6 I. Jur. N. S. 211. (R.)

11. Liberty to file a petition of revivor merely, may be obtained by motion of course: notice ought to be served when it is sought to file a petition of revivor and supplement.—*Williamson v. Tuckey*, 7 I. Jur. N. S. 276. (R.)

12. A notice of motion is required for a conditional order to assign an administration bond.—*Russell v. R.*, 8 I. Jur. N. S. 198. (P.)

13. An order to file a bill of revivor and supplement will not be made on an *ex parte* motion.—*Connor v. Reeves*, 16 I. C. R. 398. (R.)

14. It is necessary to give notice of a motion for liberty to file a suggestion of the death of a ptf. who was named sole executor of the will in dispute, and administration to whose goods had been granted to the applicant.—*McCarthy v. Mathews*, 11 I. Jur. N. S. 120. (P.)

#### LVIII. 4. Motion of Course: what effected by.

[As to what business must be done before the M. R. and V. C. by summons, see Regulations of Feb. 27th 1868.]

15. *Quere*—Ought motions of course to be moved by members of the Inner Bar?—*Anon.* 5 I. E. R. 595. (E.E.)

16. Liberty to file a petition of revivor merely may be obtained by motion of course: notice ought to be served when it is sought to file a petition of revivor and supplement.—*Williamson v. Tuckey*, 7 I. Jur. N. S. 276. (R.)

#### LVIII. 5. Motion: when and how made.

17. When an affidavit is filed as cause against a conditional order, a motion to make the order absolute may be made, notwithstanding the expiration of ten sitting days since it was filed, unless the opposite party has proceeded to tax his costs.—*Lloyd v. Armstrong*, 1 I. E. R. 75; *Jon. & C.* 73. (E.E.)

18. A motion for an order to take preliminary accounts should not be made in a suit that is either abated or defective; or in respect of accounts, the taking of which would prejudice any question in the cause.—*Thompson v. Maxwell*, 5 I. E. R. 448. (R.)

19. That a motion, if granted, will have the effect of postponing the hearing of a cause already in the list, is no reason why it should not be heard at the Rolls. This Court (Ch.) will not entertain such a motion when the case is called on.—*Crawford v. Scott*, 2 Con. & L. 412. (C.)



1. A motion for an abatement of rent in a minor matter should not be made to the Court.—*Alston v. Alcock*, 1 I. Jur. 282. (R.)

2. When a notice of motion is served for the hearing, it is in the discretion of the Court whether the motion or the cause shall be heard first.—*Stock v. Aylward*, 8 I. C. R. 429; Dr. Rep. temp. Nap. 378. (C.)

3. *Semble*—Motions on the Petty-bag side of the Court must be made in Term.—*The Queen v. Swan*, 16 I. C. R. 21. (C.)

#### LVIII. 6. Form of Motion: Proceedings on.

4. When a purchaser moves, on consent, to lodge a promissory note in part payment of his purchase-money, the consent and note should both specify the rate of interest payable on the note.—*O'Connor v. Richards*, 8. & Sc. 160. (R.)

5. An affidavit, made to resist a motion, may be used on the motion, notwithstanding that it has been referred for impertinence and scandal, and that the reference is still pending.—*Birch v. Alt*, 1 I. E. R. 228. (R.)

6. A motion, for an order on a receiver to pay over a sum in his hands, is not strictly a money motion. Such a motion having been moved while the Court was hearing money motions, and in the absence of the opposing counsel, it was re-heard.—*Anon.*, 2 I. E. R. 417. (E.E.)

7. The Court will not hear a motion founded on documents, unless counsel be furnished with a brief, and the solicitor be in attendance with the documents.—*Curtis v. Darcy*, 6 I. E. R. 149. (R.)

8. On motions to extend receivers, the only persons entitled to be heard are the petitioner and the debtor, and not the parties who have appointed or previously extended the receiver.—*Walsh v. W.*, 11 I. E. R. 607. (C.)

9. The rule against re-hearing an appeal motion is not inflexible. It is a sufficient ground for refusing the motion, that the case has already received anxious consideration.—*Lady Langford v. Mahony*, 11 I. E. R. 319. (C.)

10. A motion for an abatement of rent in a minor matter should not be made to the Court.—*Alston v. Alcock*, 1 I. Jur. 282. (R.)

11. The M. R. declined to make a consent a rule of Court, on the ground that the effect of the consent was to vary a decree of the Lord Chancellor, and that he had no jurisdiction to vary such a decree. The motion was removed before the Lord Chancellor. *Held*, that a copy of the Rolls order must be taken out, and that the new motion was in fact an appeal.—*Tennant v. T.*, 5 I. C. R. 228. (C.)

12. A motion to pay money out of Court should be entitled in all the causes respecting

which the fund is to be distributed.—*Powell v. Sullivan*, 2 I. Jur. N. S. 74. (R.)

NE EXEAT REGNO, WRIT OF. *See* WRIT, 4.

#### LIX. NEW TRIAL.

1. *When Granted.*

2. *How obtained: Proceedings on.*

##### LIX. 1. New Trial: when Granted.

13. After the trial of an issue to determine who was heir of A.—*Held*, that a new trial should be granted, because the case made at the trial differed from that made in equity: that the verdict on the first trial should not be given in evidence on the second: that the costs of the first trial should not be allowed to the party obtaining the verdict, but should be reserved: and that manifestations of applause by some of the jury at the close of the speech of one of the counsel was not a sufficient ground to change the venue.

On granting a second trial of an issue, it is not the practice in England, and ought not to be the practice in Ireland, to take any notice of the verdict on the first trial, either by setting it aside, or giving it in evidence.—*O'Connor v. Malone*, 6 Cl. & F. 572.—[Rev. 2 Dr. & Wal. 491. (C.)]

14. Before a Judge will be called on to furnish his notes of the trial of an issue, the Court must be satisfied that they are necessary for the purposes of the motion.—*Hungerford v. Jagoe*, 1 Jon. & L. 691. (C.)

15. The Court directed an issue to try whether C. was a lunatic when certain instruments were executed. At the trial, a memorial of a deed, executed by C., was produced as evidence of C.'s acts. The deed was not produced, nor was its non-production accounted for. On motion for a new trial—*Held*, that the memorial had been properly received in evidence.

After the execution of the deeds, C. was found a lunatic by a commission. Orders and a report in the lunacy matter, containing recitals and statements which were not evidence, and which might influence the jury in finding their verdict, were sent to the jury. The Judge informed the jury that those recitals and statements were not evidence, and cautioned the jury to disregard them. On motion for a new trial—*Held*, that it should not be granted on that ground.—*Creagh v. Blood*, 8 I. E. R. 34; 2 Jon. & L. 509. (C.)

16. From the circumstances under which a letter of license has been signed, it may be inferred that it was not a concluded agreement binding upon the person signing it—*e. g.*, when it was only in course of signature by the creditors generally, and it was not intended to operate unless signed by an influential overpowering body of the creditors, which it was not.

A jury having found upon an issue that a letter of license executed under such circum-

stances was not a concluded binding agreement, the Lord Chancellor refused to disturb the verdict.—*In re Semple*, 3 Jon. & L. 488. (C.)

1. The Lord Chancellor sent a case to a Court of Law. There had been two verdicts, in an ejectment on the title, establishing the right of the ptf. in the Equity suit to freehold property devised to him away from the heir-at-law, who claimed as devisee under a subsequent will, which both verdicts found to have been executed when the deviser was mentally incompetent. No complaint was made of the last verdict. *Held*, although character was involved, and the trials took place in a county remote from the residence of the parties and their witnesses, and different from the venue of the lands, the deft. having consented to the locality fixed for the trial, and the consent being made a rule of Court, that sufficient investigation had taken place.—*Ffrench v. Ff.*, 2 I. Jur. 177. (C.)

2. The Commissioners of the I. E. Court ordered the sale of a property, the petitioner's right to which was founded on a verdict obtained by suppressing a material document at the trial of an action of trespass to try an alleged right of the appellant to a way claimed by the petitioner. This action was brought under the Commissioners' direction. The Judicial Committee of the Privy Council directed a new trial at which that verdict should not be given in evidence; and stayed the sale in the meantime.—*In re Cooper's Estate*, 1 I. Jur. N. S. 321. (P.C.)

3. Whether the Judge, before whom an issue directed by a Court of Equity has been tried, has or has not misdirected the jury, one verdict does not bind the Court of Equity, which may, for its better satisfaction, direct a new trial.—*Boyse v. Rosborough*, 2 I. Jur. N. S. 265. (H.L.)—[S. c., 6 H. L. Cas. 2.]

4. A creditor relied, as ptf., on a will which gave his debtor, sole next-of-kin and heir-at-law of the testator, all the testator's property. That debtor's son relied on a will, posterior in point of apparent date, which gave him all the property. The ptf. disputed the signature to this will; and replied that it was *in fact* executed before the other will. The case was twice tried at Belfast. The first jury gave no verdict; the second condemned both wills, the Judge certifying himself not dissatisfied with the verdict. Notwithstanding this certificate a new trial was granted; because the verdict was not so satisfactory as that final judgment should be entered upon it; and because it placed the parties on unequal terms. The ptf.'s position being as favourable as if his debtor's will had been established, whereas the deft.'s right, if any, was for ever concluded.

Costs of the former trials reserved.—*Hurst v. Campbell*, 7 I. Jur. N. S. 305. (P.)

5. Verdict against an alleged will. Conditional order for a new trial refused; the evidence being conclusive that undue influence

had been practised on the testator by the person chiefly benefited, who was most active in directing the preparation of the will, and in preparing it.—*Moloney v. Casey*, 8 I. Jur. N. S. 156. (P.)

6. When there is not any allegation of surprise, mistake, accident, or newly-discovered evidence, a new trial is not considered requisite, even when the title to an inheritance is involved.—*Campbell v. C.*, 9 I. Jur. N. S. 39. (P.)

7. An executor and residuary legatee repounded a will, of which the defts. impeached only the residuary and executorial clauses. A minor intervenient, a legatee in a former will, being cited to see proceedings, appeared by solicitor; but did not plead. At the trial, a verdict was taken, by consent, in favour of the will, except the residuary and executorial clauses. The jury expressed a strong opinion against the whole will. A curator was appointed for the minor; and the Court, on the curator's motion, set aside the verdict as to the rest of the will; and directed a new trial, on terms.—*Kelly v. Dunbar*, 10 I. Jur. N. S. 151. (P.)

#### LIX. 2. *How Obtained; Proceedings on.*

8. The verdict had on the first trial of an issue should not be given in evidence on the second trial. The costs of the first trial should not be allowed to the party obtaining the verdict, but should be reserved.

On granting a second trial of an issue, it is not the practice in England, and ought not to be the practice in Ireland, to take any notice of the first verdict, either by setting it aside, or permitting it to be given in evidence on the second.—*O'Connor v. Malone*, 6 Cl. & F. 572.—[Rev. 2 Dr. & Wal. 491. (C.)]

9. Before this Court will call upon a Judge to furnish his notes of the trial of an issue directed in the cause, the counsel for the party desiring to impeach the proceedings at the trial, must state on his own responsibility a case for that purpose. If this statement satisfies the Court that the notes are necessary for the purposes of the motion, it will then call upon the Judge to furnish them.—*Hungerford v. Jagoe*, 1 Jon. & L. 691. (C.)

#### LX. NOTICE, IN PRACTICE. See NOTICE—PRACTICE, MOTION.

1. *Notice generally in Practice.*
2. *Notice, Denial of.*

#### LX. 1. *Notice generally in Practice.*

[See 30 & 31 Vic., c. 44, ss. 85, 93, 116, 146-148, 171, 174; G. O. (1867), 29, 34, 37, 40, 55, 57, 68, 75; 82, 84, 86, 91-93, 96, 97, 106, 108, 110, 112, 113, 116, 118-120, 122, 123, 125, 130-136, 138, 143, 146, 158-162, 168, 204, 205, 221, 228, 251, 267, 268, 277.]

1. Service of the month's notice to answer under the 26th G. O. is irregular, if no proceeding in the cause has been taken for more than twelve months.—*Townsend v. Newenham*, S. & Sc. 700. (R.)

2. When a notice of a motion is personally served on a party out of Court, it should be of a motion to be made on a particular day, and not on "the first opportunity."—*Cresd v. C.*, 2 I. E. R. 32. (R.)

3. Notice of motion for liberty to execute a sequestration upon a decree is necessary, when it is sought to execute it against lands.—*Welsh v. W.*, 2 I. E. R. 360. (E.E.)

4. A motion to renew an order in a cause must be upon notice.—*Brown v. Lynch*, 2 I. E. R. 411. (E.E.)

5. A notice of motion to have a receiver's account sent back to be reviewed, must specify the items objected to: it is not sufficient to refer for them to the affidavit used upon the motion. A motion to vacate the recognizance, at the same time that the receiver applies to be discharged, is premature.—*D'Arcy v. Sherry*, 2 I. E. R. 411. (E.E.)

6. A motion on behalf of sequestrators, to lodge money, must be upon notice.—*Byrne v. Langmore*, 2 I. E. R. 411. (E.E.)

7. A notice of a money motion, moveable the last of the eight equity days, is too late; it must be served in time to be moved the last day but one.—*O'Ferrall v. Madden*, 2 I. E. R. 416. (E.E.)

8. A notice of a money motion, moveable the last of the eight equity days, is too late; it must be served in time to be moved the last day but one; and the consent of all the parties interested in the funds will not vary the rule.—*Anon.* 2 I. E. R. 417. (E.E.)

9. Upon an application for liberty to issue a sequestration for the costs of dismissing a bill, if the party be going against personal property, notice of the motion need not be given. *Secus*—when the party is going against real property.—*O'Brien v. Foley*, 2 I. E. R. 418. (E.E.)

10. When it appears by the bill that the ptfs. reside out of the jurisdiction, the deft's motion, that proceedings may be stayed until the ptfs. give security for costs, is a motion of course.—*Yarborough v. Brazil*, 2 I. E. R. 468. (R.)

11. Notice of motion to make a consent a rule of Court should set forth the substance of the consent.—*Smith v. Martin*, 4 I. E. R. 168. (R.)

12. A deft. cannot vary the title of the cause in a notice or affidavit used upon a motion in the cause.—*M'Kiernan v. Kernan*, 4 I. E. R. 275. (R.)

13. When an application is made to extend a receiver from one cause to another, the notice of motion and affidavit should be entitled in both causes.—*Tenant v. Watson*, 4 I. E. R. 700. (E.E.)

14. When a parliamentary appearance has been entered for a deft. upon service effected in this country, he may afterwards, without any order obtained for that purpose, be served out of the jurisdiction with the monthly notice to press.—*Curtis v. C.*, Fl. & K. 268. (R.)

15. *Quære*—Is the service of notice under the 15th G. O. a waiver of any right to seek relief against the party?—*Harpur v. Boyd*, 8 I. E. R. 456. (R.)

16. Notices never discharged on the first day of Term. — *v. —*, 8 I. E. R. 521. (E.E.)

17. A notice of motion served on the ptf. by the deft., did not appear in the list. On an application by the ptf., the notice was discharged with costs under the 128th G. Rule of this Court.—*Bigley v. King*, 10 I. E. R. 174. (E.E.)

18. An amendment was made, and notice of it served on the same day on which notice of motion to dismiss the bill was served. The Court not being satisfied as to which notice was first served, refused the motion to dismiss the bill; but made the ptf. pay the costs, and put him under terms to file a replication within two days after a full answer to the amendments.—*Nolan v. Power*, 10 I. E. R. 200. (R.)

19. The Court refused to allow a purchaser to lodge his promissory note in lieu of the three-fourths of his purchase-money, upon the allegation that there would be a large surplus, and the inheritor consenting, notice not having been given to all the creditors.—*Gardiner v. Blesinton*, 11 I. E. R. 357. (R.)

20. A judgment creditor, having a receiver, is not entitled to notice of a petition by a mortgagee to extend him to the mortgage.—*Goldsmid v. Lord Glengall*, 11 I. E. R. 608. (C.)

21. An order to take a bill as confessed may be made if an answer is filed when the motion is moved, though none had been filed when the notice of motion was served.—*Hilhouse v. Tyndal*, 12 I. E. R. 316. (R.)

22. Notice that a cause petition was "set down in the list of causes for hearing before the Lord Chancellor under the Court of Ch. (Ir.) Reg. Act, 1850," was served upon a respondent. The petition was set down in the list of causes under the 15th sec. The Court being of opinion that such a notice was likely to mislead, refused to make a summary order under that sec. and transferred the petition to the general list.—*Livesay v. Maxwell*, 1 I. C. R. 254; 8 I. Jur. 250. (C.)

23. When funds are realised by a sale directed by this Court, the mortgagee is not entitled to

insist upon his common law right to receive a six months' notice.

*Semble*—The proceedings in this Court will be deemed to constitute such notice.—*In re Lighton*, 4 I. Jur. 35. (I.E.C.)

1. The Court will not allow a deed to be taken out of the Master's office to prove it in the cause, without notice to the parties.—*Wyse v. W.*, 4 I. Jur. 100. (R.)

2. Except in very plain cases, a cause petition under the Ch. Reg. Act cannot be amended, without notice to those respondents who have entered appearances.—*O'Brien v. Tredennick*, 4 I. Jur. 135. (R.)

3. A cause petition for the distribution of assets had been filed, in which B., a minor, and others were respondents. The minor had come of age, and a side-bar rule had been entered to proceed against him. A notice under the Act and Rules, according to the annexed form, was directed to be served, binding him with all the proceedings already had.

The minor had been served with notice of filing the petition, and an appearance had been entered for him; the notice directed to be served did not contain a copy of the prayer of the petition, as in the case of *M'Cormick v. Murphy*, 5 I. Jur. 220.—*Geraghty v. Rorke*, 6 I. Jur. 106. (R.)—[Overruled by *Naughten v. N.*, 6 I. Jur. 309. (R.)]

4. Liberty was given to amend a cause petition by annexing a statement to the effect that there were six younger children of a marriage, instead of five.

The sole respondent was a minor, when the petition was filed, and had subsequently attained age. The usual side-bar rule for liberty to proceed had been entered. The Court refused to give liberty to serve him with notice under the 32nd G. O. of 1851, as that order did not apply to a minor who was named a respondent in the petition.—*Naughten v. N.*, 6 I. Jur. 309. (R.)

5. Notice of filing a cause petition was directed to be served on a respondent who was of unsound mind, and out of the jurisdiction, by serving the keeper of the lunatic asylum, and the friend of the lunatic in London. And liberty was given to petitioner to appoint a guardian *ad litem* if respondent's friends should neglect to do so.—*Bell v. Johnston*, 7 I. Jur. 89. (R.)

6. *Semble*—The Court has not jurisdiction under the Trustee Relief Act to order service of notice of the petition on parties residing out of the jurisdiction.—*Ex parte Bernard*, 6 C. R. 133; 2 I. Jur. N. S. 226. (R.)

7. A conditional order will be made absolute in the office, although an affidavit has been filed, if a notice of motion to show cause against the order has not been served.

But a more proper course is, for the party who has obtained the order, to apply to the

Court on notice, to make it absolute, notwithstanding the affidavit.—*Stevenson v. Moore*, 7 I. C. R. 462. (R.)

8. Parties going to trial must give under the 44th Rule (Contentions) regular notice, besides the eight-day notice given under the 40th Rule; which latter notice was deemed sufficient notice of trial.—*Crossley v. Andrews*, 8 I. Jur. N. S. 137. (P.)

#### LX. 2. Notice: Denial of.

[Notice Department of the Record and Writ Office—See G. O. (1867), 57, 277.]

LXI. OFFICERS OF COURT. See JURISDICTION—PRACTICE, SEQUESTRATION. RESPECTING EXAMINER, see PRACTICE, EVIDENCE—DEPUTY REMEMBRANCER, see *infra*—MESSENGER, see PRACTICE, MESSENGER—SOLICITOR, see SOLICITOR.

##### 1. Generally.

a. *Their Rights, Duties, Privileges, and Liabilities.*

b. *Mistakes and Errors of.*

c. *Their Fees: Lien for.*

##### 2. Accountant-General.

##### 3. Clerks, Chief.

##### 4. Clerks, Junior.

##### 5. Clerk in Court.

##### 6. Clerk of Enrolments.

##### 7. Clerk of Records and Writs.

##### 8. Commissioners to Administer Oaths in Chancery in Ireland.

##### 9. Cursitor.

##### 10. Master and Deputy Remembrancer.

##### 11. Master Extraordinary.

##### 12. Messenger.

##### 13. Registrars.

##### 14. Registrars (Assistant).

##### 15. Secretary to the Lord Chancellor.

##### 16. Secretary to the Master of the Rolls.

##### 17. Six Clerks.

##### 18. Stock-brokers.

##### 19. Under Clerks.

##### 20. Usher.

##### 21. Waiting Clerks.

LXI. 1. a. *General Rights, Duties, Privileges, and Liabilities of Officers of Court.*

[See 13 & 14 Vic., c. 89; 20 & 21 Vic., c. 60; 30 & 31 Vic., c. 44, ss. 11–20, 25, 26–30, 41–46, 181, 182, 188, 191; 30 & 31 Vic., c. 129.]

9. A practising solicitor or attorney cannot be the Accountant-General of the Court of Exchequer.—*In re Mahony*, Hayes, 52. (E.E.)

10. The Pursuivant's duty is discharged by taking from the party arrested a bond with two sureties who, at the time, appear solvent.—*Matthews v. Wynne*, Hay. & J. 797. (E.E.)

11. The Registrar of the Commissioner of Bankrupt Court is an officer of the Court of Chancery; and, as such, entitled to privilege from arrest. under a *ca. sa.*

*Semble*—The Court will discountenance such an application on the part of its officers.—*Re Collins*, S. & Sc. 73. (R.)

1. The Clerk of the Juries in the Court of Common Pleas is entitled to privilege from arrest under a *ca. sa.*—*Beahan v. Mills*, S. & Sc. 76, n. (C.P.)

2. If an officer of the Court, on a *ca. sa.* being sued out against him, claims a general privilege from arrest at all times, and cautions the sheriff not to arrest him, he will be ordered to pay the debt out of his salary.

*Secus*—If he only claims privilege from arrest *eundo* to, *redeundo* from, *et morando* at his office.—*Cane v. Stewart*, S. & Sc. 84, n.; 1 Jones, 630. (E.E.)

3. The 4 G. 4, c. 61, s. 43, applies as well when the witnesses reside abroad as when they reside within the Court's jurisdiction. The Court, therefore, will not order a commission to issue to take the examination of witnesses residing abroad, with a direction that the Examiner shall not be required to qualify as directed by that Act. When the parties will not consent that such a commission shall issue, the Court will direct that publication shall be respited.—*D'Alton v. Lord Trimleston*, Fl. & K. 663. (R.)

4. On motion, the Court will not refuse to allow the customary fees payable on the swearing in of attorneys, to the Secondary, the Tipstaff, and the Deputy Crier.

*Semble*—These fees are now legally established.—*In re Price*, Long. & T. 584. (E.E.)

5. The Master's Examiner will lodge with the Registrar of the Court, for the hearing of a cause, deeds deposited in the office for the purposes of the cause, upon receiving a requisition from any of the parties concerned. A motion that he shall be at liberty to do so is not necessary.—*Plumptre v. O'Dell*, 5 I. E. R. 404. (R.)

6. The Court will compel a Commission Examiner to deliver, for the purposes of the suit, the documents lodged with him for the examination of witnesses, though he has not been paid his fees and expenses; the solicitor undertaking to return them to the Examiner after the termination of the suit.—*Lord Lucan v. O'Malley*, 8 I. E. R. 586. (R.)

#### LXI. 1. b. *Mistakes of, and Errors.*

#### LXI. 1. c. *Their Fees, and Lien for.*

7. On motion, the Court will not refuse to allow the usual fees payable on the swearing in of attorneys to the Secondary, the Tipstaff, and the Deputy Crier; these fees being now legally established.—*In re Price*, Long. & T. 584. (E.E.)

8. *Prima facie*, the Crier and the Tipstaff are entitled between them to the fee of one guinea

on the admission of attorneys; but the Court-keeper is not entitled to the fee of ten shillings and sixpence. The Secondary is entitled to a fee of one guinea for swearing attorneys into office.—*In re Admission of Attorneys*, 4 I. E. R. 685. (Rev. Exch.)

#### LXI. 2. *Accountant-General.*

9. The Accountant-General of the Court of Ch. has no right to attend to any order inconsistent with, or varying the order of this Court, without its special direction so to do.—*Gore v. G.*, 4 I. E. R. 164. (R.)

10. When money is lodged with the Accountant-General under the Legacy Act, he is bound to invest from time to time the dividends on the principal sum in stock; the order for investing the principal sum should provide for the costs of investing the dividends. When the order did not provide for those costs, he was not held responsible for not having so invested the dividends.—*Ex parte M'Mullen*, 7 I. E. R. 488. (R.)

11. The Accountant-General of the Court of Ch. will sometimes be directed to accept a transfer of the purchase-money of property sold in the I. E. Court; the money not being distributable immediately.—*Radcliffe v. Munce*; *Tighe v. Munce*, 2 I. Jur. 251. (R.)

LXI. 3. *Clerks, Chief.* [See 30 & 31 Vic., c. 44, ss. 11-20, 25, 26.]

4. *Clerks, Junior.* [See 30 & 31 Vic., c. 44, ss. 16-20, 25, 26.]

5. *Clerk in Court.* [See 30 & 31 Vic., c. 129.]

6. *Clerk of Enrolments.*

7. *Clerk of Records and Writs.* [See G. O. 1867.]

8. *Commissioners to Administer Oaths in Chancery in Ireland.* [See 30 & 31 Vic., c. 44, ss. 75-81.]

9. *Cursitor.* [See 9 G. 4, c. 61, s. 54. Office abolished by 6 & 7 W. 4. c. 74, s. 1.]

10. *Master and Deputy Remembrancer.* [Masters, except Receiver Master, abolished: 30 & 31 Vic., c. 44, ss. 27, et seq.]

LXI. 11. *Master Extraordinary.* [Abolished: 30 & 31 Vic., c. 44, s. 75.]

12. A person applying to be appointed Master Extraordinary must have his certificate signed by some member of the Legal Profession practising in the district for which he seeks to be appointed.—*Ex parte Needham*, 10 I. C. R. 465. (C.)

13. It is not a conclusive objection to an application to be appointed Master Extraordinary, that the applicant is an hotel-keeper.—*Ex parte Shiel*, 10 I. C. R. 466. (C.)

LXI. 12. *Messenger*. [See 20 & 21 Vic., c. 60; 30 & 31 Vic., c. 44, s. 84.]

13. *Registrars*.

14. *Registrars (Assistant)*. [See 30 & 31 Vic., c. 44, ss. 41-46.]

15. *Secretary to the Lord Chancellor*. [See 13 & 14 Vic., c. 89, ss. 34-37.]

16. *Secretary to the Master of the Rolls*. [See 13 & 14 Vic., c. 89, s. 33.]

17. *Six Clerks*.

18. *Stock-brokers*. [See 30 & 31 Vic., c. 44, s. 194.]

19. *Under Clerks*.

20. *Usher*.

21. *Waiting Clerks*.

## LXII. ORDERS.

1. *Orders generally*.

2. *Construction and Effect of*.

3. *Entry and Drawing up of*.

4. *Showing Cause against: Suspension or Discharge of*.

5. *Service of*.

6. *Amendment of*.

7. *Short-day Order*.

8. *Stop Order*.

[See GENERAL ORDERS, ante, p. 359.]

### LXII. 1. *Orders generally*.

1. The general rule, that an affidavit filed for cause, and notice thereof duly given, shall be cause against making a conditional order absolute, does not apply to a conditional order obtained as of course in the office.—*Murphy v. Meade*, Hay. & J. 720. (E.E.)

2. An order dismissing a bill cannot be enrolled.—*O'Brien v. Manders*, Fl. & K. 628. (R.)

3. Form of order upon an application for liberty to read, on the trial of an issue, depositions taken in the cause, and made by a witness whom illness disabled from attending the trial.—*Lynch v. L.*, Dr. Rep. temp. Sugden, 538. (C.)

4. A continuing order, for payment of balances out of Court from time to time by a receiver, refused; no report ascertaining the amount due having been obtained.—*Alexander v. Abernethy*, 7 I. E. R. 308. (E.E.)

5. The rule to change an attorney, on payment of costs, is not an order under the 3 & 4 Vic., c. 105, s. 29.—*Emmet v. Marnane*, 8 I. E. R. 522. (E.E.)

6. When a petition has been referred to the Master, under the Ch. (Fr.) Reg. Act, 1850, s. 15, he has power to direct the service of notice, under the 32nd G. O. of 1851, for the purpose of binding persons by the proceedings in the cause.—*Stanley v. S.*, 5 I. C. R. 416. (C.)

7. Orders under the 1st sec. of the Ch. Reg. Act, and the 32nd order of July 1851, should state the character and right in which the parties to it are to be bound.—*Swan v. Doak*, 6 I. C. R. 55. (R.)

8. A minor may be bound by an order under the 1st sec. of the Ch. Reg. Act, and 32nd order of July 1851. Form of such order.—*Fry v. Johnson*, 6 I. C. R. 56. (R.)

9. An order of reference under the Ch. Reg. Act, s. 15, in an administration suit, cannot be obtained without a personal representative being named as a party.—*Cleary v. C.*, 8 I. C. R. 264. (C.)

### LXII. 2. *Construction and Effect of Orders*.

10. Motion for an order to take preliminary accounts should not be made in a suit that is either abated or defective; or in respect of accounts, the taking of which would prejudice any question in the cause.—*Thompson v. Maxwell*, 5 I. E. R. 448. (R.)

11. A. claimed land under a valid lease of 1735, and under a lease of the same and of other land made in 1831, by C., the owner of one-third only of the estate, who had obtained a renewal of the order, and acted as sole owner of it. The other two-thirds were vested in B., whose right thereto was afterwards established by decree, subject to a lease subsisting in 1804. A., being abroad, was not a party to the suit. After the decree, he applied to be examined *pro interesse suo* as to his title under the leases of 1735 and 1831, and was allowed this only upon consenting to be made a deft., and to be bound by the decree and other proceedings. *Held*, that, under this order, he could not set up his title under the lease of 1831, and that he could not have the order varied; but that to obtain relief against C., A. should institute a new suit.—*Peed v. Cussen*, 4 Dr. & War. 199; 2 Con. & L. 384. (C.)

12. An order to take the bill *pro confesso* against one deft., only establishes the facts stated against him, and those claiming under him; but any point of law arising on the facts is still open.—*Simmonds v. Pallas*, 8 I. E. R. 335; 2 Jon. & L. 489. (C.)

13. Though trustees are protected in acting under the decision of a competent tribunal, the protection does not extend to persons receiving payments out of a fund for themselves; and though the decision has been long acted on, it is no protection to such persons against the claims of others not bound by it.—*Foster v. M'Mahon*, 11 I. E. R. 287. (C.)

14. In a suit to raise an incumbrance, a deft. omitted to put in issue by her answer a deed of a certain date, under which she claimed an annuity. Upon motion founded upon an affidavit, stating that the omission arose from inadvertence, but not stating any of the circumstances under which the deed was executed, she obtained liberty to prove the deed, and to rely on it at the hearing, although it had not been put in issue in the cause. *Held*, that, under that order, evidence that the deed was executed upon a day different from that on which it bore date, was inadmissible at the hearing, and that evidence of its execution merely could be then received. The Court,

however, in the decree, declared that the deft. should be at liberty to rely before the Master on the deed in relation to such rights as she might claim.—*Ramsay v. Huffington* 13 I. E. R. 185. (C.)

LXII. 3. *Entry and Drawing up of.*

1. An appeal does not properly lie upon the rulings of a Master; the order itself ought to be made up before the appeal is brought.—*Jones v. Stokes*, 2 I. Jur. N. S. 42. (R.)

LXII. 4. *Showing cause against; Suspending or Discharging,*

2. The General Rule—that an affidavit filed as cause, and notice thereof duly given, shall be cause against making absolute a conditional order—does not apply to conditional orders obtained as of course in the office.—*Murphy v. Meade*, H. & J. 720. (E.E.)

3. When an affidavit is filed as cause against a conditional order, a motion to make the order absolute may be made, notwithstanding the lapse of ten sitting days since the affidavit was filed, unless the opposite party has proceeded to tax his costs.—*Lloyd v. Armstrong*, 1 I. E. R. 75; *Jon. & Ca.* 73. (E.E.)

4. In this Court, when an affidavit is filed as cause against a conditional order, the party should move upon the affidavit. Otherwise, the conditional order will be made absolute in the office, as of course.—*Singleton v. Kyle*, 1 I. E. R. 327. (R.)

5. When the time for showing cause against a conditional order expires on the last of the eight days after Term, the Court will not make it absolute upon a certificate of no cause, until the first day of the next ensuing Term.—*Alexander v. Abernethy*, 3 I. E. R. 384. (E.E.)

6. The affidavit of the person against whom process of sequestration has issued will not be heard as cause against a conditional order obtained in the cause, such affidavit not stating any irregularity in the proceedings.—*Creed v. C.*, *Long. & T.* 581. (E.E.)

7. Neither a person in contempt, nor a third person, will be heard to show cause against making absolute a conditional order for a receiver on process.—*Creed v. Moore*, 4 I. E. R. 684. (E.E.)

8. Injunction order in a possessory suit set aside, on the ground that ptf. had not stated his case fairly.—*Dease v. Plunkett*, *Dr. Rep. temp.* Sugden, 255. (C.)

9. A conditional order, out of date, which was not served on all parties, must be discharged; and a new conditional order issued, and served on all parties.—*Barron v. Power*, 7 I. E. R. 300. (E.E.)

10. An affidavit filed, and notice of it, is not "cause shown" against an order to appoint a receiver, unless moved on pursuant to notice.—*Jameson v. Scarry*, 9 I. E. R. 476. (R.)

11. Leave given to show cause after the appointment of a receiver, on an affidavit stating that the respondent had been informed and believed that the ten days for showing cause, mentioned in the conditional order for the appointment of a receiver, were Sitting-days in Term; the respondent paying the costs of the absolute order, and the costs consequential thereto.—*Cassidy v. Hopkins*, 10 I. E. R. 208. (R.)

12. The Court will not, on the client's application, set aside an order made on consent, signed by the client's solicitor, on the allegation that he acted without authority; there being no case made of fraud or misrepresentation.—*Connatty v. O'Reilly*, 11 I. E. R. 333. (R.)

13. A possessory bill was filed to restrain the deft. from cutting turf for sale, on the allegation that he was tenant to the ptf. of lands adjoining the bog, with a limited permission to cut turf for use in the bog which ptf. claimed as his. On the affidavits showing cause, the tenancy of the lands was admitted; but it appeared that the deft. and his predecessors had long claimed the disputed right over the bog, the ptf.'s title to which was vaguely stated. In 1807 an injunction had been obtained in a similar suit, restraining the tenant from cutting turf at all. *Held*, that an injunction could not be obtained in this suit, as, if the tenant was a mere trespasser, it was not sustainable to establish a disputed right, there being no triennial possession, and the allegation of a limited permission could not be strengthened by the order of 1807, which set up a different claim.

An order, on showing cause against an injunction obtained on a possessory bill, allowing the cause to stand over with liberty to amend the bill by putting in issue matter not stated in or exactly consistent with it, cannot be made; such a motion being analogous to the final hearing of an ordinary cause.

The rule, as to using supplemental affidavits on such motions, considered.—*Congleton v. Mitchell*, 12 I. E. R. 34. (C.)

14. An order, made *ex parte* to amend a demurrer, after a copy of it had been ordered, and signed by the officer, set aside, it being doubtful whether the copy had been actually taken out, and the order being grounded on a statement that it had not.—*Keatinge v. Garde*, 12 I. E. R. 310. (R.)

15. A party showed cause against making absolute an order adverse to a will in which during ten years he had acquiesced. The Court made absolute the order, with liberty to him to have his rights determined upon such motion as he might be advised to make.—*In re Beecher's Estate*, 3 I. Jur. 199. (I.E.C.)

1. Premises having been sold, the ptf., the first incumbrancer, was declared the purchaser. The incumbrance being for a larger amount than the purchase-money, the ptf. was allowed to lodge her promissory note for one-fourth of the purchase-money; the sale to be thereupon confirmed *nisi*; she when the time expired, to lodge her promissory note for the remainder of the purchase-money.—*Hammond v. Mitchell*, 6 I. Jur. 249. (R.)

2. A conditional order will be made absolute in the office, although an affidavit, has been filed, if a notice of motion to show cause against the order has been served.

A more proper course is, for the party who obtained the order to apply to the Court on notice, to make it absolute, notwithstanding the affidavit.—*Stevenson v. Moore*, 7 I. C. R. 462. (R.)

#### LXII. 5. Service of Orders.

3. A conditional order may be served on a Sunday.—*O'Leary v. Cavanagh, Hay, & J.* 373. (E.E.)

4. If a party has appeared in a cause, it is unnecessary to apply for liberty to serve him with an order of the Court, although he resides out of the jurisdiction.—*Smith v. Rooney, Jo. & Car.* 104. (E.E.)

5. A deft., out of the jurisdiction, was directed to execute the conveyance in pursuance of the 4 & 5 W. 4, c. 78, s. 8. On hearing the messenger coming to the room wherein he was sitting, deft. ordered the door to be barred. The messenger heard deft.'s voice, but did not see him. Standing outside the door, the messenger in a loud voice stated the object of his visit; and offered to leave copies of the decree, order, and conveyance, with deft.'s son and daughter, who refused. The son forcibly turned the messenger out of the house. The messenger then sent to deft.'s residence a notice and copy of the order, with an explanatory letter (which there was evidence that deft. received), appointing a time and place for deft. to execute the conveyance. Deft. did not execute the conveyance. *Held*, that this was good personal service of the copies of the order and decree, and a sufficient tender of the conveyance, within the 4 & 5 W. 4, c. 78. *Piers v. P.*, S. & Sc. 89. (R.) —[See *Pasley v. Roberts*, S. & Sc. 104, n.]

6. An order made in the presence of the party, on a motion, wherein he appeared by counsel, need not be served on him, to ground an attachment for non-compliance.—*D'Arcy v. D'A.*, 1 I. E. R. 407. (R.)

7. Service of the order for hearing, on a servant, at the registered lodgings of the deft.'s attorney, is not sufficient.

The order must be served either on the attorney's servant, or upon the landlord or landlady of his registered lodgings; but service on the landlord's servant is not good

service.—*Crosthwaite v. Murray*, 2 I. E. R. 323. (E.E.)

8. It is not necessary to serve personally an inheritor with an order to furnish a rental.—*Watkins v. Lloyd*, 5 I. E. R. 244. (E.E.)

9. Before an attachment for non-performance of a decree or order of the Court can issue, personal service of that decree or order must be effected.—*Whistler v. Aylward*; *In re Fitton*, Dr. Rep. temp. Sugden, 1. (C.)

10. When a receiver, against whom an order for an attachment has been made, conceals himself so that his residence is unknown, service of an order to put his recognizance in suit will be substituted on his solicitor with whom he is in communication.—*O'Farrell v. M'Con*, 7 I. E. R. 63. (R.)

11. Every decree and order must be served on the party to obey it, pursuant to the 104th G. O., before any attachment can issue for disobedience thereof. A solicitor issued an attachment without having served the order on the party. The Court set aside the attachment, with costs against the solicitor.

An order to perform an act "forthwith," means, within a reasonable time.—*Mackinnon v. Palmer*, 7 I. E. R. 203. (R.)

12. The conditional order to confirm a sale must be served on the inheritor, even if he have not appeared in the cause.

Although, as a general rule, the time for showing cause against a conditional order does not run when the Rolls Court is not sitting, the Lord Chancellor will, under particular circumstances, direct the officer to issue the side-bar rule to lodge the remaining three-fourths of the purchase-money, though the conditional order to confirm the sale had not been served until after the Rolls Court had risen for the vacation.—*Copeland v. Conway*, 3 I. C. R. 486. (C.)

#### LXII. 6. Amendment of Orders.

13. A creditor, who had obtained a report and allocation order in the cause, died. The funds reported to him were allocated to his executor, without any special order or variation of the allocation order.—*Roberts v. Hughes*, 6 I. E. R. 306. (R.)

14. The title of an order to extend a receiver was amended by inserting the words "and another," it being admitted that they had been left out by mistake; although the alteration deprived the ptf. in the suit in which the receiver was originally appointed of the funds in the receiver's hands.—*Corbet v. Mahon*, 10 I. E. R. 201. (R.)

#### LXII. 7. Short-day Order.

#### LXII. 8. Stop Order.

15. The 3 & 4 Vic., c. 105, ss. 23, 24, are to be read in connection. The charging order under that statute is first a conditional order



*ex parte*, to be made absolute: which last is the order contemplated by s. 23.—*In re Dunscombe*, 9 I. E. R. 4. (R.)

LXII.\* OUTLAWRY. See OUTLAWRY.

LXII.\*\* PARTIES. See PLEADING, PARTIES—PRACTICE, PRODUCTION OF PARTIES.

LXIII. PARTY: PLAINTIFF AND DEFENDANT, AND STRANGERS. See PRACTICE, EVIDENCE.

[See 30 & 31 Vic., c. 44, ss. 66, 67, 70, 194.]

1. *Party Plaintiff: his Rights, Duties, &c.*
2. *Party Defendant: his Rights, Duties, &c.*
3. *Strangers: when they may be heard.*
4. *Attorney-General.*

LXIII. 1. *Party Plaintiff: his Rights, Duties, &c.*

1. The Court appointed a solicitor to act for a number of minor ptfs. On application of some of those who had attained age, the Court varied the order of appointment, and permitted them respectively to name their own solicitors.—*Bennett v. Wheeler*, 1 I. E. R. 16. (R.)

2. When a matter was within a ptf.'s knowledge, and great expense was incurred because he stated it incorrectly, he must pay all that expense.—*Field v. Lord Donoughmore*, 1 Dr. & War. 227. (C.)—[*Rev. 2 Dr. & Wal. 630. (C.)*]

3. A creditor, ptf. in an administration suit to carry out the trusts of a voluntary deed, including personal estate, is entitled to his costs in the first instance, he having put the personal estate in a train to be realised.—*O'Dowda v. O'D.*, 11 I. E. R. 464. (C.)

4. When, pending a suit, a deft. becomes insolvent, the provisional assignee of the Insolvent Court is properly made a party to the suit by supplemental bill.—*Roddy v. Molloy*, 13 I. E. R. 90. (R.)

LXIII. 2. *Party Defendant: his Rights, Duties, &c.*

5. A motion to take a bill off the file, the suit having been instituted without ptf.'s authority, cannot be made by deft.—*Wheeler v. Bulwer*, Hayes, 479. (E.E.)

6. When no proceedings have been taken against a deft. within a year, the cause is, as to him, out of Court, though, within that time, proceedings have been taken against other defts.—*Bartley v. Davis*. Fl. & K. 620. (R.)

7. Defts. who, by persisting in an unfounded claim, have caused the suit to be proceeded with, may be decreed to pay the costs of their co-defts. and of ptf., so far as the suit was properly instituted.—*Glynn v. Locke*, 5 I. E. R. 61; 3 Dr. & War. 11; 2 Con. & L. 21. (C.)

8. It is not deft.'s right to file his answer after a decree on sequestration against him, on paying the costs thereof.—*M. Cartney v. O'Neil*, 5 I. E. R. 159. (E.E.)

9. When a judgment creditor, served with notice under G. O. 15, enters a common appearance under G. O. 18, he is a deft. in the cause as if he had been served with subpoena to appear and answer. *Aliter*, if the appearance entered be a special one under G. O. 19.—*Bryson v. M. Cluskin*, 6 I. E. R. 77. (R.)

10. Costs cannot be given to a deft. who sets up a defence that fails. From the tenant's conduct in this case, and because the bill contained an unproved imputation on the landlord, specific performance of the covenant to renew was decreed, without costs.—*Fitzgerald v. O'Connell*, 6 I. E. R. 455; 1 Jon. & L. 134. (C.)

11. A defective rental, furnished by deft., will be ordered to be amended in order to ground an attachment in case of non-compliance.—*Young v. Arrell*, 8 I. E. R. 159. (R.)

12. When a deft. in a cause has been found by commission a lunatic, the Court will not appoint a Clerk in Court to answer in the cause.—*Dooley v. Harding*, 1 I. Jur. 330. (R.)

13. *Quære*—Can a deft., who has not the carriage of the decree, bid at the sale in the Master's office, without an order permitting him to do so?—*Munns v. Feris*, 11 I. E. R. 253. (R.)

14. A creditor who has obtained a receiver under the Judgment Acts is a necessary answering party in a cause seeking a sale of the lands. The receiver cannot be extended from the matter to the cause, unless the creditor has filed his answer, and has had notice of the motion to extend.

When it is sought to extend a receiver from one matter to another, or from a matter to a cause, in which a receiver only is prayed for, the debtor only, and not the creditor who has obtained the receiver, should be served with notice of the motion.—[*Walsh v. W.*, 1 I. E. R. 609, observed on.]—*Le Grand v. O'Neill*, 2 I. C. R. 569. (R.)

15. After a decree to account in a suit against B. and C., the executors of A., in a suit for the administration of A.'s assets, B. died. B. had received part of the assets of A.; it was alleged, but not proved, that he died insolvent. *Held*, that the cause could not proceed until the representative of B. was brought before the Court.—*M. Namara v. O'Kelly*, and *M. Mahon v. O'Kelly*, 5 I. C. R. 288; 2 I. Jur. N. S. 280. (C.)

16. A., having devised all his property to his wife, and having contracted to sell the lands, died. *Held*, in a suit for specific performance by the purchaser, that the heir-at-law of A. was not a necessary party to the conveyance, as he had no legal estate in the lands; no equitable estate; and no right to

institute a suit to set aside the contract, having regard to the will of A. devising all his property to his wife who, if the contract was set aside, would be entitled to the lands; and, if the contract was not set aside, would be entitled to the purchase-money.—[*Roberts v. Marchant*, 1 Ph. 370, explained.]—*Fowler v. Lightburne*, 11 I. C. R. 495; 6 I. Jur. N. S. 93. (R.)

LXIII. 3. *Strangers: when they may be heard.*

1. The assignee of W., an insolvent, having sold a policy of insurance on the life of W., who shortly afterwards died, some creditors, who intervened in the Insolvent Court, alleged that the sale had been made at an undervalue, by collusion between the assignee and the insolvent; and the produce of the policy was brought into the Insolvent Court. The purchaser filed a petition against the assignee and the intervening creditors, praying that the produce of the policy might be paid to him. *Held*, that, as against the creditors, the petition must be dismissed, with costs; but the petition was allowed to stand over, in order to have a new assignee appointed.

That the creditors were entitled to the costs of the affidavits filed by them, impeaching the sale.—*O'Reilly v. Fannin*, 6 I. C. R. 166. (C.)

2. Leave refused to one, not a party to the suit, to intervene in the Master's office in taking the account, though he was the only person beneficially entitled in the result of it; his interest, however, being represented by the petitioner.—*Connor v. Burke*, 17 I. C. R. 207. (R.)

LXIII. 4. *Attorney-General.*

8. In incumbrancers' suits, the Attorney-General, made a party in respect of a recognizance, sufficiently represents the parties interested in it for all purposes. It should be reported an incumbrance, though the condition be not broken.—*Delany v. Firman*, 12 I. E. R. 304. (C.)

4. The Attorney-General, made a party, in respect of a recognizance or otherwise, cannot be made a notice party, but must be required to answer.—*Fawcett v. Biggs*, 12 I. E. R. 305. (C.)

5. Petitions for receivers on tenants' and receivers' recognizances should be entitled in the Queen's name: the Att.-General should be the petitioner.—*The Queen v. Cruise*, 2 I. C. R. 65. (C.)

LXIV. PAUPER. *See PRACTICE, COSTS; PRACTICE, EVIDENCE.*

6. An application to sue *in forma pauperis* in this Court must be made on an affidavit that the ptf. is not worth £5, except the matter in question in this suit.—*O'Donnell v. M'Mahon*, 9 I. E. R. 471. (R.)

7. The ptf., an executrix, being also a devisee and legatee, the Court made an order that she might sue *in forma pauperis*.—*Flattery v. Anderson*, 11 I. E. R. 586. (R.)

8. Order made in a cause petition matter, giving leave to the petitioner to carry on the suit *in forma pauperis* after the matter had been set down for hearing.—*St. Clair v. Crawford*, 2 I. C. R. 557. (R.)

9. A person suing *in forma pauperis*, appealing from the judgment of the M. R., must lodge £10.—*Wall v. —*, 3 I. Jur. 285. (C.)

10. A party suing *in forma pauperis*, and succeeding in his suit, is entitled to *dives* costs as against the deft. The solicitor may have his costs taxed as *dives* costs, though there are no special directions in the decree, and though the fund produced by the sale decreed is not sufficient to pay the ptf.'s demand without costs.—*Woodrooffe v. Murphy*, 6 I. Jur. 1. (R.)

11. A ptf., suing *in forma pauperis*, having obtained a final decree, entered a rule to change her solicitor, who moved that the rule be rescinded, and the carriage of the decree restored to him, or that ptf. should pay him the costs incurred. The Court refused the motion, without prejudice to any lien which he might have on the fund.—*M'Ghee v. Mahon*, Fl. & K. 93. (R.)

LXV. PAYMENT: ORDER FOR.

12. On personal service of deft. with the decree directing him to pay ptf. a specified sum, and on demand of payment by a third person, under power of attorney, it is enough to show deft. that power. To ground a motion for a sequestration for not paying the money pursuant to the decree, it need not appear that at the time of service of the decree, and of the demand, a copy of that power was left with deft.—*Vereker v. Gort*, 2 I. E. R. 239. (R.)

13. When an incumbrancer, to whom a sum is ordered to be paid, before payment assigns his charge, the assignee cannot obtain an order for payment of that sum to himself upon affidavit merely; he must take a reference at his own expense.—*Huggard v. Lynch*, 8 I. E. R. 511. (E.E.)

14. Orders to pay or transfer funds to trustees should direct the payment or transfer to be made to them personally, and should not contain the words "to their attorney lawfully authorised."—*In re Fishbourne*, 9 I. E. R. 340; 3 Jon. & L. 584. (C.)

15. In the Exchequer, upon motion to pay a sum on account of costs, although notice had been served on all the parties, the Court only granted a conditional order.—*Alexander v. Molloy*, 2 I. Jur. 236. (E.E.)

**LXVI. PAYMENT INTO COURT. See PRACTICE, INJUNCTION.**

1. *On Admissions.*
2. *By and in case of Executors, &c., Trustees, and Receivers.*
3. *On Interpleaders.*
4. *On Obtaining and Continuing Injunction against Proceedings at Law, and Commission to Examine abroad.*
5. *In cases of Partners.*
6. *In cases of Vendor and Purchaser.*
7. *In other cases: generally.*

**LXVI. 1. On Admissions.**

1. An executor, admitting assets, and ordered to bring them in, cannot rely on his own demands, set forth in a charge under the decree, but not proved, as cause against the issuing of an attachment for not complying with the order; nor will the Court extend the time for bringing in the money until after the Master reports, an unreasonable delay having already occurred.—*D'Arcy v. D'A.*, 11 E. R. 407. (R.)

2. When, in an administration suit, the executor, by his answer, admits that there are assets still outstanding, lent by testator on personal security, the Court will not, before the hearing, compel the executor to bring the money into Court, or give security to abide the decree.—*Costelloes v. Cantwell*, 6 I. E. R. 386. (R.)

3. The debt, in the original suit, after a decree that she should lodge in Court a sum when ascertained by the Master, died. The suit was revived against her executors, who admitted assets by their answer, and the amount was ascertained by the report. Upon motion by the ptf's., the executors were compelled to bring in the money, without waiting until the cause should be heard.—*Mackinnon v. Palmer*, 7 I. E. R. 74. (R.)

4. A party having obtained probate to a will, which was afterwards cancelled, on the ground that the alleged will was a forgery, under that probate possessed himself of personal property of the deceased. On administration obtained by another party, and bill filed against the executor for an account and payment of the personal property of the deceased, in his answer the deft. admitted having received certain moneys, but alleged that he had paid them away under the provisions of the will. An application by the administrator, on motion, that the deft. should pay into Court those sums admitted by him to be received, and alleged to be improperly paid away, was refused.—*Auld v. Stewart*, 8 I. E. R. 399. (E.E.)

**LXVI. 2. By and in case of Executors, &c., Trustees, and Receivers.**

5. To indemnify a trustee or executor who lodges funds in Court under the Trustee Indemnity Act (11 & 12 Vic., c. 68), they must

be lodged to the credit of a particular trust. When they have been improperly lodged, the Court will not make an order.

Practice under this and the corresponding English Act.—*In re Godfrey's Trust*, 2 I. C. R. 105. (R.)

**LXVI. 3. On Interpleaders.**

**LXVI. 4. On Obtaining and Continuing Injunction against Proceedings at Law, and Commission to Examine Abroad.**

6. A., in consideration of being permitted to become an intestate's administrator, agreed to deposit the share of C., a minor, one of the next-of-kin, in the hands of a trustee for him. A. deposited £180 with B., in trust for C., subject to the final settlement of the administration account. Afterwards C.'s share was ascertained to be £156. A. proceeded at law to recover the £180 from B., and refused a tender of the difference between £156 and £180. Upon a bill filed by C. against A. and B., and before appearance by A., the Court allowed B. to lodge the £180 in Court to the credit of the cause; and, upon his doing so, restrained A. from proceeding further with his action.—*Fleming v. F.*, 2 Jon. 810. (E.E.)

**LXVI. 5. In Cases of Partners.**

**LXVI. 6. In Cases of Vendor and Purchaser.**

**LXVI. 7. Payment into Court in other Cases, generally.**

7. When lands were decreed to be sold, subject to a charge, application upon consent to lodge the sum charged in Court refused.—*v. —* 8 I. E. R. 514. (E.E.)

8. On motion to transfer funds from the Court of Ch. to the I. E. Court it is necessary to produce on the motion at the Rolls Court a certificate of the Commissioners of the I. E. Court, showing that there is a fund in that Court to be distributed to which the funds in Ch. can be transferred; otherwise such motion will be refused.—*Bagge v. Barron*, 7 I. Jur. 242. (R.)

**LXVII. Payment out of Court.**

9. Under the words "reasonable costs, charges, and expenses," in the 2 & 3 Vic., c. 61, s. 29, the Court will award all necessary costs incurred by parties in obtaining payment out of Court of the purchase-money of lands required for the purposes of the commission, or of having it invested upon trusts similar to those to which the lands so required were subject.—*In re Nar. Commrs. of the Shannon*, 3 I. E. R. 355; Fl. & K. 13. (R.)

10. When a consent is in the nature of an allocating order, there must be an affidavit that it has been signed by all the creditors who have proved in the cause.—*Cooke v. Briscoe*, 3 I. E. R. 28; Fl. & K. 39. (R.)

1. When the surplus in Court is small, the Court will, on an affidavit that it is not incumbered, allow it to be paid out.

If the surplus is considerable, there must be a reference.—*Seymour v. Sirr*, Fl. & K. 236. (R.)

2. Dividends of small amount, which have accrued due on a sum of stock (ordered to be transferred to a party) between the date of the order and of the transfer, were ordered to be paid to the party's attorney, who was authorised to accept the transfer. The application was made shortly after the transfer.—*Pidgeon v. D'Alton*, 3 I. E. R. 134. (E.E.)

3. When an application is made to draw out of Court, money which has been made the subject of a settlement, the settlement itself must be produced in Court.—*Batt v. Cuthbertson*, 3 Dr. & War. 58. (C.)

4. A charging order had been obtained by a judgment creditor upon funds reported to his debtor in the cause. The Court, after the expiration of the six months from the date of the order, directed the funds to be transferred to the creditor, upon motion, without a bill being filed.—*Burke v. B.*, 7 I. E. R. 174. (R.)

5. A sequestration having issued against the debt for non-performance of a decree to pay money to the ptf., the sequestrator seized the rents and profits of his lands. The ptf. and a prior incumbrancer both applied for the funds in the sequestrator's hands. *Held*, that the prior incumbrancer was entitled to them. Sequestration is neither in form nor in substance an execution; it is founded on default of performance of the decree of the Court, and gives no right in the funds levied to the party at whose instance it is sued out.—*Burne v. Robinson*, 7 I. E. R. 188. (R.)

6. A receiver having been appointed in the matter of a judgment creditor, a continuing order for payments out of Court from time to time was refused, no report having been obtained ascertaining the amount due.—*Alexander v. Abernethy*, 7 I. E. R. 308. (E.E.)

7. The Court will distribute a fund in Court payable to a personal representative, upon a Diocesan probate, if the intestate had not *bona notabilia*.—*Graves v. G.*, 8 I. E. R. 36. (R.)

8. The ptf. having filed an interpleader bill, and brought the money into Court, dismissed the bill with costs by side-bar rule before any of the debts. answered. *Held*, that the ptf. was entitled to draw the money so lodged.

*Quere*—In such case are the debts. entitled to their costs out of the money lodged in Court?—*M'Kiernan v. Kernan*, 8 I. E. R. 145. (R.)

9. On a motion for payment out of Court of part of a party's demand, the costs of the application refused.—*Massey v. O'Dell*, 8 I. E. R. 509. (E.E.)

10. When an incumbrancer to whom money was ordered to be paid before payment assigns his charge, the assignee cannot obtain an order for payment of the sum ordered, to himself, upon affidavit, merely, but must take a reference at his own expense.—*Huggard v. Lynch*, 8 I. E. R. 511. (E.E.)

11. By the decree of this Court a *femme sole*, a subject of Great Britain, was decreed entitled to a sum to be realised by a sale of lands. Before the sum was realised, she intermarried abroad with a subject of the Austrian Empire, and continued to reside with him in that empire. The sum being realised, and in Court, an application made on their behalf, that the money should be paid out to the attorney for them, on a warrant executed abroad by them, and on an affidavit, stating that, by the laws of the Austrian Empire, the sum would be at the absolute disposal of the wife, was granted: the Court not requiring that the husband should thereout make any settlement on the wife, or that any commission for her separate examination should issue.—*Hutchinson v. Cathcart*, 8 I. E. R. 394. (E.E.)

12. When persons are entitled to a fund in Court upon the contingency of a childless female of advanced age, having children, the Court will order it to be paid out to them, on their entering into security by recognizance to refund the money, if children should be born.—*In re Commissioners of Wide Streets*, 7 I. E. R. 484. (R.)

13. Orders for the payment or transfer of funds to trustees should direct it to be made to them personally, and not contain the words "to their attorney lawfully authorised."—*In re Fishbourne*, 9 I. E. R. 340; 3 Jon. & L. 584. (C.)

14. The G. S. & W. Railway Co. having purchased settled lands, the tenant for life conveyed them to them under their Act, and he and the tenant in tail applied to draw the purchase-money out of Court. No disentailing deed had been executed. *Held*, that the money was to be considered as bound by the limitations affecting the land, and to be dealt with as subject to be invested in lands, to be settled to the same uses as the sold lands; and that a disentailing deed was necessary to enable the parties to draw the money.—*In re Gt. S. and W. Railway*, 9 I. E. R. 482. (R.)

15. Petition matters under the Judgment Acts should be revived before funds can be paid out in them.—*Cloncurry v. Piers*, 9 I. E. R. 407; 3 Jon. & L. 573. (C.)

16. When a petition is presented under the Mortgage Act, the mere impeachment of the mortgage by affidavit, without showing probable grounds for such impeachment, is not sufficient to prevent the Court from making the usual reference to appoint a receiver.

*Semble*—If a bill should be filed to impeach the mortgage, the Court would not distribute the fund received by the receiver until such

suit was disposed of.—[The case of *Cosgrave v. Gannon*, 3 I. E. R. approved of].—*Whaley v. W.*, 11 I. E. R. 276. (R.)

1. Though trustees are protected in acting under the decision of a competent tribunal, the protection does not extend to persons receiving payment out of a fund for themselves. Though the decision has been long acted on, it is no protection to such persons against the claims of others not bound by it.—*Foster v. M'Mahon*, 11 I. E. R. 287. (C.)

2. A tenant at will having agreed to give possession of lands to a R. Co. for £23, subsequently refused to give possession unless his sister, who, he alleged, had an equal interest in the premises, was also satisfied. The money was offered to be paid on his giving possession, but was not formally tendered. The Company having lodged the sum agreed on in Court to the separate credit of the tenant solely, alleging in the warrant his refusal to accept it as the reason for the lodgment—*Held*, that the tenant was entitled to draw the entire money out of Court, but refused to give any costs, holding each party to have been in default.—*In re S. E. Ry. Co.*, 12 I. E. R. 398. (E.E.)

3. The Court has not jurisdiction on motion, without a petition, to pay out funds lodged under the Trustee Relief Act.—*Ex parte Stock*, 5 I. C. R. 341. (R.)

4. A solicitor, applying for an order to a receiver to pay over money to a party in the cause under a decree, should be prepared with a certificate that the sums are correctly made up.—*Buchanan v. Hoare*, 5 I. Jur. 142. (R.)

5. The wife's equity to a settlement, against the assignee of her *chose in action*, is an obligation attaching not on the property, but upon the right to receive it. Therefore a plenary suit is not necessary to enforce it; and it may be insisted on, in a motion to distribute the fund.

The amount to be settled is discretionary with the Court, and depends on the circumstances of each case.

Husband and wife assigned the *chose in action* of the wife. A decree was pronounced in a suit to which the assignors were not parties, declaring the rights of the assignees *inter se* to the fund. *Held*, that the wife was not bound by the decree, and might, notwithstanding it, insist on her equity to a settlement.—*Marshall v. Gibbings*, 4 I. C. R. 276. (R.)

6. Husband and wife being domiciled in Scotland, where a wife has no equity to a settlement, the Court ordered a fund, the property of the wife, to be transferred to them, or their attorney thereto lawfully authorised, without requiring the wife to appear to waive her equity.—*In re Molyneux*, 5 I. C. R. 346. (R.)

7. Trust funds, the subject of a settlement, were lodged in Court, and an application was made, by a party to whom the dividends thereof had been assigned, for an order to draw them. The trustee was not allowed his costs of attending on the motion, there not being such difficulty in the case as rendered his attendance necessary.

A notice to draw dividends of a fund in Court should state from the Accountant-General's account the amount of the sum sought to be transferred.—*In re Dowden's Trusts*, 1 I. Jur. N. S. 38. (R.)

8. A person having been accused of embezzling money from his employer, and having sums of money lodged to his own credit in bank, an injunction was granted upon petition, restraining the officers of the bank from paying out this money to the accused, the petition alleging that it was the money of the employer. An order was now made, upon motion, directing the payment of £30 out of these sums, to the attorney of the accused, for the purpose of defraying the expense of the defence of the accused upon the criminal charge—the attorney undertaking to account for same if called on by the Court to do so.—*Allen v. M'Kenna*, 1 I. Jur. N. S. 234. (R.)

9. Under the Juvenile Convict Prisons Act 1856, the provisions of which are adopted from the Railways Act (Ireland) 1851, lands were taken, which were vested in an Archbishop in right of his See. A claim of right of common over these lands was made by adjoining proprietors. The arbitrator found the substantial value to be in the commoners, and awarded to the Archbishop one shilling as compensation for his interest. The Archbishop traversed the award, without having obtained a certificate, and without the compensation having been paid into Court. To that traverse the commoners were not parties, but it was resisted by the Commissioners of Public Works; and by the verdict on the traverse, a sum exactly equal to that awarded by the arbitrator to the commoners was found as compensation to the Archbishop. A conditional order to enter the verdict for the Commissioners was obtained, and on the motion to show cause against that order, an order was made on the suggestion of the Court, that the Commissioners should bring the money into the Court of Chancery, and that the motion should stand over until the next term. The money was brought into Court, and the cause was afterwards allowed with costs.

On petitions presented by the Archbishop and the commoners, to obtain payment of the money out of Court—*Held*, per the Lord Chancellor, that the traverse was irregular, and a nullity, having been taken without obtaining the certificate required by the statute; that the verdict could not be taken as conclusive of the amount payable to the Archbishop; and that the right should be tried on an issue.

*Held*, on appeal, that the Lord Chancellor's

judgment was right, and ought to be affirmed.—*In re Juvenile Convict Prison*, 7 I. C. R. 532. (C.A.)

1. A motion to pay money out of Court should be entitled in all the causes with respect to which the fund is to be distributed.—*Powell v. Sullivan*, 2 I. Jur. N. S. 74. (R.)

2. Lands were sold in the I. E. Court, and the proceeds brought in to a cause pending in the Court of Ch. to be administered. W., the first incumbrancer, was not made a party to the suit; and the fund was paid out to P., a puisne incumbrancer. *Held*, that P. was liable in a suit instituted to make good to W. the amount which he had so received.—*Walker v. Power*, 9 I. C. R. 527; 5 I. Jur. N. S. 13. (C.A.)

3. When money is set apart in order that proceedings may be instituted in the Court of Ch., and those proceedings are taken accordingly, the money will not be paid out while that suit remains pending.—*In re Murphy's Estate*, 6 I. Jur. N. S. 69. (L.E.C.)

4. A draft award stated, and the arbitrator certified under the Railways Act (*Ir.*), 1851 (14 & 15 Vic., c. 70), a sum as the sum to be deposited in respect to certain land required by a Municipal Corporation for the construction of water-works. The Corporation lodged the money, and went into possession. The award awarded a smaller sum. Pending a traverse, the Court refused to refund the difference to the Corporation.—*In re the Dublin Corporation Water-works*, 17 I. C. R. 16. (R.)

PERPETUATING TESTIMONY. *See* PRACTICE, BILL TO PERPETUATE—EVIDENCE, 14.

LXVIII. PETITION. *See* PLEADING, II—BILL OR PETITION, VI—PETITIONS UNDER STATUTORY JURISDICTION OF THE COURT—BANKRUPTCY, VI, XVI, XVII—CHARITY, IV.

1. *General Orders respecting Petition.*
2. *What effected by.*
3. *Proceedings on generally.*

LXVIII. 1. *General Orders concerning Petition.*

5. An application under the 1 W. 4, c. 60, to appoint a person to convey in the place of an absent trustee, who has been discharged by decree, ought to be by motion in the cause in which the decree was pronounced. A petition for that purpose is not necessary.—*Callaghan v. Egan*, 1 Dr. & Wal. 187. (C.)

6. In proceedings under the 1 W. 4, c. 60, all the circumstances giving the Court juris-

diction should be stated in the petition, since a supplemental affidavit cannot be read.—*In re Hartford*, 2 Dr. & War. 292; 1 Con. & L. 394. (C.)

7. Petitions presented in lunacy matters, after the lunatic's decease, ought to state the fact of his death.—*In re Briscoe*, 2 Dr. & War. 501. (C.)

LXVIII. 2. *What is effected by Petition.*

8. In minor matters a party cannot come in to show cause against a conditional order obtained on petition, without a further petition for that purpose.—*In re Cummins*, 1 I. E. R. 9. (R.)

9. In all petition matters, except those under the 5 & 6 W. 4, c. 55, every application after the original motion must have a new petition for that purpose.—*Johnston v. Anketell*, 1 I. E. R. 15. (R.)

10. A petition matter being called on, there was no attendance on petitioner's part. The notice of the appearance was therefore struck out of the list. *Held*, that the matter could not be moved without a new petition.—*Scott v. Denroche*, 1 I. E. R. 872. (R.)

11. In a petition matter under the Judgment Act, a receiver having been appointed, the Court on motion decided a serious question of estate, viz.:—Whether a respondent under a limitation in marriage articles had an estate for life, or an estate tail?—*Brennan v. Fitzmaurice*, 2 I. E. R. 113. (E.E.)

12. In an administration suit, the report, but not the bill, made a case for charging the executor with interest upon the balance in his hands. *Held*, that the proper mode of bringing the question before the Court was, to present a petition stating the special matter, and praying that the cause may be set down to be heard for further directions.—*Cleary v. C.*, 3 I. E. R. 562. (E.E.)

13. The 3 & 4 Vic., c. 105, s. 21, disallows the costs of any further petition under the 5 & 6 W. 4, c. 55, or that Act, presented during the sitting of the Court. After an order made on the original petition, such further petition should not be received. Any fees taken in the office in respect of it are illegal.—*Keene v. Bannon*, 4 I. E. R. 521. (R.)

14. The Court will not appoint a Commissioner Extraordinary without a petition having been presented.—*In re Armistead*, 2 Dr. & War. 50. (C.)

15. A reference to ascertain what is due from an infant for penal fines for a non-renewal, cannot be obtained on a petition. A bill must be filed.—*In re Colthurst*, 5 I. E. R. 322; 3 Dr. & War. 35; 2 Con. & L. 35. (C.)—[*Rev. 4 I. E. R. 444; Fl. & K. 515. (R.)*]

1. An application to take money out of Court must be by petition.—*In re Ponsonby*, 5 I. E. R. 263; 3 Dr. & War. 27; 2 Con. & L. 30. (C.)

2. When a petition for a receiver has been presented under the Mortgage Act, deft. cannot show cause without filing a petition. If the petition has not been filed, the Court has not jurisdiction even to give costs against the respondent of a motion to show cause.—*Pukenham v. Darcy*, 7 I. E. R. 476. (R.)

3. V. bequeathed an annuity payable out of her personal estate, and disposed of the residue. In an administration suit, it was ordered, pursuant to the decree, that a specified amount of £3½ per cent. stock, the dividends on which equalled the annuity, should be set apart to answer it. The stock was reduced to £3¼ per cent., and the dividends became insufficient. There was other stock in bank standing to the credit of the cause. On petition, and without a re-hearing, the Court ordered a sufficient amount thereof to be set aside to answer the deficiency.—*Comrs. of Ch. D. & B. v. St. Lawrence*, 9 I. E. R. 560; 3 Jon. & L. 561. (C.)

4. When an order that the Master, or any other person appointed by the Court, should convey in the name of a deft., under the 1 W. 4, c. 60, s. 8, cannot be made contemporaneously with the decree at the hearing of the cause, in consequence of the party to whom the conveyance is to be made not being then ascertained—(e. g. when lands are by the decree directed to be sold), an application under the 1 W. 4, c. 60, that the Master should execute a conveyance in the name of such deft. must be made by petition.—*Newman v. Fitzgerald*, 13 I. E. R. 65. (R.)

#### LXVIII. 3. Proceedings on generally.

5. In a cause in which a petition is presented in Vacation, but so near the Term that the application might as well be made in Term by a regular motion in the cause, an order will not be made on the petition.—*Corcoran v. Sparrow*, 1 I. E. R. 15. (R.)

6. A solicitor who has answered a petition presented against him, is not entitled to dismiss it with costs until after one clear Term from the date of his answer.—*Bucke v. Murphy*, 3 I. E. R. 373; Fl. & K. 173. (R.)

7. An affidavit to verify a petition under the 5 & 6 W. 4, c. 55, made by the petitioner's agent will not suffice. The petitioner himself must make it.—*Phelan v. P.*, Fl. & K. 177. (R.)

8. Under the 5 & 6 W. c. 55, the verifying affidavit may be sworn before the petition is filed.

*Semble*—When under an Act an affidavit in a petition matter required by the Act may be sworn before the petition is filed, an indictment for perjury in that affidavit may be sus-

tained.—*Clendinning v. O'Malley*, 2 Dr. & War. 210; 1 Con. & L. 363. (C.)

9. When a petition is ordered to stand over, a new petition need not be presented before bringing the matter again before the Court. But, if any new fact has occurred, on which the Court should adjudicate, a supplemental petition, stating that fact, is necessary.—*In re Gavacan*, 2 Dr. & War. 432. (C.)

10. It is not necessary to entitle a petition in the matter of the Act of Parliament under which it is presented; and if it be entitled in the matter of a wrong Act of Parliament, and the Court can see, from the matter of the petition itself, that it has jurisdiction to make the order prayed under the authority of a public statute, the reference to the Act in the title will be rejected as surplusage.—*Hunter v. Edmonds*, 6 I. E. R. 123. (E.E.)

11. An application, to amend a petition verified by affidavits, refused. — *v. Steele*, 8 I. E. R. 511. (E.E.)

12. An order was obtained on petition against a minor, not a party to the cause, to execute the conveyance. The minor refused to obey the order. *Held*, necessary to present a further petition to obtain an order, that an attachment should issue against the minor, that a person appointed by the Court should execute in his name.

*Semble*, the 4 & 5 W. 4, c. 78, does not apply to minors.—*Moore v. Grogan*, 9 I. E. R. 472. (R.)

PLAINTIFF. See PLEADING V—PARTIES TO SUIT—PRACTICE, PARTY, &C.

#### LXIX. PLEA.

[As to Form of Plea and different kinds of Plea, see PLEADING VII—PLEA. As to Pleading in Court of Probate, see PLEADING XI. See also PRACTICE, COSTS.]

1. When proper: Filing: Leave to Plead, when necessary.
2. Jurat: Attestation and Signature.
3. Setting down: Argument upon.
4. Withdrawing and Waiving.
5. Allowing and Overruling, when: their Effect.
6. Amending.
7. Of former Suit: Reference on.
8. When ordered to Stand for Answer.

LXIX. 1. When Plea is proper: Filing: Leave to Plead, when necessary.

13. Time to plead to a bill will not be given, unless a special case is made. Terms on which time may be given.—*Gethin v. Cochrane*, Hay. & J. 217. (E.E.)

14. An objection to a bill of revivor should be taken by plea or demurrer; but, if ptf. misrepresents the character which he fills,

the objection may be taken at the hearing.—*Stuart v. Burrowes*, Dr. Rep. temp. Sug. 265. (C.)

1. A party, supposed to be the personal representative of a former deft., was served with a subpoena to revive and answer. He did not discover the character in which he was made a party until after the time to plead had expired. Notwithstanding G. O. 64, the Court allowed him to plead, since an answer would not prevent the suit being revived against him.—*Lewin v. L.*, 9 I. E. R. 638. (R.)

2. The rule, that immaterial matter cannot operate to make a pleading double, prevails in equity as well as at law.—*Daly v. Kirwan*, 10 I. E. R. 312. (R.)

3. A deft. to a bill of revivor appeared. Subsequently an order to revive was obtained. Within a month from his appearance the deft. filed a plea. *Held*, that the order to revive did not preclude the filing of the plea.—*Hamilton v. H.*, 1 I. Jur. 241. (C.)

4. Liberty given to a deft. to plead double to a bill to which she had not entered an appearance; she undertaking to adopt the parliamentary appearance filed by the ptf., and to pay the costs of the motion.—*Fitz Gerald v. F.*, 2 I. Jur. N. S. 181.

#### LXIX. 2. *Jurat of: Attestation & Signature of.*

5. A plea that ptf. was discharged as an insolvent debtor under the 53 G. 3, c. 138, must be verified by oath.—*Corbally v. Kirwan*, 2 Jones, 170. (E.E.)

#### LXIX. 3. *Setting down and Argument of.*

6. It is deft.'s duty to set down his plea to be argued. If ptf. admits the validity, but denies the truth of the plea, the Court will allow him to file a replication.—*Wilson v. W.*, 5 I. E. R. 514. (E.E.)

7. When ptf. sets down a plea for argument, and does not appear when the case is called on, the plea will be allowed with costs.—*Walker v. Daly*, 9 I. E. R. 460. (R.)

#### LXIX. 4. *Withdrawing and Waiver of.*

#### LXIX. 5. *Allowing and Overruling; when: Effect of.*

8. An order, allowing a plea of the Statute of Limitations, does not put the cause out of Court.—*Howlett v. Lambert*, Fl. & K. 593. (R.)

9. A plea may be good in part, and bad in part, with respect to the quantity of the bill covered by it, but not with respect to the defence made thereby. The plea must be overruled, if part of the defence is bad.

Ptf.'s bill sought a revivor against a deft. in several characters. Deft. pleaded to the whole relief. The Court was of opinion that ptf. was entitled to revive against deft. in one character. *Held*, that the plea should be overruled.—*Fitzmaurice v. Sadlier*, 12 I. E. R. 136. (R.)

#### LXIX. 6. *Amending.*

#### LXIX. 7. *Of Former Suit: Reference on.*

10. When ptf. denies the truth of a plea, he must, within the time limited by G. R. 19 (of 1834), for setting down the plea for argument, serve a notice that he will move for an order of reference to the Master to enquire into the truth of the plea.—*Howlett v. Lambert*, Fl. & K. 226. (R.)

#### LXIX. 8. *When ordered to stand for Answer: Practice on.*

PRELIMINARY OBJECTIONS. See PRACTICE, HEARING.

#### LXX. PRIORITY OF SUIT. See PRACTICE, CROSS-BILL.

#### LXXI. PRISONER. See PRACTICE, ATTACHMENT—PRACTICE, HABEAS CORPUS.

11. Deft., having been arrested under process of contempt for not answering, was not brought to the bar of the Court within the time required by the 5 & 6 W. 4, c. 16, rule 2; but remained in custody without praying for his discharge. Whilst so in custody, ptf. in the equity suit caused him to be detained under a *ca. sa.* The Court discharged him both from the arrest under the process of contempt, and from the detainer.—*Chester v. Barrett*, 2 Jones, 579. (E.E.)

#### LXXII. PRIVILEGE FROM ARREST. See BANKRUPTCY, VII—PRACTICE, WRIT—SOLICITOR.

12. A solicitor is privileged from arrest going to, tarrying at, and returning from Court, whilst he is in attendance on a motion or cause.

The arresting party, if aware of the existence of the privilege at the time of the arrest, will be ordered to pay the costs of the solicitor's application to be discharged, besides any other costs which may be incurred by his detention.—*In re O'Neill*, S. & Sc. 78. (R.)

13. A solicitor's privilege from arrest is not confined to those cases in which his personal presence is indispensable.—*In re Keane*, S. & Sc. 81. (R.)

14. An attorney is not privileged from arrest in execution, when he comes to Court to perform an act for his client which a clerk could do equally well.—*Salmon v. Kiernan*, S. & Sc. 83, *note*. (R.)



1. A general clerk of the Clerk of the Pleas in the Court of Exchequer is an officer entitled to privilege from arrest under a *ca. sa.*, going to, tarrying at, and returning from his office.—*Kane v. Stewart*, S. & Sc. 84, note; 2 Jones, 630. (E.E.)

2. If a solicitor be *bona fide* attending a motion or other proceeding in Court for his client, he is privileged from arrest. But when he is merely looking for his counsel in Court to consult him touching the course to be pursued in the cause, he is not privileged from arrest.—*Longfield v. Carpenter*, 1 I. E. R. 349. (C.)

3. Deft. being in attendance at the Quarter Sessions, pursuant to his recognizance to prosecute, was arrested under a commission of rebellion for not answering ptf.'s bill. The Court discharged him.—*Graves v. M'Carthy*, 2 Jones, 626. (E.E.)

4. The deft. having been arrested under process of contempt, for not answering, was not brought to the bar of the Court within the time required by the 5 & 6 W. 4, c. 16, rule 2; but remained in custody without applying for his discharge. Whilst so in custody, the ptf. in the Equity suit caused him to be detained under a *ca. sa.* The Court discharged him from the arrest under the process of contempt, and from the detainer.—*Chester v. Barrett*, 2 Jones, 579. (E.E.)

5. Under an order of reference, the Master directed that the ptf., resident in the county of Galway, should file a charge, and verify it by his affidavit. The ptf.'s solicitor accordingly wrote to him requiring his presence in Dublin upon the subject. Consequently the ptf. came to Dublin on the 24th of Nov. 1839, and was detained from day to day in giving the required information and assistance for the preparation of the charge, and in waiting for the direction of counsel respecting it, until the 24th of Dec. following, when the charge, having been approved by counsel and engrossed, was ready to be filed. The ptf. being in debt, and fearful of being arrested if he should go down to Court to verify the charge, an appointment was made between him and his solicitor that, on the 24th of Dec. the solicitor should accompany him to the house of the Master's Examiner, that he might there make the required affidavit. On that day the ptf., when on his way to the office of his solicitor for the purpose of keeping the appointment, was arrested under a *ca. sa.* Shortly afterwards a number of detainers upon him were lodged with the sheriffs. *Held*, that he was privileged at the time of the arrest, and should be discharged.—*Brown v. M'Dermott*, 2 I. E. R. 438. (R.)

6. A principal deft. having come to town for the hearing of a cause in the Lord Chancellor's list, and having been on his way from his hotel to his solicitor's office was arrested under a *ca. ad resp.*—*Held*, that he was privileged, and should be discharged, although he had

deviated and remained a little for his amusement. That although the cause for which the deft. came to town was to be heard by the Lord Chancellor, yet as it was generally depending in Chancery, the M. R. might make the order allowing the deft. privilege, and ordering his discharge.—*Mahon v. M.*, 2 I. E. R. 440. (R.)

7. A cause being set down for hearing, and in the Lord Chancellor's list for the day, the ptf. attended in Court until it rose, but that cause was not called. Upon leaving Court, he called at his place of business, and remained there about an hour and a half, sorting his papers, and making other preparations for the hearing of the cause, and, when proceeding from thence homewards, was arrested under a *ca. sa.* for a large amount. *Held*, that he was privileged from arrest, and should be discharged. That he was entitled to apply to the Rolls Court for his discharge.—*Ahearns v. M'Guire*, 2 I. E. R. 437. (R.)

8. O., a party and solicitor in the cause, having been in attendance in the Master's office, upon a summons in the cause, left the office, and was arrested on a *ca. sa.*, near Carlisle-bridge, which was out of the direction of, and beyond his residence in, Jervis-street. *Held*, that the deviation deprived him of his privilege from arrest. The question in such cases always is, Whether the person arrested was, at the time of the arrest, *bona fide* engaged in the business he was called on to execute?—*In re Owen*, 6 I. E. R. 125. (R.)

9. A party in a suit, who was arrested under an execution while returning home from Court, where he had been assisting his solicitor in the discharge of duties which were the proper business of his solicitor, is not privileged from arrest.—*Flattery v. Anderson*, 6 I. E. R. 518. (R.)

10. A solicitor, not keeping a clerk, arrested on civil process, in the *bona fide* discharge of his client's business, will be ordered to be discharged, although a clerk might have done the same business.

*Seem*—That even if he did keep a clerk he would be entitled to his discharge.—*In re Ahearns*, 2 Dr. & War. 141; 1 Con. & L. 250; 4 I. E. R. 337; 2 Dr. & War. 142. (C.)

11. O., a party to and solicitor in the cause, having been in attendance in the Master's office on a summons in the cause, left the office, and was arrested on a *ca. sa.*, near Carlisle-bridge, which was out of the direction of, and beyond his residence in, Jervis-street. *Held*, that the deviation deprived him of his privilege.

In such cases, the question always is—Whether the person arrested was, at the time of the arrest, *bona fide* engaged in the business which he was called on to execute.—*Heron v. Stokes*, 6 I. E. R. 125. (R.)

12. A person going to the Master's office to swear a discharge is privileged from arrest.

The affidavit in support of a motion for the

discharge of a person arrested under such circumstances, should state the hour when the business was done, and where and when the arrest took place, in order to show that there was not any unnecessary delay.

The application should be made to the Court of which the arrest is a contempt.—*Phelan v. Byrne*, 2 I. Jur. 60. (R.)

1. A suitor coming from the country, whose attendance at the hearing of the cause is material, is privileged from arrest on civil process during the period that his absence from home is necessary.—*Squire v. Blake*, 2 I. Jur. 122. (R.)

2. A solicitor was arrested on the direct way from the Taxing Master's office, but it appeared that before his arrest he had deviated considerably from the direct way. *Held*, that he was not entitled to be discharged.—*Walsh v. Wilson*, 1 I. C. R. 610; 3 I. Jur. 275. (R.)

3. A respondent in a matter, who was his own solicitor, and who came from the country to attend in the Master's office to the letting of lands in his own occupation, was *held* to be privileged from arrest during his stay in town.—*Lawlor v. Scollard*, 2 I. C. R. 146. (R.)

4. A receiver, who had come to Dublin to attend to a motion, in which a charge of a criminal nature was made against him, was arrested for debt on the evening of the day when the motion was disposed of. The Court ordered that he should be discharged.—*Brabazon v. Teynham*, 2 I. C. R. 563; 5 I. Jur. 74. (R.)

5. Though an appellant comes to London so long before attendance at the hearing of his cause requires his presence that he would not be discharged out of custody, if then arrested, he will nevertheless be discharged, if not arrested until his cause is actually on the paper.—*Persse v. P.*, 5 H. L. Cas. 671.—[*See s. c.*, 7 Cl. & F. 279; 3 I. C. R. 196. (C.); 5 H. L. Cas. 682.]

6. A party coming to town to attend the conduct of a cause, does not possess any general privilege from arrest. Such privilege will be extended to him during the time that he *bona fide* remains in town to attend the hearing of the cause, or other proceedings, at which his presence is required for the due administration of justice.—*O'Connell v. O'C.*, 3 I. Jur. 342. (R.)

7. A party who acts *bona fide* as his own solicitor in a matter, and who comes from Cork to Dublin to attend a summons in the Master's office in that matter, is privileged from arrest during his necessary stay in Dublin.—*In re Lalor*, 4 I. Jur. 276. (R.)

8. A party brought up to town to attend on a summons before the Master, is privileged from arrest while going to the Four-courts to

swear an affidavit to verify a cause petition in another suit, and while returning straight to his lodgings.

When a party comes up to town to be examined *viva voce* before the Master, respecting a discharge filed by him in the office, and remains till the hearing, when he is ordered to amend his discharge, and is arrested in town the day after this order to amend is made, he will be privileged from arrest, if it appear that it was necessary for him to remain in town to verify the discharge when amended.—*West v. Farrel*, 5 I. Jur. 153. (R.)

9. A petitioner came from the Isle of Man for the purpose of attending at the hearing of his cause, which was expected to come on immediately, and was arrested under a writ of *ca. sa.* while proceeding to his solicitor's office upon business connected with the case. *Held*, that he should be discharged.

Distinction, as to protection from arrest, between the cases where a suitor resides in Dublin, and where he comes to town to attend at the hearing of his cause.—*Norris v. Duckworth*, 2 I. Jur. N. S. 95. (R.)

#### LXXII.\* PRIVY COUNCIL.

#### LXXII.\*\* PROBATE, COURT OF, PRACTICE IN.

[*See Pleading in the Court of Probate; Wills Act*, 1 Vic., c. 26; *Probate Act*, 20 & 21 Vic., c. 79; 21 & 22 Vic., c. 56.]

1. *Jurisdiction.*
2. *Administration or Probate—Grant or Recall of—Renunciation of Probate.*
3. *Affidavits.*
4. *Appeals.*
5. *Appearance.*
6. *Caveat.*
7. *Citation.*
  - a. *Generally.*
  - b. *When Proper or Necessary.*
8. *Costs.*
9. *Judgment.*
10. *Jury.*
11. *Notice.*
12. *Parties.*
13. *Petition.*
14. *Pleadings, Defences, Issues.*
15. *Sealing, Re-sealing.*
16. *Suits, Transfer of to Assistant-Bar-rister.*
17. *Trial, New.*
18. *Venue, Changing.*
19. *Will, Execution of.*

#### LXX.\*\* 1. Jurisdiction.

10. The Court of Probate in Ireland has not power to compel the attendance of witnesses, residing in England, at the trial of a cause in this country. If their attendance is necessary, the proper course is to obtain a direction for the trial of the issue in a Court of Law.—*Potts v. Batty*, 6 I. Jur. N. S. 45. (P.)

11. *Semble*—The Court has power to bind the rights of insane persons, though not so

found by inquisition.—*Massey v. Pennefather*, 7 I. Jur. N. S. 268. (P.)

1. When the heir-at-law successfully resists probate of a will of real estate, the Court of Probate has not jurisdiction to charge the real estate with the costs of the litigation.—*Newton v. N.*, 13 I. C. R. 245. (C.A.)

LXXII.\*\* 2. *Administration or Probate, Grant or Recall of—Renunciation of Probate.*

2. Administration will be granted to a person interested in a term of years created for trust purposes; but the administration will be limited to the trust term alone.—*In re Ryves*, 3 I. Jur. N. S. 184. (P.)

3. Application by the solicitor of deceased for administration under the 20 & 21 Vic., c. 79, s. 78, without citing next-of-kin, refused; the applicant not being a creditor or having any apparent right to the assets. This sec. only applies to cases in which there is a defunct personal estate to administer.—*In re E. Gibbon*, 3 I. Jur. N. S. 184. (P.)

4. It appearing by an affidavit that the husband had been in the habit of ill-treating his wife; that he had deserted her; that she had not heard from him after he left her; and that she was ignorant of his residence; the Court dispensed with his signature to an administration bond.—*In the Goods of Wilson*, 3 I. Jur. N. S. 351. (P.)

5. W. died leaving children. His widow renounced administration. The eldest son, who was of full age, resided abroad. Administration for the use of the younger children, minors, was granted to their uncle.—*In re Woodward*, 4 I. Jur. N. S. 269. (P.)

6. V. bequeathed all he "died possessed of, to his wife, for the use of herself and his children." The Court was moved to grant administration to the widow, without her giving security, or that the security should be measured at a low amount. The children were not wards of Ch. The Court offered to grant administration upon the conditions that the children were made wards of Ch., and a sum of money lodged.—*Cochrane v. C.*, 5 I. Jur. N. S. 42. (P.)

7. Nothing short of an actual renunciation will come within the 20 & 21 Vic., c. 79, s. 84.—*In the Goods of Usher*, 5 I. Jur. N. S. 72. (P.)

8. When one of the next-of-kin has the consent of the majority of the next-of-kin that he be appointed administrator, and is in other respects unobjectionable, the fact that he claims an interest in some property adversely to the intestate's estate, is not a sufficient objection to disqualify him.—*Maqueen v. Barron*, 6 I. Jur. N. S. 70. (P.)

9. Administration, as in case of intestacy, granted when a party, cited to bring in a will and show cause why it should not be con-

demned, appeared and lodged it, but proceeded no further. No costs were ordered against him.—*Germain v. O'Dwyer*, 6 I. Jur. N. S. 91. (P.)

10. Notwithstanding that sureties for an administratrix as curatrix of minors have, after due notice and no objection made, entered into the necessary security, the Court will, on affidavits of their insolvent circumstances, entertain a motion to require the administratrix to give justifying security, or in default to cancel the administration, and give it to another party.—*O'Rourke's Goods*, 6 I. Jur. N. S. 116. (P.)

11. When, by a private arrangement, the intestate's widow had consented with another party, who had lodged a caveat, that he should get administration; but afterwards herself applied for it, the Court refused to disturb the arrangement, and gave administration to the caveator; but allowed her costs.—*Currygan's Goods*, 6 I. Jur. N. S. 116. (P.)

12. A testator left all his property to the then R. C. Bishop of K., to be by him disposed of in the most charitable way he might think fit, and appointed the Bishop executor. The Bishop died before the testator, who left his will unaltered. The Court refused to give administration c. t. a. to the Bishop's successor, without notice to the next-of-kin.—*Tierney's Goods*, 6 I. Jur., N. S. 167. (P.)

13. In a Ch. suit a sum was reported to belong to the intestate's wife, and to be a charge on lands respecting the sale of which proceedings were pending in the L. E. Court. The intestate and his wife had gone to Australia, where she died in 1852; no tidings of him had since been heard.

On motion of his next-of-kin, administration of his goods, &c., limited to substantiate proceedings in the L. E. Court, and a similar grant respecting his wife's goods, were granted to the applicant. The enquiries and advertisements to entitle the party to a general grant to be in the meantime proceeded with.—*In re Ramsey's Goods*, 6 I. Jur. N. S. 248. (P.)

14. The contents of a lost will must be detailed in *hæc verba* in the affidavit to support a motion for probate. The motion should be for probate of the will as contained in the affidavit of A., and not as contained in a draft or copy. The next-of-kin must have notice of the motion.—*In re Coghlan's Goods*, 6 I. Jur. N. S. 271. (P.)

15. A testator, V., desired the name of his principal and residuary legatee to be written as a third witness to his will, under a mistaken idea of protecting his rights. The legatee signed the will.

On discovering his error, V. ordered the name to be struck out as a witness. Lines in different coloured ink were drawn over the name, but it was not obliterated. On consent of all the next-of-kin in this country, probate,

omitting that name, was decreed to the executors.—*In re Harlin's Goods*, 6 I. Jur. N. S. 271. (P.)

1. The Court cannot, under the 20 & 21 Vic., c. 79, s. 78, set aside the right of the next-of-kin to administration, merely because she is the mother of a person who claims as his own the property of the intestate.—*M'Loughlin v. Feeny*, 6 I. Jur. N. S. 323. (P.)

2. Without the sanction of the Master in Ch., or the consent of the parties interested in the fund, the Court will not order an administration bond to be assigned to a petitioner in a Ch. matter, who is entitled to a share of the assets, for the administration of which the petition has been presented; the respondent being the administrator, and a final order having found a sum due by him which could not otherwise be made available.—*In the Goods of Fitzpatrick*, 7 I. Jur. N. S. 86. (P.)

3. A next-of-kin, or party entitled to distribution, seeking to establish his interest in the assets, either on the construction of the will, or by way of *donatio mortis causa*, to the exclusion of the other next-of-kin, must do so clearly by affidavit. Failing to satisfy the Court, the general rule will prevail, that the person having the majority of interests will be preferred; and he who has an interest adverse to the assets will be passed over.

*Semble*—In administration suits brought by married women, their husbands should be parties.—*In re Mahony's Goods*, 7 I. Jur., N. S. 107. (P.)

4. A case showed a pressing necessity for immediately raising a personal representative to revive in Ch. an abated suit, pending for hearing in the Lord Chancellor's list. The Court limited the time for extracting administration to less than fourteen days.—*Phillips v. Hassard*, 7 I. Jur. N. S. 126. (P.)

5. V., by will, dated 5th Nov. 1819, expressly revoked a will dated 10th Sept. 1819; and by codicil of even date gave his property (subject to annuities) to his nephew, and added:—"Trusting to his performance of my wishes contained in a will signed at, &c., on the 10th September 1819, and which, if I live and perfect by legal advice, I intend to be my last will." *Held*, that this passage incorporated the first will, and should form part of the probate, as forming, together with the other will and codicils, the testator's last will.—*Bell v. Att.-Gen.*, 7 I. Jur. N. S. 203. (P.)

6. An administrator became of unsound mind, but was not so found by inquisition. The Court granted administration *de bonis non*, limited during the administrator's lunacy, and directed the original letters of administration to be impounded, and their effect to be suspended until further order.—*In the Goods of Halliday*, 7 I. Jur. N. S. 206. (P.)

7. The Court will order an administration bond to be assigned, to be put in suit against sureties, when satisfied that a substantial breach of the condition has occurred; but will not require such evidence thereof as would be necessary to satisfy a jury. Applicant's *laches*, in not enforcing his rights against the principal, will not disentitle him to an assignment.—*In the Goods of De Morin*, 7 I. Jur. N. S. 266. (P.)

8. Though more than seven years had elapsed since the supposed deceased was heard of, the Court would not dispense with the advertisements usually required in cases of applications for administration when the death is presumed.—*In the Goods of Armstrong*, 7 I. Jur. N. S. 402. (P.)

9. About £70, balance of a pension which the pensioner had assigned to a creditor as security for an annuity, remained due to the pensioner at his death. £38. 2s. 0d. was due to the creditor. The Court refused to grant to the creditor administration limited either to the £70, or to receiving and giving a discharge for £38. 2s. 0d., part of the £70.—*In re Fleming's Goods*, 8 I. Jur. 39. (P.)

10. A will was proved in an English Diocesan Court. There were in this country no assets except a legacy for the legatee's life, which the trustees in the will had lodged, under the Trustee Relief Act, in the Irish Court of Ch., which declared the legatee entitled to the dividends of the invested legacy. Administration, *c. t. a.*, was granted to the legatee, limited to receiving the dividends on the legacy for her life.—*In re Airey*, 8 I. Jur. N. S. 113. (P.)

11. The personal representative of a deceased administrator preferred as grantee of a grant *de bonis non* to the original intestate's next-of-kin, who was an aged and delicate lady; the property being very large, and requiring to be managed by a person of active and business habits, the grantee himself having a considerable interest in the assets.

*Semble*—Independently of the 20 & 21 Vic., c. 79, s. 78, the Court could pass over the next-of-kin.

Security not required for assets brought into the Court of Ch.

A *caveat*, lodged by a person who had no right to prevent the issue of a grant of administration, dismissed with costs.

*Semble*—A petition by way of peremptory exception in an interest suit is irregular; and, having an erroneous title, was dismissed with costs.—*Flood v. Bradley*, 8 I. Jur. N. S. 114. (P.)

12. Administration refused to a creditor who had cited next-of-kin to accept and refuse, though the estate was insolvent, and considerable delay in applying for a grant had occurred on the part of the next-of-kin; but the creditor was allowed his costs out of the estate.—*Forster v. Murphy*, 8 I. Jur. N. S. 135. (P.)

1. Administration of the goods, &c., of a *felo de se* granted to the Crown's nominee, though there was a will appointing executors.—*In re Ure's Goods*, 8 I. Jur. N. S. 136. (P.)

2. That the assets consist principally of a farm which requires the superintendence of an active and intelligent farmer—*Held*, no ground, in choosing an administrator, for passing over the intestate's widow, who was advanced in life. A joint grant never forced by the Court.—*Kelly v. K.*, 8 I. Jur. N. S. 137. (P.)

3. A will, on its face rational, was made by a person, who was sworn to have been at its date of unsound mind, and who was soon afterwards confined as a lunatic in an asylum, where he died.

The Court, reciting in the order its opinion of the invalidity of the will, granted administration as in case of intestacy, to one of the next-of-kin.—*In re Goods of Holmes*, 8 I. Jur. N. S. 159. (P.)

4. The wife of an alien can dispose by will of her chattels real situated in the United Kingdom, as a *femme sole*; and when probate, limited to such property as she had power to dispose of, had been granted, it was amended on motion, by making it a general grant irrespective of the power.—*Goods of Chatauvillard*, 8 I. Jur. N. S. 197. (P.)

5. An executor, who, before the 20 & 21 Vic., c. 79, had renounced, was not permitted to retract and accept a grant of administration *de bonis non c. t. an.* Having become next-of-kin, he was allowed to take a grant in that character.—*Goods of Givens*, 8 I. Jur. N. S. 197. (P.)

6. A notice of motion is required for a conditional order to assign an administration bond.

An order to assign refused, when the two sureties sought to be made liable had signed for payment and as a matter of form, but had declined to act when the officer explained to them their liability, and had been rejected by him, though a third person afterwards signed the bond, and administration had issued.—*Russell v. R.*, 8 I. Jur. N. S. 198. (P.)

7. Deceased's father had not been heard of for twenty-six years, and was believed to have died long since. Deceased died recently. Administration to the son's goods granted, without extraction of a grant to the father.—*In re Lindley's Goods*, 8 I. Jur. N. S. 217. (P.)

8. When an applicant for administration *c. t. a.*, would be beneficially entitled to the whole assets under the will, if valid, made in America, and proved there by the executors, who gave the applicant a power of attorney to take the grant; and would, if the will were invalid, be entitled to a moiety, the Court required justifying security for only one moiety.

Deceased had originally been domiciled in

Ireland; but had, as was alleged, acquired an American domicile, and had returned and died here *in itinere*.

*Semble*—He never lost his domicile of origin; or, if he did, it was revived by his return to this country.—*In re Sullivan's Goods*, 8 I. Jur. N. S. 313. (P.)

9. In a case of administration on presumption of death, it is unnecessary to negative in the affidavit for administration the existence of the persons who, if alive, would, at the time of the deceased's death, have had interests prior to those of the applicant, if he is unable so to negative their existence. To negative it at the time of swearing the affidavit suffices. Grant made under the 20 & 21 Vic., c. 79, s. 78.—*In re Sloane's Goods*, 8 I. Jur. N. S. 314. (P.)

10. After probate issued, assets of the testator were discovered in Scotland. *Held*, that under the 21 & 22 Vic., c. 56, s. 14, there might be written on the probate a memorandum that, at the death of the testator, his domicile was in Ireland.—*In re the Goods of Mackay*, 10 I. Jur. N. S. 80. (P.)

11. An executor having renounced, administration *c. t. a.*, was granted to a residuary legatee. *Held*, that the grant could not be impeached on the ground that it was made in terms to the residuary legatee named in the will; the residuary legatee not being specifically named in that exact character, but being in law and construction residuary legatee, and the grant being 45 years old.

It is unnecessary to apply to revoke a grant which has expired by the death of the administrator.

Charges of fabrication and fraud, made in a petition, failed. It was dismissed with costs.—*Stubber v. S.*, 10 I. Jur. N. S. 153. (P.)

12. In 1836 a bachelor went to Australia. He corresponded regularly with his family until 1849; but for the next fifteen years was not heard of. His father died intestate in 1853, and administration was taken to his goods. Enquiries for the son had not been advertised; but a person in Australia made an affidavit rendering it almost certain that the son was dead. Under the 20 & 21 Vic., c. 79, s. 78, the Court granted to his brother, one of the next-of-kin, administration of his goods, without requiring the publication of advertisements, the father's administrator consenting.—*In re Hamilton's Goods*, 10 I. Jur. N. S. 155. (P.)

13. Administration was required merely to make title to a term vested in the deceased as mortgagee. There were no other tenants, and most of the next-of-kin consented. The Court gave a grant limited to the premises comprised in the term, although the party was entitled to a general grant.—*In re Ward's Goods*, 10 I. Jur. N. S. 180. (P.)

14. A creditor obtained administration limited to two policies of insurance, without the will, though a will then existed; but the

widow, who had it, did not appear, when cited, or lodge the will. The next-of-kin also were cited, but did not appear. There were no other assets.—*Costello v. Elliott*, 10 I. Jur. N. S. 180. (P.)

1. Bequest to A. of a residue to be by him disposed of in such public or private charities as he should think fit. *Semble*, that the gift is void, and cannot be carried out either in Ch. or by the Crown. Therefore, administration *c. t. a.* was granted to the next-of-kin, as beneficially entitled to the residue; A. and the executors having renounced.—*Goods of Burrows*, 10 I. Jur. N. S. 277. (P.)

2. The mutual will of a domiciled Hanoverian subject and his wife, not attested, having been on the husband's death duly decreed for in the proper Court in Hanover, this Court granted administration of his goods, with a certified translation of same, to the nominee, under a power of attorney from the widow, (no executor being named, and there being no issue save a minor), who was by the Hanoverian law the party entitled in her own right, and as the minor's guardian.—*In the Goods of Reitzenstein*, 11 I. Jur. N. S. 60. (P.)

3. It is not ground for the Court passing over the surviving executor, that he is old, and in embarrassed circumstances, and without interest; but the grant was ordered to be impounded for fourteen days.—*Watson v. W.*, 11 I. Jur. N. S. 311. (P.)

4. A., an officer in the Bombay Staff Corps, being in England on leave, left his lodgings in London on Feb. 4, 1866, in a cab, with his luggage, stating to the landlady that he was going by the Irish mail train to Ireland, where his relations resided. He was never afterwards heard of; nor could any news be obtained of his luggage, though advertisements had been published, and enquiries made, in every quarter. *Held*, that a grant of administration *c. t. a.*, might be granted to his brother on giving security, and in the renunciation of the executor named in the will, since the Court could not dispense with justifying security.—*In re the Goods of McCreedy, supposed deceased*, 11 I. Jur. N. S. 311. (P.)

5. The Court will not grant administration to the goods of a deceased person who left surviving several children and next-of-kin, supposed to be dead; but will require the applicant to take out in the first instance a grant to one of such children.—*In re the Goods of Galligan, widow*, 11 I. Jur. N. S. 312. (P.)

6. M., sole next-of-kin of a deceased brother and sister, being of weak mind, and advanced in age, a commission to enquire into the state of her mind was granted; but was directed not to issue until further order. It was never acted on. An order in Chancery expressly authorised her to manage and receive the income of the property of the deceased brother and sister.

This Court refused to grant to her nominee letters of administration limited to the

income thereof only, and during her life only, under the 20 & 21 Vic., c. 79, s. 78; one of the persons who, if M. was dead, would have been her next-of-kin, opposing the motion. This Court directed, however, that an application to the Court of Ch. should be made to appoint a person to apply for administration.—*Lawler v. Metcalf*, 11 I. Jur. N. S. 379. (P.)

#### LXXII.\*\* 3. Affidavits.

7. If a will has been lodged in the Principal Registry, and no further proceedings taken thereon, and afterwards a party desires to have it transferred to the District Registry, to prove it there; the affidavit on which the motion is grounded should state that no proceedings have been taken to prove the will in the Principal Registry.—*In re Draper*, 5 I. Jur. N. S. 42. (P.)

8. When the ptf., heir-at-law of deceased, resided in America, and knew nothing of the case, the Court allowed his solicitor to make and file an affidavit of scripts.—*Murray v. Mulligan*, 5 I. Jur. N. S. 313. (P.)

9. When a citation to accept or refuse administration *c. t. a.* has issued, and no caveat has been lodged, the contentious business begins with the issue of the citation, after which all affidavits, &c., should be entitled in the cause, and not in the goods of the deceased.—*In the Goods of Spillery*, 6 I. Jur. N. S. 168. (P.)

#### LXXII.\*\* 4. Appeals.

10. Since the passing of the 20 & 21 Vic., c. 79, appeals from the Court of Prerogative, standing in the Court of Delegates, are transferred to the Court of Probate.—*Anderson v. Preston*, 3 I. Jur. N. S. 183. (P.)

11. When notice of an appeal is lodged, and no further step taken within the proper time, the party in whose favour the decision has been pronounced may elect to take the probate in a District Registry, upon making the affidavit rendered necessary by the 50th sec. of the Act.—*Patrick v. P.*, 3 I. Jur. N. S. 303. (P.)

#### LXXII.\*\* 5. Appearance.

12. When a party has been cited under the old practice, and has not appeared, the Court will, on motion, order him to enter an appearance, and, in default, will permit the other party to proceed.—*Armstrong v. Moore*, 3 I. Jur. N. S. 204. (P.)

13. A next-of-kin served an executor with a citation to accept or refuse probate. No appearance was entered within the specified time; but the ptf.'s solicitor knew that the executor was preparing the papers for the purpose of taking out probate. The Court set aside a side-bar rule entered by the ptf. that the deft.'s non-appearance be taken as a renunciation.—*Hoey v. Redmond*, 7 I. Jur. N. S. 126. (P.)

1. The 20th Rule, of April 1861, does not apply to cases of persons lodging *caveats* "in the goods," who are not by interest entitled to do so. In such cases an appearance entered, accompanied by a notice in the terms of that rule, and the *caveat*, will be set aside with costs.—*Russell v. R.*, 3 L. Jur. N. S. 40. (P.)

LXXII.\*\* 6. *Caveat*.

2. An executor instituted for his testator's widow, a caveat, a suit to establish the will. Persons, alleged to be next-of-kin and heir-at-law of the testator, were cited. By consent a verdict establishing the will was taken.

The present defts. knew of the former trial; had been in Court during part of it; but had not been cited. They were not parties to the consent, of which they remained unaware till after the verdict. Before probate issued, they, as next-of-kin, lodged a *caveat*. Held, that they were not bound by the verdict.—*Davidson v. Woods*, 7 L. Jur. N. S. 307. (P.)

3. A *caveat*, lodged by a person who had not a right to prevent the issue of a grant of administration, dismissed with costs.—*Flood v. Bradley*, 8 L. Jur. N. S. 114. (P.)

LXXII.\*\* 7. *Citation*.

a. *Generally*.

b. *When Proper or Necessary*.

LXXII.\*\* 7. a. *Generally*.

4. When a party would be bound by a citation, the Court will allow it to be served on him out of its jurisdiction, but merely for the purpose of giving him notice.—*In re Joseph Rogers*, 4 L. Jur. N. S. 77. (P.)

5. A testator's heir-at-law was a lunatic, though not so found by inquisition; and was an inmate of an asylum. It was desired to prove the will in solemn form. The Court, having ordered service of a citation on the heir-at-law himself, as well as on his mother and the keeper of the asylum, permitted the case to go to trial; the order for trial, and all further orders and notices, being served in the same way as the citation.—*Massy v. Pennefather*, 7 L. Jur. N. S. 205. (P.)

6. When a citation, which had been served abroad, was, on its return voyage, rendered illegible by shipwreck and salt water, but the affidavit of service was forthcoming, and also the *præcipe* for the citation, the Court ordered a duplicate to issue and to be filed in the office, instead of the original.—*Robinson v. Ince*, 8 L. Jur. N. S. 52. (P.)

7. Service of a citation, on a minor's father or proper guardian, is valid, and will bind the minor.—*Kelly v. Dunbar*, 10 L. Jur. N. S. 151. (P.)

LXXII.\*\* 7. b. *When Proper or Necessary*.

8. A suit was instituted by one of several next-of-kin. The ptf., wishing to withdraw

from the litigation, neglected to deliver the issue within the time limited by the 39th Rule. The Court refused to allow the deft. to proceed in the cause without citing the other next-of-kin.—*O'Keeffe v. Hughes*, 3 L. Jur. N. S. 304. (P.)

9. When an executor has warned a *caveat* filed by a next-of-kin, who has appeared, he is entitled then to an order giving leave to cite the heir-at-law.—[*Copelstone v. Nicholas* 33 L. J., Pr., 57, considered.]—*In the Goods of Loftus*, 9 L. Jur. N. S. 97. (P.)

10. When the heir-at-law of the deceased is also a next-of-kin, and it is desired to bind him by the proceedings as to the real estate, it is proper to apply to the Court for an order to allow him to be cited.—*In the Goods of Rankin*, 9 L. Jur. N. S. 38. (P.)

11. When a suit was pending at the suit of the executor in a will to establish it, and the validity of the residuary and executorial clauses was disputed by one of the legatees, the Court directed a motion to fix the mode of trial to stand over, to allow time for such legatee to cite the legatees in a former will lodged in the registry, to see proceedings, in order to bind them.—*Kelly v. Dunbar*, 9 L. Jur. N. S. 383. (P.)

LXXII.\*\* 8. *Costs*.

12. The Court will not establish, as a general rule, that the security to be given for costs shall not exceed a particular sum. The special circumstances of each case must be enquired into.

*Semble*—In inexpensive cases, £100 may be sufficient security.—*O'Keeffe v. Hughes*, 3 L. Jur. N. S. 204. (P.)

13. A next-of-kin, who enters a *caveat*, and merely cross-examines the witnesses at the other side, is entitled to an indemnity against costs; but, if he or she goes into a separate case, and makes charges against the opposite party, and fails to establish those charges, it is at the peril of costs.—*Kenny v. K.*, 3 L. Jur. N. S. 352. (R.)

14. The next-of-kin of a testator, although unsuccessful in disputing his will, may obtain their costs out of the estate, if the Judge be of opinion that they were justified in disputing it by reason of circumstances of a suspicious character appearing in the case.—*Carberry v. Healy*, 4 L. Jur. N. S. 304. (P.)

15. *Semble*—When newly-acquired evidence supports the deft.'s case, the Court will not, after verdict, take it into consideration in deciding the question of costs.—*Crozier v. Philpott*, 5 L. Jur. N. S. 292. (P.)

16. The sheriff is not entitled to a fee of £3. 8s. for summoning a special jury for a trial in this Court; and, having been paid that fee under protest by the ptf.'s attorney,

was ordered to refund £2. 2s., with costs.—*Richardson v. R.*, 6 I. Jur. N. S. 247. (P.)

1. A final decree ordered each party to bear his own costs. The short-hand writer, who had, by the Judge's direction, taken notes of the evidence, was held entitled to an order for payment of one moiety of his fees by the ptf.—*Kelly v. K.*, 7 I. Jur. N. S. 125. (P.)

2. The costs of proving a will in the common form are always paid out of the residue, and should not be charged on a legatee.—*Nugent v. N.*, 8 I. Jur. N. S. 52. (P.)

3. A testatrix, being in *extremis*, and of doubtful capacity, the drawer of the will gathered her intentions from previous declarations, and introduced into the will words in favour of himself and his wife. These words were omitted from the will, the Court not being satisfied that the testatrix understood their meaning, or intended that they should be inserted.

The drawer destroyed that will which, nevertheless, the jury found to be valid. It contained a clause of revocation. To it an executor and express trustee for charities in a former will pleaded undue execution and want of capacity. Held, that he was justified in pleading thus, and he was allowed his costs.

As a general rule, intervenients do not get their costs; but when the Att.-Gen. intervenes as a necessary party his costs will be allowed. *Daly v. Burke*, 8 I. Jur. N. S. 73. (P.)

4. In a suit between a residuary legatee in a will (there being no executor named in it) and the next-of-kin, touching the validity of that will, when, after a plea filed by the next-of-kin, the parties consented that the proceedings should cease, and the ptf. (the residuary legatee) should have his costs in the cause out of the estate, and the defts. should pay their own costs, the Court refused to make that consent a rule of Court as regarded the costs.—*Smith v. Brunker*, 9 I. Jur. N. S. 38. (P.)

5. When final judgment is postponed after argument, additional Court fees on the day of the delivering of judgment are necessary; and also refreshers to counsel.—*Gamble v. Robinson*, 9 I. Jur. N. S. 55. (P.)

6. *Semble*—The Court of Q. Sessions has not a discretion as to costs in cases sent there by this Court; but must award costs according to the Civil-bill Act, to the successful party. The Probate Court will not give additional costs beyond what the Chairman had jurisdiction to award.—*Flinn v. F.*, 9 I. Jur. N. S. 383. (P.)

7. A legatee under a will disputed the due execution of a later will, of which the watermark showed that it had been antedated. He was allowed his costs, though the later will was established.—*Cowan v. Rankin*, 10 I. Jur. N. S. 88. (P.)

8. A legatee, being also next-of-kin, impeaching, as legatee, a later will, because of want of capacity, or undue influence, if he fails, is generally liable to costs.

Next-of-kin are more favoured regarding costs. Three wills, differing materially from each other, were written within four days. The latest will was established; but the next-of-kin, who had intervened, got his costs.—*Doyle v. Leary*, 10 I. Jur. N. S. 58. (P.)

9. When a deft. as next-of-kin has pleaded undue influence, with other pleas, and withdrawn them promptly on finding that they could not be sustained, the Court will not impose costs on him.—*Irwin v. Blakeley*, 11 I. Jur. N. S. 178. (P.)

#### LXXII.\*\* 9. Judgment.

10. In order to obtain final judgment in a cause, commenced to be heard in Vacation and concluded in Term, the party who got the verdict must apply to the Judge to limit a time within which the other party shall, if he thinks fit, move to set the verdict aside, pursuant to the power reserved in the 85th Rule (Contentious).—*Maloney v. Casey*, 8 I. Jur. N. S. 184. (P.)

#### LXXII.\*\* 10. Jury.

11. A motion for a special jury should not be made until a replication has been filed to the plea alleging a will.—*Parke v. Sinnott*, 4 I. Jur. N. S. 214. (P.)

12. The Court will not order a special jury to be struck according to the old system, unless an affidavit be filed showing the necessity for doing so.—*Woods v. Murphy*, 11 I. Jur. N. S. 61. (P.)

#### LXXII.\*\* 11. Notice.

13. If a party desires to serve a notice of motion out of Term, he must apply to the Court for liberty to do so, on an affidavit stating the pressing circumstances which necessitate the motion.—*Pilsworth v. Nash & Nolan*, 4 I. Jur. N. S. 78. (P.)

14. To a plea denying that A. had died intestate, and propounding a will, ptf., without serving notice, moved for leave to file special replications. Held, that deft. should be served with two clear days' notice of the motion.—*Meek v. M.*, 5 I. Jur. N. S. 42. (P.)

15. The Court will only give a conditional order to assign an administration bond to be put in suit against sureties, unless notice of motion has been given.—*In the Goods of De Morin*, 7 I. Jur. N. S. 205. (P.)

16. Parties going to trial must give, under the 44th Rule (Contentious), regular notice, besides the eight-day notice given under the 40th Rule; which latter notice was considered sufficient notice of trial.—*Crossley v. Andrews*, 8 I. Jur. N. S. 136. (P.)



1. Notice is requisite of a motion for a conditional order to assign an administration bond.—*Russell v. R.*, 8 I. Jur. N. S. 198. (P.)

2. When by leave of the Court an heir and devisees are cited in a cause in which pleadings have been filed, there should be given with the citation a notice, stating that proceedings in the cause would be suspended for ten days, so as to allow the cited parties to intervene.—*Parke v. Flinn*, 8 I. Jur. N. S. 314. (P.)

3. The notice to be given under the 46th G. R. of 1865, that deft. intends only to cross-examine the witnesses produced by ptf., applies to cases in which, besides the plea of undue execution, want of capacity and undue influence have been pleaded.

The cause, being heard before the Court, his Lordship decreed for the will, and excused the deft. from costs, being of opinion that the Rule applied to such cases.—*Murphy v. M.*, 10 I. Jur. N. S. 154. (P.)

4. It is necessary to give notice of a motion for leave to file a suggestion of the death of a ptf. who was named sole executor in the will in dispute, and administration to whose goods had been granted to the applicant.—*McCarthy v. Matthews*, 11 I. Jur. N. S. 120. (P.)

#### LXXII.\*\* 12. Parties.

5. Parties cited in a cause, instituted to ascertain the validity of a will, cannot therein plead and allege a prior paper-writing as the last will of the deceased.—*Curtis v. C.*, 4 I. Jur. N. S. 248. (P.)

6. *Semble*—To administration suits brought by married women, their husbands should be parties.—*In re Mahony's Goods*, 7 I. Jur. N. S. 107. (P.)

7. In testamentary causes the husband of a ptf. propounding a will should be joined as a co-ptf.—*Gamble v. Williams*, 8 I. Jur. N. S. 159. (P.)

8. In case of the death pending suit of a deft. the Court will not, within fourteen days from his death, allow a citation to issue, on behalf of the ptf., to deft.'s next-of-kin, to accept or refuse letters of administration.—*Norton v. Casey*, 9 I. Jur. N. S. 383. (P.)

9. An intervenient, who has appeared to a citation to see proceedings, but has not pleaded, is not entitled at the hearing to cross-examine witnesses or address the jury.

An application made on his behalf at the hearing, for liberty to plead want of capacity and undue influence, was refused.—*Kelly v. Dunbar*, 10 I. Jur. N. S. 16. (P.)

10. When a deft. dies after plea pleaded, the ptf., who desires to proceed, may file a suggestion stating the deft.'s death, and the grant

of administration to his goods.—*Casey v. C.*, 10 I. Jur. N. S. 58. (P.)

11. When the interest of an alleged next-of-kin is disputed on the ground of the illegitimacy of his ancestor, the objecting party may require the next-of-kin to file a pleading setting out his kindred; and the Court will direct him to do so.—*Eastwood v. E.*, 11 I. Jur. N. S. 310. (P.)

#### LXXII.\*\* 13. Petition.

12. Objections to the interest of caveators should be raised by petition; and not, as in the Prerogative Court, by peremptory exception.—*Davidson v. Woods*, 7 I. Jur. N. S. 202. (P.)

13. Ptf. propounded a will, and got an order that either party be at liberty to set down the cause for hearing; but did not pay the duty, and declined to act on the order. Thereupon deft. moved to dismiss the petition, and condemn the will. *Held*, an irregular motion. The deft.'s proper course is, to pay the duty, take out a copy of the order, and set down the cause.—*Goslin v. G.*, 7 I. Jur. N. S. 306. (P.)

14. A party, alleging himself to be next-of-kin, questioned the legitimacy of a person represented as the father of an alleged next-of-kin. The practice is to raise such a question by petition and affidavit; and, if either party asks for an issue, to direct an issue to a jury on that point.—*Davidson v. Woods*, 8 I. Jur. N. S. 40. (P.)

15. In cases in which the facts are peculiar, it is proper to adopt a petition in order to have a caveat, appearance, and plea set aside.

The costs of proving a will in the common form are always paid out of the residue, and should not be charged on a legatee.—*Nugent v. N.*, 8 I. Jur. N. S. 52. (P.)

16. *Semble*—A petition, by way of peremptory exception, in an interest suit, is irregular. Being wrongly intitled, it was dismissed with costs.—*Flood v. Bradley*, 8 I. Jur. N. S. 114. (P.)

17. To have an administrator *pendente lite* appointed, it is not necessary to present a petition. A motion grounded on affidavit suffices.—*Finn v. Gorman*, 8 I. Jur. N. S. 217. (P.)

18. In interest cases, when the kindred of either party is disputed, the question should be raised by petition, by way of peremptory exception, and not by affidavit.—*Corcoran v. Duggan*, 9 I. Jur. N. S. 17. (P.)

19. In cases by petition, questioning the legitimacy of a person who had taken out letters of administration as a next-of-kin, the proper course is, when an answering affidavit has been filed and an issue raised, to apply to the Court for its directions as to the mode of

trial of that issue, and not to file affidavits.—*Cannon v. McIntyre*, 9 I. Jur. N. S. 383. (P.)

1. Charges of fabrication and fraud, made in a petition, having failed—*Held*, that it should be dismissed with costs.—*Stubber v. S.*, 10 I. Jur. N. S. 153. (P.)

#### LXXII.\*\* 14. Pleadings, Defences, Issues.

2. Form of issue when the entire will is impeached on the ground that the testator was not of sane mind; particular devices being also impeached on special grounds.—*Lord Guillamore v. O'Grady*, 2 Jon. & L. 210. (C.)

3. The deft., in answer to the ptf.'s declaration, which relied upon a document said to be the last will of the deceased, pleaded a prior will, and alleged that it had been destroyed by the ptf. Pleadings held insufficient, the deft. not having stated his case fully on the face of them.—*Connolly v. Teevan*, 3 I. Jur. N. S. 303. (P.)

4. It is only in those cases which are to be tried before the Judge and a jury that it is necessary to settle any issues.—*Connolly v. Teevan*, 3 I. Jur. N. S. 350. (P.)

5. When there are several defts. who rely upon the same defence, and who appear by separate counsel and attorneys, the Court will compel them to consolidate their defences; and to appear by one set of counsel at the trial.—*Benson v. Derrig*, 3 I. Jur. N. S. 351. (P.)

6. Whenever a plea alleges a will, the ptf. must file a replication.—*In re Martin*, 4 I. Jur. N. S. 214. (P.)

7. When several defts. appear by the same attorney, and severally file similar defences, the Court will order them to consolidate their defences, to save expense.—*Campbell v. Robinson*, 4 I. Jur. N. S. 270. (P.)

8. Except by consent, the Court will not order, when only one will is alleged by the ptf., the validity of other wills to be tried at the same time.—*Campbell v. Pepper*, 5 I. Jur., N. S. 313. (P.)

9. The Court will not send to a jury an issue touching the validity of a will which has not been formally pleaded, unless some party interested under it alleges it in a distinct pleading.—*Kiernan v. K.*, 6 I. Jur. N. S. 46. (P.)

10. A plea, that no instructions were given by the testator to the drawer of his will to include therein a certain property, is bad.—*Ratty v. Potts*, 6 I. Jur. N. S. 168. (P.)

11. A will and codicil, propounded by different parties, were respectively impeached in

the pleadings. *Held*, unnecessary to have separate issues touching the validity of each.

The proper issue is, Whether the will and codicil together are, or is either and which of them, the last will, &c.—*O'Connor v. Herbert*, 7 I. Jur. N. S. 125. (P.)

12. A plea, alleging that a testamentary instrument incorporates another testamentary instrument, need not, if they are lodged in the registry, set out the passage of the will or codicil relied on as constituting the incorporation; but the instruments must be specially referred to in the plea as being then lodged in the registry, and thereby their contents will be considered as if fully set out in the pleadings.—*Bell v. The Att.-Gen.*, 7 I. Jur. N. S. 127. (P.)

13. Several earlier wills of a deceased person, not propounded by any party, cannot, except by consent, be put in issue in a suit by an executor to establish a later will; nor can the next-of-kin, by a citation on the interested parties, oblige them to litigate such wills in that suit.—*Bradley v. Reilly*, 8 I. Jur. N. S. 135. (P.)

14. At the hearing, the Court will allow the pleadings to be amended, by filing a further plea to meet the evidence.—*Gumley v. G.*, 8 I. Jur. N. S. 198. (P.)

15. In a suit to establish the contents of a lost will, the contents must be set out in an affidavit, or a copy lodged in the registry, and referred to in the declaration. A record, made up in the ordinary form, applicable to an existing will, was at the hearing ordered to be amended accordingly.—*Connor v. M'Gettigan*, 8 I. Jur. N. S. 338. (P.)

16. Several parties propounded different wills, each of which was impeached, because of the exercise of undue influence by persons different as regarded each will. The Court ordered the issue to be confined at the trial to the validity of the will latest in date.—*Gamble v. Robinson*, 8 I. Jur. N. S. 373. (P.)

17. A party impeaching a propounded will cannot, in addition to pleas objecting to its validity, plead a further plea propounding a former will, though intended to be used only in case any intervenient should propound an intermediate will.

A legatee, who is next-of-kin, impeaching as legatee a later will, because of want of capacity or undue influence; but failing, is in general liable to costs.

Next-of-kin are more favoured regarding costs. Three wills, differing materially from each other, were written within four days. The latest will was established; but the next-of-kin, who had intervened, got his costs.—*Doyle v. Leary*, 10 I. Jur. N. S. 58. (P.)

18. An executor and residuary legatee propounded a will, of which the defts. impeached only the residuary and executorial clauses.

A minor intervenient, a legatee in a former will, being cited to see proceedings, appeared by solicitor, but did not plead. At the trial, a verdict was, by consent, taken in favour of the will, except the residuary and executorial clauses. The jury expressed a strong opinion against the whole will. A curator was appointed for the minor; and the Court, on the curator's motion, set aside the verdict, as to the rest of the will, and directed a new trial on terms.

The issue at the trial was, whether the paper writing, dated the 4th Nov. 1863, or any and what part of it, was the last will of the deceased? *Held*, that the issue should have been amended, by confining it to the residuary and executorial clauses.

That a verdict had by consent cannot be set aside on the ground of being against evidence.

That service of a citation on a minor's father or proper guardian is valid, and will bind the minor.—*Kelly v. Dunbar*, 10 I. Jur. N. S. 151. (P.)

1. A declaration alleged a will. The plea alleged undue execution, incapacity, and undue influence, and averred that the will was not the last will of the deceased, for that he made his last will, &c. (alleging a former will). *Held*, a good plea, provided that the former will be alleged with the same formalities as are required in a declaration.—*Berry v. Hillis*, 11 I. Jur. N. S. 119. (P.)

2. The ptf. was executor of a testator, who had propounded a will in which he was named executor and principal legatee. The intervenient propounded a former will, which appointed the same executor, and principal legatee; but made the intervenient also legatee. The deft. impeached both wills, for forgery, and undue execution; and the last for want of capacity and undue influence. Different persons witnessed the wills. *Held*, that an issue touching both wills should go to the jury.—*Mullarkey v. Mathews*, 11 I. Jur. N. S. 220. (P.)

#### LXXII.\*\* 15. *Sealing: Re-sealing.*

3. Testamentary papers executed by one who, domiciled in Scotland, died before the 20 & 21 Vic., c. 56, came into operation, there being assets in Ireland, may, if confirmed in Scotland, be proved here—the clause about resealing the confirmation being inapplicable.—*In Oag's Goods*, 8 I. Jur. N. S. 134. (P.)

4. When a Scotch confirmation omitted by mistake to state that the inventory included in it, as it did, property in Ireland, the Court refused to permit it to be re-sealed in Ireland.—*In Goods of Murray*, 11 I. Jur. N. S. 140. (P.)

#### LXXII.\*\* 16. *Suits, Transfer of, to Assistant-Barrister.*

5. If it appears from an affidavit that a contentious suit is within the jurisdiction of

an Assistant-Barrister, the Court will transfer it to him, and will order the original will to be transferred to the Clerk of the Peace of the county to which the cause is transferred, if there be no District Registrar for that county.—*In re Plant*, 4 I. Jur. N. S. 123. (P.)

6. A motion, to transfer a suit commenced in the Court of Probate to the jurisdiction of the Assistant-Barrister, who, under the terms of the Act, would have had jurisdiction over the case if it had not been commenced in the Probate Court, should be made on notice to the opposite party.—*In re O'Donnell*, 4 I. Jur. N. S. 393. (P.)

7. When assets give the Court of Q. Sessions jurisdiction, the Court of Probate will order (unless under special circumstances) the case to be tried there, not giving an option to the parties to try it before this Court.—*Barry v. Milligan*, 5 I. Jur. N. S. 292. (P.)

8. On consent, a case, in which a creditor of the testator propounded a litigated will, was sent to the Sessions.

*Quære*—Can a creditor be allowed, except upon consent, to propound and litigate a will? —*Derlin v. M'Carthy*, 8 I. Jur. N. S. 159. (P.)

#### LXXII.\*\* 17. *Trial, New.*

9. Verdict against an alleged will. Conditional order for a new trial refused, the evidence being conclusive that undue influence had been practised on the testator by the person chiefly benefitted, who was most active in directing the preparation of the will and in preparing it.

No part of the will in favour of other persons was allowed to stand, nor was the appointment of an executor.

Degree of proof necessary when the case is suspicious.—*Moloney v. Casey*, 8 I. Jur. N. S. 156. (P.)

10. When an important witness in the case, who had ample opportunities of knowing the capacity and testamentary intentions of the testator, and had written letters at the time to the deft. detailing the facts, not consistently with the evidence which he gave at the trial, the Judge directed the jury not to be content with only striking out his evidence if they disbelieved it; but that it reflected on the entire case of the deft. *Held*, a correct direction.

When there is no allegation of surprise, mistake, accident, or newly-discovered evidence, a new trial is not considered requisite, even when the title to an inheritance is involved.—*Campbell v. C.*, 9 I. Jur. N. S. 39. (P.)

11. A verdict had, by consent, cannot be set aside on the ground of being against evidence.—*Kelly v. Dunbar*, 10 I. Jur. N. S. 151. (P.)

#### LXXII.\*\* 18. *Venue, Changing the.*

12. On an affidavit stating the great age and infirmity of some of the witnesses, and that their

removal from Sligo to Dublin might prove fatal to them, the Court ordered the venue to be changed to the county of Sligo.—*Benson v. Derrig*, 3 I. Jur. N. S. 350. (P.)

1. The Court will require a stronger case to be made for changing the venue from Dublin than the Common Law Courts require; because, *prima facie*, all Probate cases should be tried before the Court specially created for them.—*Fowler v. Connolly*, 3 I. Jur. N. S. 352. (P.)

2. It appeared likely that persons really interested in the litigation would, from their position and influence, occasion a disagreement among the jury at the Assizes. They had put forward as a deft. an uninterested person. The Court refused to send the case for trial at the Assizes, though all the witnesses resided in the county; but fixed a special day for the trial.

A will and codicil propounded by different parties were respectively impeached in the pleadings. *Held*, unnecessary to have separate issues touching the validity of each.

The proper issue is:—Whether the will and codicil together are, or is either and which of them, the last will, &c. ?—*O'Connor v. Herbert*, 7 I. Jur. N. S. 125. (P.)

3. When the assets do not appear, by affidavit or otherwise, to be small, the Court will not send the case to the Assizes, though all the parties and witnesses reside in the country.—*Adams v. Quinn*, 8 I. Jur. N. S. 52. (P.)

4. The Court will not send for trial to the Assizes a case, merely because the parties, and the great majority of the witnesses reside in the country; nor because the parties' characters are known to the jurors there, and the result will probably depend on the credit to be given to the parties.—*Caswell v. Doyle*, 11 I. Jur. N. S. 219. (P.)

#### LXXII.\*\* 19. Will, Execution of.

[See PRACTICE, LXXVII. 2.—PROBATE, ADMINISTRATION.]

5. A plea "that the will was executed by testator according to the provisions of the 1 Vic., c. 26, in presence of the witnesses whose names severally appear upon the said will" is bad, without stating that the witnesses subscribed the same in the presence of the testator, and of each other.

One of the attesting witnesses subscribed the will after the signature of testator, but before execution, in the presence of the other witnesses. *Held*, a bad execution under the 1 Vic., c. 26, unless the first witness signs again. *Mitchell v. Huffington*, 4 I. Jur. N. S. 40. (P.)

LXXIII. PROCESS. See LETTER MISSIVE—PRACTICE, ATTACHMENT—PRACTICE, COMMITMENT—PRACTICE, CONTEMPT—PRACTICE, COSTS—PRACTICE, HABEAS CORPUS—PRACTICE, WRIT.

6. If a female deft., against whom process has issued, marries during the suit, the pro-

cess will be continued against her and her husband.—*M'Namara v. Lysaght*, Hay. & J. 623. (E.E.)

7. Attendance at Quarter Sessions, when the Chairman threatened to fine the sheriff for absence, will not be admitted as an excuse for delaying to execute the process of this Court.—*In re Comyns*, 1 I. E. R. 72. (R.)

8. When a deft. has been served, out of the jurisdiction, with subpoena to appear and answer, but does not appear, process entered against him without the Court's order is irregular, and will not be permitted to stand.—*Perse v. Bayley*, 5 I. E. R. 586. (E.E.)

9. In a cause petition, an order against a minor cannot be made without process.—*Holmes v. H.*, 3 I. C. R. 126. (C.)

10. A trader debtor summons is not a "process" within the meaning of the order for protection under the 348rd section.—*In re Dobson*, 8 I. C. R. 388. (B.)

PROCEEDINGS AT LAW. See PRACTICE, INJUNCTION.

LXXIV. PROCHEIN AMI. [See PRACTICE, COSTS: 30 & 31 Vic., c. 44, s. 62.]

11. *Quere*—Will the Court require a wife's next friend to be a person of sufficient substance to answer the costs?—*Sweeney v. Hall*, 1 I. E. R. 22: S. & Sc. 662. (R.)

12. When one person is next friend to infants and to a *femme covert*, co-ptfs., the Court will compel ptfs. to give security for costs, on the ground of insolvency alone. In such a case, the form of the order is—that the proceedings be stayed until the next friend of the *femme covert* be changed, or security for costs be given.—*Drinan v. Mannix*, 5 I. E. R. 190; 3 Dr. & War. 154; 2 Con. & L. 87. (C.)—[Affg. 5 I. E. R. 162. (R.)]

13. A bill may be filed by the next friend on behalf of a person of weak mind, a fit subject for a commission of lunacy, his property being too small to bear the expense of a commission. *Carr v. Boyce*, 13 I. E. R. 102. (R.)

14. If the next friend of a married woman be insolvent, the Court will stay the proceedings until the next friend be changed, or security for costs be given.

*Drinan v. Mannix*, 3 Dr. & War. 154, followed.—*M'Keon v. Walsh*, 1 I. C. R. 608. (R.)

LXXV. PRODUCTION OF DEEDS, BOOKS, &c. See PRACTICE, INSPECTION OF DEEDS—PRACTICE, ORDER FOR INSPECTION.

1. Generally.

2. *By Solicitor, of Documents within the Doctrine of Privilege.*
3. *In Favour of Heir.*
4. *Upon what Admission or Evidence of Possession.*
5. *Court and Public Documents, Wills, &c.*
6. *By Purchaser, &c., without Notice.*
7. *On Defendant's Motion.*

LXXV. 1. *Production of Deeds, &c., generally.*

[See 13 & 14 Vic., c. 89, s. 13: 31st G. O. (1851): 4th G. O. of Nov. 1852: 30 & 31 Vic., c. 44, ss. 71, 73, 109, 111, 128, 187: G. O. (1867) 167.]

1. The debt. in a foreclosure suit not having complied with the order in the decree to bring in the title deeds, the Court on motion referred it to the Master to appoint a receiver, although the decree was merely for a sale, and did not direct a receiver to be appointed.—*Harris v. Shee*, 6 I. E. R. 543. (C.)—[See 1 Jon. & L. 91. (C.)]

2. A General Order to bring in and lodge documents relating to lands, without specifying the particular documents, cannot be sustained. *Chaytor v. Peyton*, 2 I. Jur. N. S. 486. (R.)—[See also *Staunton v. Donohoe*, 7 I. Jur. 37.]

3. A petition stated that the testatrix intended, and that the respondent knew that she intended, that a residuary bequest to him was not for his own personal benefit, but was to be applied to certain charitable purposes which she did not then indicate to him; and that he agreed, on those conditions, to accept the bequest, or promised her that he would dispose of the residue in conformity with her wishes. As evidence thereof, the petitioners referred to a letter dated, &c., and written and sent by the respondent to the testatrix shortly before her death. *Held*, on the authority of *Hardman v. Ellames*, 2 M. & K. 725, that the respondent was not entitled to the production of the letter.

That the respondent was not entitled to production of the letter before answer, under the 4th G. O. of Nov. 1852.

*Semble*—To entitle a party to production of a document under that G. O., its possession need not be admitted.

*Semble*—As a general rule, the Court will not, before answer, order the production of a document under that G. O.—*Fitzgerald v. Simpson*, 17 I. C. R. 141. (R.)

LXXV. 2. *By Solicitor, of Documents within the Doctrine of Privilege.*

4. In a suit against an attorney, to set aside a conveyance made as a security for untaxed costs, the Court refused to order the deed to be lodged in Court.—*Carr v. Moulds*, H. & J. 714. (E.E.)

5. After decree to sell, the solicitor of one debt., a mortgagee, who had been paid, but

had not re-conveyed, having the mortgage-deed in his possession, being made a party by supplemental bill, admitted by his answer that he held the deed, upon which he had a lien for the mortgagee's costs. On motion by ptf. against the solicitor—*Held*, that he should bring in the deed, without prejudice to any claim that he might have against his own client.—*Plumptre v. O'Dell*, 1 I. E. R. 113. (R.)

6. An attorney, C., refused either to proceed with a cause, unless ptf. furnished him with the necessary funds, or to hand the papers to another attorney, unless repaid costs out of pocket. On ptf.'s petition—*Held*, that C. should hand to the new attorney, D., such papers and documents connected with the cause as, upon inspection, D. might deem necessary to the effectual prosecution of the suit: ptf. consenting that C. should have a lien on any funds that might be realised thereby, and D. undertaking to proceed without delay to bring the suit to a termination, unless counsel should otherwise advise; in which event D. undertook to hand back all the deeds and papers to C., immediately upon receipt of such advice.—*Strangways v. Harman*, 1 I. E. R. 467. (E.E.)

7. When a solicitor, as such, receives from his client muniments of title, the Court has jurisdiction, under a decree binding the client, to order his solicitor to bring in such of the client's deeds as are in his possession, though he never appeared in the cause, and though it be uncertain when the deeds came into his possession.—*Hargrave v. Holland*, 2 I. E. R. 137. (R.)

8. When a party, claiming by title paramount to the client, enforces production of a paper—*Semble*, the benefit which thereby accrues incidentally to parties deriving under the client, cannot be taken from them; and the solicitor's lien is lost.—*Blunden v. Desart*, 5 I. E. R. 221; 2 Dr. & War. 405; 2 Con. & L. 111. (C.)—[Reversing the decision respecting the solicitor's priority over a judgment creditor—5 I. E. R. 52; Fl. & K. 572. (R.)]

9. This Court has not jurisdiction to order the personal representatives of a deceased solicitor to deliver up title deeds on which they claim a lien.—*Allen v. Jervoise*, 11 I. E. R. 583. (R.)

10. A debt., by answer, stated that a deed was in the possession of the personal representative of a solicitor who claimed a lien on it. The Court ordered him to produce it, with liberty to apply, if production or inspection of the deed was refused by the party who had it, on payment of the costs due to him.—*Monsel v. Lindsay*, 13 I. E. R. 144. (R.)

11. A solicitor who claimed a lien on deeds was summoned as a witness with a *s. d. t.*, and brought the deeds into Court, but refused to produce them, claiming a lien against A., and he was then precluded from giving secondary evidence of their contents.—*Att.-Gen. v. Ashe*, 10 I. C. R. 309.

LXXV. 3. *In Favour of Heir.*LXXV. 4. *Production of Deeds, &c.: upon what Admission or Evidence of Possession.*

1. The Court will compel the production of a document referred to by the answer of a deft. as in his possession, although such document refers merely to the deft.'s title.

When the deft. makes a document part of his answer, and states that it is in his possession, ready to be produced and proved; and that the truth of the matters stated in his answer will more fully appear from the document when produced; the ptf. is entitled to the production of it.—*Phumtrev. O'Dell*, Fl. & K. 589; 4 I. E. R. 602. (R.)

2. *Semble*—When the bill charges that deeds are in the possession of a particular deft., who allows the bill to be taken as confessed against him, the charge in the bill is equivalent to the deft.'s admission by answer, so as to ground a motion for an order upon him to produce the deeds.

But when the bill charged that deeds were "in the possession of said defts., or some or one of them," and two of the defts. allowed the bill to be taken as confessed against them, and all the others answered, positively denying possession of the deeds, the Court would not act upon the argumentative conclusion as an admission by the defts. against whom the bill had been taken as confessed, that the deeds were in their possession; although the ptf.'s solicitor offered to make an affidavit as to the fact that their solicitor had distinctly admitted to him having possession of the deeds. The ptf.'s course in such a case is to proceed by attachment for want of an answer, and not to take the bill *pro confesso*.—*Purcell v. Langston*, 4 I. E. R. 443. (R.)

3. In a bill by one partner for an account on foot of the dissolved partnership, letters written by the deft. to the ptf., after the dissolution, were set out as in ptf.'s possession, and forming the basis of the partnership agreement, which the deft. in his answer denied. A motion by the deft., for the production of the letters, refused.—*Palmer v. Mahony*, 6 I. E. R. 504. (R.)

4. The Court will not compel the ptf. to produce copies of accounts furnished by the deft. as agent of ptf.'s deceased husband, which were stated to be taken from the books of the deft.—*Magan v. Coffey*, 6 I. E. R. 506, n. (R.)

5. Ptf. sought a renewal of a lease not in his possession. Deft.'s answer denied his right to the renewal "inasmuch as he is convinced, from documents in his possession, to which he will hereafter more particularly refer, that no such lease was executed." Deft. further stated that it appeared by a certain deed and schedule, which he admitted to be in his possession, that a lease for a different

term and rent had been executed; and that it was manifest from the schedule that a renewal, if obtained, was fraudulent. *Held*, that deft. had referred to the deed and schedule in such a way as to make it part of his answer, and must produce it.—*Phelan v. Hamilton*, 9 I. E. R. 264. (R.)

6. The answer admitted that a certain document, evidencing ptf.'s title, was in deft.'s possession. *Held*, that ptf. was not entitled to call for its production at the hearing.—*Dowling v. Legh*, 9 I. E. R. 418; 3 Jon. & L. 716. (C.)

7. In a suit instituted to set aside an assignment of a mortgage, the Court refused to order the production of an alleged assignment to the assignor, endorsed on the original mortgage. This assignment not being admitted in the answer, the Court directed its production.—*O'Keefe v. Lanigan*, 1 I. Jur. 210. (R.)

8. The defts. by answer admitted that two deeds were in their possession; stated them partially, and referred to them (when produced) for greater certainty. *Held*, that they were bound to produce them for the inspection of the ptf., on motion.

On a bill filed to sell the inheritance, it appeared on the face of the answer of the tenant for life, that the parties entitled to the remainder immediately expectant on the life estate were not before the Court. *Held*, that the Court could not compel the tenant for life to produce the deed under which the absent parties held their estate, although as against the tenant for life the right of the ptf. to inspection was complete.

That it is not a valid objection to a motion by the ptf. for the production of documents, for the defts. to show that the bill is open to a demurrer for want of equity.—*Dundas v. Blake*, 9 I. E. R. 640. (R.)—[Varied by ordering production of both deeds; 10 I. E. R. 260. (C.)]

9. The deft. in his answer set out the contents of documents, but did not refer to them when produced, or admit them to be in his possession, nor was he directly interrogated to the fact. *Held*, that the ptf. could not compel the production of them.—*Southwell v. Daly*, 10 I. E. R. 7. (R.)

10. In a suit affecting the inheritance, the Court, on the admission of a tenant for life, will direct the production of the documents.—*Murphy v. Balse*, 1 I. Jur. 218. (R.)

11. A title deed of the deft., which was not directly the subject of the suit, was charged by the bill to have been fraudulently altered. The charge was denied by the answer. The Court refused to order its production until the hearing of the cause.—*Swift v. M'Ternan*, 18 I. E. R. 119. (R.)

12. A deft. by answer stated that a deed was in the possession of the personal representa-

tive of a solicitor who claimed a lien on it. The Court ordered him to produce it, with liberty to apply, if production or inspection of the deed was refused by the party who had it, on payment of the costs due to him.—*Monsel v. Lindsay*, 13 I. E. R. 144. (R.)

1. After an answering affidavit to a cause petition had been filed, and the petition had been amended, without interrogatories to the amendments, the Court refused, without a cross-petition, to order the production of documents stated in the petition to be in the petitioner's possession.—*The Marquis of Sligo v. Hildebrand*, 2 I. C. R. 118. (R.)

2. The principle on which *Hardman v. Ellames*, 2 M. & K. 755, was decided is applicable to cause petitions.

A petitioner referred for greater certainty to a document as in the petitioner's possession. *Held*, that the respondent was entitled to its production.

Some of the petitioners were minors, and sued by their next friend. The Court allowed the petition to be amended, by withdrawing the words of reference to the document.—*Peyton v. Lambert*, 6 I. C. R. 9; 2 I. Jur. N. S. 93. (R.)

3. A general order to bring in and lodge documents relating to lands, without specifying the particular documents, cannot be sustained.

When deeds appear to evidence the petitioner's title affirmatively, he is entitled to a production of them by the respondent, though they are the title-deeds of the respondent also; otherwise, if parties not before the Court are interested in them.

In a suit to raise the amount of two judgments out of lands of the conuzor, after his death, the owner of the lands, a minor, by his guardian filed a discharge, claiming, under certain deeds, to be a purchaser of the lands, without notice of the judgments. The guardian, in his affidavit, admitted generally that he had in his possession all documents relating to the lands. The first of these deeds was a conveyance by the conuzor (subsequent to the rendition of the judgments) of the lands to trustees for the benefit of creditors. *Held*, that the petitioner was entitled to the production, by the guardian, of this and other deeds, before the judgments were declared to be charged upon the lands.—*Chaytor v. Peyton*, 2 I. Jur. N. S. 486. (R.)

4. A mere general charge of fraud in the execution of a deed will not entitle a party to production of it by the opposite party. An account-book ordered to be produced; it being endorsed, and marked, and referred to in the answering affidavit, to avoid prolixity.—*Ball v. Flanagan*, 6 I. Jur. N. S. 97. (R.)

5. The petitioners filed an affidavit stating that the matters in issue would appear from the documents mentioned in a schedule annexed thereto. Upon this affidavit the case

was again referred to the Master, who ordered the production of all the documents in the petitioner's power relating to the matter; the order referred to that affidavit. That order was not appealed against.

The petitioners refused to produce some of these documents, the relation of which to the matter in issue they denied by affidavit. The Master ordered the production of the withheld documents. Against that order the petitioners appealed. *Held*, that their first affidavit, and the order unappealed against, concluded them; and that they must produce those documents.—*Reilly v. R.*, 11 I. Jur. N. S. 166. (R.)

#### LXXV. 5. Upon what Admissions or Evidence of Possession.

6. The minutes of a decree cannot be used in this Court. The decree itself must be produced.—*Hall v. Hill*, Fl. & K. 619. (R.)

7. A will, which had been lodged in Court, handed out to a solicitor for the purpose of proceedings in the House of Lords.—*Massy v. —*, 6 I. Jur. N. S. 340. (R.)

#### LXXV. 6. By Purchaser, &c., without Notice.

#### LXXV. 7. Production of Deeds, &c., on Defendant's Motion.

### LXXXVI. PRODUCTION OF PARTIES.

#### LXXVII. PROHIBITION. See COURTS, INFERIOR.

8. The affidavits on which an application for a writ of prohibition is grounded ought to be entitled simply in the Court to which application is made.

The writ of prohibition may be issued to stay proceedings before magistrates, even after conviction. The application to the Court of Ch. for a writ of prohibition is to the Common Law side of that Court; and the conditional order, though issued from the Registrar's office, should not resemble an injunction order.—*Rich v. Anderson*, 3 I. C. R. 463. (C.)

#### LXXVII. a. Pro interesse suo.

#### LXXVII. b. Publication. See PRACTICE, EVIDENCE.

### LXXXVIII. RECEIVER. See BANKRUPTCY, X—LEGACY, V—MORTGAGE, III, IV—PRACTICE, COSTS—PRACTICE, PAYMENT INTO COURT.

[See 1 & 2 Vic., c. 109; 3 & 4 Vic., c. 105; 12 & 13 Vic., c. 95; 13 & 14 Vic., c. 29, ss. 3, 12, &c.; 19 & 20 Vic., c. 77. G. Orders 1843, 1846, 1847, 1849, 1851, 1857. See Gam. Ch. Orders, pp. 187 to 259.]

1. *Generally.*
2. *Appointment of.*
  - a. *Generally: in what Cases.*
  - b. *Before Appearance or Answer.*
  - c. *Who may be.*
  - d. *Against Executors, Administrators, and Trustees.*
  - e. *Over Infant's Estate.*
  - f. *Against Joint Tenants, and Tenants in Common.*
  - g. *Against Mortgagor or Mortgagee, and other Incumbrancers.*
  - h. *In Partnership Cases.*
  - i. *Pendente lite.*
  - j. *Against Vendor and Purchaser.*
  - k. *Judgment and Custodiam Creditors: under the Sheriff's Act.*
  - l. *In other Cases.*
3. *Receiver's Duties, Rights, and Liabilities.*
4. *Security by: Rights and Liabilities of his Surety.*
5. *Accounts and Allowances to.*
6. *Discharge and Removal of.*
7. *Over Rents, Lands, and Tenants under the Court.*
  - a. *Generally: respecting Letting, Abatement to Tenants, &c.*
  - b. *Attachment, Distress, &c.*

LXXVIII. 1. *Receiver, generally.*

1. The Court will not order a receiver to pay to the inheritor's attorney the amount of expenses incurred, without the Court's authority, in legal proceedings relating to the lands.—*Dudgeon v. Bowen*, H. & J. 717. (E.E.)

2. Service on the respondent, of the conditional order for a receiver on a judgment, will be substituted, when the respondent keeps out of the way to avoid service.—*Armitage v. Palmer*, 1 Jones, 594. (E.E.)

3. The expenses of repairing the glebe-house are the first charge upon the profits of the benefice received by the receiver.—*Sterling v. Wynne*, H. & J. 817. (E.E.)

4. It is not the practice of this Court to entertain an application for a receiver upon the answer, when the bill is not filed by a creditor, and when a special case, as of irreparable mischief, is not made out.—*Galway v. Barron*, 2 Jones, 723. (E.E.)

5. A petition for a receiver under the 5 & 6 W. 4, c. 55, should in all cases be verified by the affidavit of the person interested, if such an affidavit can possibly be procured.—*Cloncurry v. Piers*, S. & Sc. 669. (R.)

6. A conditional order for a receiver will be discharged, if there be not a verifying affidavit by the attorney respecting service of the conditional order.—*Keogh v. K.*, 2 I. E. R. 412. (E.E.)

7. Before decree, a receiver was appointed over the assets of a company formed under

the 6 G. 4, c. 42, which had stopped payment. The Court refused to restrain a creditor from suing out execution under sec. 18, against the shareholders, upon a judgment against the company.—*Acheson v. Hodges*, Fl. & K. 371. (R.)—[See 3 I. E. R. 516.]

8. It is not an objection to a conditional order for a receiver under the 5 & 6 W. 4, c. 55, that it was granted on reading an affidavit made by a third person, verifying the petition, and that there is not an order of Court directing that the petition shall be verified in that manner. *Bennett v. Power*, 5 I. E. R. 152. (E.E.)

9. On an application under the 4 & 5 W. 4, c. 82, the Court will not substitute service of a subpoena to answer on a person appointed receiver over deft.'s lands in a Chancery cause, unless it can be sworn that he remits the rent to deft.—*Butler v. Goold*, Long. & T. 270. (E.E.)

10. *Quære*—When a receiver has been appointed to collect and get in outstanding personal estate, has the Court jurisdiction to order a debtor to the estate to pay the sum due by him to the receiver?

The Court declined to make such an order, when the debtor had paid the money to the personal representative before he had notice of the order appointing the receiver.—*Kirk v. Houston*, 5 I. E. R. 498. (E.E.)

11. Ptf. having been appointed assignee of an insolvent, a considerable time after the insolvency, is not sufficient proof that there are debts justifying the Court in granting a receiver over the insolvent's property, on bill and answer, when it is sworn by the answer that ptf. and all the creditors have been paid.—*Fogarty v. Burke*, 2 Dr. & War. 580; 1 Con. & L. 565. (C.)

12. The vesting order under the English Insolvent Act transfers to the assignee the property of the insolvent, subject to the operation of the laws in Ireland relating to such property. A creditor by judgment, before the date of the vesting order under the English Act, is entitled to obtain a receiver over the lands of the insolvent in Ireland.—*Reilly v. Jacob*, 7 I. E. R. 199. (R.)

13. When a petition for a receiver has been presented under the Mortgage Act, the respondent cannot show cause without filing a petition. If the petition has not been filed, the Court has no jurisdiction, even to give costs, against the respondent, of a motion to show cause.—*Pakenham v. Darcy*, 7 I. E. R. 476. (R.)

14. When a party in the cause, and a tenant of deft. was appointed receiver in the cause, all, but one, of the ptf.s, who had carriage of the order, concurring in the appointment, the Court refused to set aside the Master's report on the application of the dissenting ptf.—*Turner v. Lord Donegal*, 8 I. E. R. 235. (R.)



1. Practice respecting showing cause against an order for a receiver under the Old Rules.—*Wilson v. Owens*, 8 I. E. R. 516. (E.E.)

2. A conditional order to appoint a receiver under the Sheriffs Act, having been obtained in the Court of Exchequer, the solicitor for another judgment creditor, who had knowledge thereof, petitioned the Ld. Ch. for a receiver, but suppressed the fact of the Exchequer order. The Court dismissed the petition, and directed that the solicitor should not have the costs thereof against his client.—*Daly v. D.*, 9 I. E. R. 461; 2 Jon. & L. 752. (C.)

3. An affidavit filed, and notice of it, is not "cause shown" against an order to appoint a receiver, unless moved on pursuant to notice.—*Jameson v. Scarry*, 9 I. E. R. 476. (R.)

4. An order, appointing a receiver, and directing all parties to come in under one cause, will not take the case out of the operation of the 81st G. O.—*Young v. Wilton*, 10 I. E. R. 265. (C.)

5. On motions to extend receivers, the only persons entitled to be heard are the petitioner and the debtor, and not the parties who have appointed or previously extended the receiver.—*Walsh v. W.*, 11 I. E. R. 607. (C.)

6. D. was tenant for life of estates, subject to a charge on the inheritance vested in S. A bill was filed by D.'s own creditors; and a receiver was appointed over the estates. S. filed a bill to raise his charge. D. died in Oct. 1844; and S. obtained an order in Jan. 1845, that the receiver should be extended to S.'s cause, so far as related to the rents due at the decease of D., and then remaining uncollected. A sum being in the receiver's hands, consisting of rents due in D.'s lifetime,—*Held*, that the creditors of D.'s life estate were entitled to the rents received before, and S. to the rents received after, the order of Jan. 1845.

The extension of a receiver in an abated suit against a tenant for life, after his death, to a suit by a creditor on the inheritance, is not irregular.—*Moore v. Donegal*, 11 I. E. R. 412. (C.)

7. If a receiver be appointed in a plenary suit, instituted in Ch. by a prior creditor, the Court of Exch. will restrain a receiver appointed in a petition matter in the Exch. from interfering further with the land over which he was appointed, till the Ch. suit be concluded.—*Cochrane v. Fitzpatrick*, 1 I. Jur. 10. (E.E.)

8. When the interest in a leasehold, over which a receiver has been appointed, has been evicted by the head landlord for non-payment of rent, the landlord is entitled, out of the funds in the receiver's hands received out of the evicted lands, to be paid the arrears

of rent.—*Donovan v. Sweeney*, 1 I. Jur. 165. (R.); *Elliott v. Elliott*, 1 I. Jur. 165. (E.E.); *Sherlock v. Roe*, 1 I. Jur. 177. (R.)

9. In an incumbrancer's suit, A., the inheritor, admitting his liability to an arrear of interest, and disputing his liability for more; on motion for a receiver, A. was ordered to pay, within a certain time, the admitted amount, and pay the accruing gales of interest for the future. He paid accordingly for some years. Having made default afterwards, the receiver was appointed under this order; and under a consent order, subsequently made, applied the funds from time to time in paying the future interest. The receiver was afterwards extended on the petitions of several puisne judgment creditors of A. A fund, brought in by the receiver after paying the interest, having accumulated—*Held*, that it could not be claimed by the judgment creditors, while the principal and the disputed arrear of interest were due to the ptf.; the receiver, when once appointed, being so for all purposes of the cause, and not to be considered limited to the payment of the accruing interest. On an appeal, counsel for the appellant only can be heard in support of his case, and not counsel for others in the same interest, who have not appealed.—*Stewart v. The Marquis of Donegal*, 13 I. E. R. 106. (C.)

10. An order was obtained at the Rolls, pursuant to the 154th G. O., for a receiver under the Judgment Acts, unless cause shown in ten days. On the last of the ten days, the respondent filed an affidavit as cause, to the effect, that on that day a receiver had been appointed, by his consent, in the Eq. Exch., pursuant to the 139th G. O. of that Court. This cause his Honor disallowed, on the ground of collusion between the petitioner and respondent in the Exch.; and directed his order, appointing a receiver, not to be acted upon until the order of the Exch. should be discharged. The Court of Exch., on an application under this direction, refused to discharge their receiver.—*Swift v. Le Strange*, 2 I. Jur. 29. (E.E.)

11. The conditional order for the appointment of a receiver in Chancery renders every party to the cause or matter, interfering with the rents payable to the receiver, guilty of a contempt.

Entering into a consent does not preclude a party from appealing.—*Delacherouis v. —*, 2 I. Jur. 89. (C.)

12. A creditor seized under a *fi. fa.* an equitable interest, on the 19th June. An order having been made on the 26th for the appointment of a receiver, the Court refused the motion to set aside the order for the receiver with costs, unless the party moving, who was out of the jurisdiction, should give security for costs.—*Scott v. Nixon*, 2 I. Jur. 90. (R.)

1. After a decree *pro confesso*, notice of the appointment of a receiver should be given.—*Johnson v. Mason*, 2 I. Jur. 106. (R.)

2. In future it will not be necessary to present a petition in order to show cause against an order for a receiver under the Mortgage Act. All applications under that Act, after an order made on the first petition, may be by motion.—*Hart v. Carleton*, 1 I. C. R. 231; 3 I. Jur. 131. (R.)

3. Petitions for receivers on tenants' and receivers' recognizances should be intitled in the Queen's name. The Att.-Gen. should be the petitioner.—*Reg. v. Cruise*, 2 I. C. R. 65. (C.)

4. The parties in a cause, the receiver, and A., consented that A. should be substituted for B. as receiver; that certain persons be approved of as A.'s sureties; that the security be measured at a named sum, without reference; and that the existing sureties be discharged; that A. should pay B. an advance made by B., and all his costs; that A. should have credit in his accounts for such payments; that a policy of insurance on B.'s life should be discontinued; that the premiums on the life of a third party already insured should be kept up by A.; and that the amount of the insurance when realised should be applied to recoup his advances. *Held*, that such a consent might be made a rule of Court, it appearing that there was not any intention to traffic with the office of receiver.—*Farran v. Morris*, 4 I. Jur. 366. (C.)

5. A poor-rate was struck in 1849. The poor-rate collector did not make a demand on the receiver until 1852, on foot of any arrear of that rate, although he was paid the rates for 1850 and 1851. An application being made for an order on the receiver to pay the arrear; under the circumstances, the rate-books of the union not being produced, the motion was refused.—*Palles v. O'Ferrall*, 5 I. Jur. 141. (R.)

6. The M. R. will not order the receiver to pay poor-rates due on one denomination of the land out of the funds in his hands for the whole estate, if it appears that there was negligence on the part of the poor-rate collector.—*Blakeney v. B.*, 5 I. Jur. 145. (R.)

7. After an absolute order by the I. E. C. to sell lands, a petition was presented in the Court of Ch. praying a sale thereof, and in the meantime a receiver. *Held*, that the receiver was ancillary only to the sale; and that, the prayer for the sale being bad under the 12 & 13 Vic., c. 77, s. 42, the petition must be amended by praying the receiver only; but without prejudice to any question as to costs incurred in the Master's office on the petition before amendment.—*O'Beirne v. Reade*, 1 I. Jur. N. S. 403. (R.)

8. When by an order of the M. R. in England a receiver was appointed over a minor's

estates in Ireland, and by that order the tenants were directed to attorn to the receiver and pay their rents to him, the Court in this country refused to make an order carrying out the English order; but made the minor a ward of Court in this country, and referred it to the Receiver Master to appoint a receiver.

By the Irish practice the tenants of an estate do not by the appointment of receiver become his tenants.—*In re Trant*, 3 I. Jur. N. S. 51. (R.)

9. In Ireland, a creditor, having an annuity or a charge on the lands, may obtain an order, that the receiver shall pay him his annuity, or interest on his charge, in the proper priority, without filing a petition to extend the receiver.—*Foss v. F.*, 15 I. C. R. 215. (R.)

#### LXXVIII. 2. a. Appointment of Receiver generally: in what Cases.

[The Mortgage Act, 11 & 12 G. 3, c. 10, repealed by 19 & 20 Vic., c. 77, s. 4.]

10. When the answer has been filed six months, a receiver will not be granted without an affidavit.—*Loveday v. D'Esterre*, Hay. & J. 151. (E.E.)

11. The appointment of a receiver in a puisne creditor's suit in Chancery is an answer to a prior creditor's application in a suit in the Exchequer.

*Semble*—Filing an answer is cause against a conditional order for a receiver on sequestration.—*Cuppige v. Atkinson*, Hay. & J. 515. (E.E.)

12. Even upon consent, a receiver will not be appointed without a recognizance.—*Conolly v. Codd*, H. & J. 624. (E.E.)

13. The Court will not grant a receiver to compel an appearance by the deft. to an *elegit*, when the judgment has been obtained in an adversary suit.—*Anon.*, H. & J. 719. (E.E.)

14. The Court will not grant an absolute order for a receiver, on the deft.'s answers, when the first answer has been filed eleven months before the motion, though the last answer has been filed in the preceding term.—*Spratt v. Ahearne*, H. & J. 800. (E.E.)

15. When the object of a consent is to appoint a receiver over outstanding personal estate, the amount of his salary should be fixed by the consent.—*Burke v. B.*, Fl. & K. 89. (R.)

16. A consent that a receiver may be appointed, and that he may be obliged to account before the Master, will not be made a rule of Court.—*Richey v. Gleeson*, Fl. & K. 99. (R.)

17. Upon a motion for a receiver upon bill and answer, an affidavit by the ptf. may be read in explanation of a doubtful passage in an answer not disclosing the whole truth.—*Bell v. M'Loughlin*, Fl. & K. 272. (R.)

1. A receiver, appointed in a cause in the Court of Exchequer, will not be extended to one in this Court.—*Weldon v. O'Reilly*, Fl. & K. 320. (R.)

2. The ptf., as mortgagee of the tithe rent-charge, filed a bill against the incumbent, and a sequestration creditor in possession. The answer of the creditor submitted that the mortgage was void under the 10 & 11 Car. 1, c. 8. The Court appointed a receiver.

In case of the appointment of a receiver over a benefice, he will be directed to appropriate a portion of the profits, to be settled by the bishop, for the performance of the religious duties of the benefice.—*Kenny v. Cumming*, Fl. & K. 321. (R.)

3. It is contrary to the practice of the Court of Exchequer to appoint a receiver after a final decree.

*Semble*—That the practice is different in the Court of Chancery.—*Barber v. Roe*, Long. & T. 662. (E.E.)

4. An order, dismissing a bill with costs, for want of prosecution, is an order within the meaning of the 3 & 4 Vic., c. 105, s. 27; and the Court will, after the taxation of such costs, and without any further order, appoint a receiver (on petition) under that section.

It is not necessary that there should be an order directing, in specific terms, the costs to be paid to some particular person; but the person who would be entitled to issue a subpoena for costs made payable by an order of the Court, is entitled to have a receiver appointed under this Act.

It is not necessary for the appointment of a receiver under this sec., that the Court should, after the costs have been taxed, make a separate order for their payment.—*Madden v. Davis*, Fl. & K. 475. (R.)

5. On the 3rd March 1841, the petitioner obtained a conditional order for a receiver, under 5 & 6 W. 4, c. 55, on a judgment entered in 1828, by warrant of attorney, against the respondent, who was then a trader, and against whom a commission of bankruptcy issued, within two months after the conditional order in this matter was made absolute. On motion of the assignee—*Held*, that this case was within the Bankrupt Act (6 W. 4, c. 14, s. 126), and that the receiver should be removed.—*Burt v. Bernard*, 4 I. E. R. 328. (R.)—[Affd.: 5 I. E. R. 425. (C.)]

6. A petition for a receiver on a judgment over a rentcharge, will not authorise the appointment of a receiver over the lands themselves, although it appears on the affidavit of the respondent that he is entitled to the lands and not to the rentcharge.—*M'Alister v. Martin*, 4 I. E. R. 428. (E.E.)

7. The only cause against a conditional order for a receiver on process, is an answer on the file.—*M'Cartney v. O'Neil*, 5 I. E. R. 494. (E.E.)

8. The affidavit to verify the petition for a receiver may be sworn before the petition has been presented.—*Clendinning v. O'Malley*, 2 Dr. & War. 210; 1 Con. & L. 363. (C.)

9. V., by will, dated 1805, gave R. an annuity of £300. By a subsequent will, revoking the former, V. gave R. an annuity of £600. The will of 1805 was admitted as valid. The subsequent will was impeached, and a suit instituted to establish it. *Held*, that, pending the litigation, R., though entitled in any event to £300 a-year, was not entitled to an order that the receiver should pay her that annuity of £300 out of the rents.—*D'Alton v. Lord Trimleston*, 2 Dr. & War. 531. (C.)

10. In an administration suit, the Court by decree appointed a receiver to collect the testator's outstanding personal estate, and "to be continued until the further order of the Court."—*Raymond v. Franks*, 5 I. E. R. 24. (E.E.)

11. When the head landlord threatened to evict mortgaged premises for non-payment of rent, the Court, on bill filed for a foreclosure, and before answer or process, granted a conditional order for a receiver.—*Barrett v. Mitchell*, 5 I. E. R. 501. (E.E.)

12. When the ptf. in an administration suit obtained an order for a receiver in 1822, but did not complete the appointment of the receiver until 1834, the Court directed an enquiry to ascertain by whose default the receiver was not appointed; and directed, that if it was by the ptf.'s default, and if he might, through such appointment, have kept down the interest on his own demand, he should not now be entitled to so much of the interest on his debt as would have been paid by the receiver, had he been appointed as early as he might have been.—*Newby v. Drew*, 1 Jon. & L. 445. (C.)

13. The deft. in a foreclosure suit, not having complied with the order in the decree to bring in the title deeds, the Court, on motion, referred it to the Master to appoint a receiver, although the decree was merely for a sale, and did not direct a receiver to be appointed.—*Harris v. Shee*, 6 I. E. R. 543; 1 Jon. & L. 91. (C.)

14. Upon the death of a respondent, the receiver over whose lands has been extended to the matters of several judgment creditors' petition; the proper order under the 5 & 6 W. 4, c. 55, s. 32, is to continue the proceedings in all the matters.—*Brady v. Fitzgibbon*, 7 I. E. R. 1. (R.)

15. A judgment creditor having sued out a *fi. fa.* and obtained a return of goods on hands for want of bidders, presented his petition for a receiver, without having proceeded to a sale under the *fi. fa.* *Held*, that he was not entitled to a receiver until the execution at law was consummated and at an end; the proceedings

under the the Sheriffs Act being analogous to an execution.—*Chatterton v. Allen*, 7 I. E. R. 64. (R.)

1. Upon notice of motion to appoint a receiver, the Court will not entertain an application to extend one.—*Pringle v. Little*, 7 I. E. R. 205. (R.)

2. When a receiver neglects to lodge the balance due on foot of his account, within the time directed by G. O. 147, the poundage which he is to be disallowed on passing his next account is to be the poundage on this last, not that on the preceding account of which he neglected to lodge the balance.—*Maxwell v. Boate*, 7 I. E. R. 281. (R.)

3. In 1822, the ptf. obtained an order for a receiver over the shares of F. and P., but did not prosecute it. No receiver was appointed until 1834; interest on the ptf.'s demand running on in the meantime. *Held*, that if the non-appointment of the receiver was caused by the ptf.'s default, he must bear the loss of so much of the interest as would have been paid out of F.'s (the deficient) share by the receiver if he had been appointed in due time; and an enquiry directed accordingly.—*Newby v. Drew*, 7 I. E. R. 349; 2 Jo. & L. 416. (C.)

4. When a petition for a receiver has been presented under the Mortgage Act, the respondent can show cause without filing a petition; and if the petition has not been filed, the Court has no jurisdiction, even to give costs, against the respondent, of a motion to show cause.—*Pakenham v. Darcy*, 7 I. E. R. 476. (R.)

5. The time of presenting the petition under the Judgment Creditors Acts, as appearing by the endorsement of the Chancellor's Secretary, and not the date of the *fiat*, is the period at which the petitioner must be entitled to sue out his *elegit*.

If the petition be presented within a year after the judgment has been obtained, it is sufficient, though not filed until after the year.—*Robertson v. M'Cabe*, 7 I. E. R. 477. (R.)

6. Leave given to the ptf. to move under particular circumstances, for a receiver in a suit defective for want for parties.—*Sullivan v. S.*, 8 I. E. R. 72. (C.)

7. The Court has a discretion to grant or withhold a receiver under the 1 & 2 Vic., c. 108, s. 30 (Tithe Rent-charge Act). Therefore, though a *prima facie* title be stated in the petition, if a fair doubt be cast on it by the answering affidavit, the Court will not appoint a receiver.

*Semble*—A certificate by the Commissioners under the Tithe Composition Act (4 G. 4, c. 99, s. 25) is valid, though it only finds generally that tithes are payable to a lay impropriator, without giving his name.

*Semble also*—The title to the tithes is not concluded by the certificate.—*Greville v. Fleming*, 8 I. E. R. 201; 2 Jo. & L. 285. (C.)

8. A receiver refused on a bill filed by a termor for years who leased for his entire term, reserving rent, with a power of distress; it being doubtful whether the bill could be sustained, the ptf. having a remedy at law.

*Cremen v. Hawkes*, affirmed on appeal.—*Cremen v. Hawkes*, 8 I. E. R. 503; 2 Jon. & L. 674. (C.)—[Afig. 8 I. E. R. 153.]

9. When a conditional order was obtained under the Old Rules for a receiver, any person who might be affected might come in and show cause.—*Wilson v. Owens*, 8 I. E. R. 516. (E.E.)

10. The wife's estate was upon her marriage conveyed to trustees to the use of the husband until bankruptcy, insolvency, or until an *elegit* should issue against the lands on foot of any judgment against the husband; and, from the happening of any of these events, to the use of the wife for her separate use. *Held*, that a judgment creditor of the husband could not appoint a receiver over the lands.—*Woodrooffe v. Marshall*, 8 I. E. R. 670. (R.)

11. In a suit to carry into execution the trusts of a will, a receiver will not be appointed over the lands in the possession of the heir-at-law, unless he admits the will, or until it is proved against him.—*Dobbin v. Adams*, 8 I. E. R. 157. (R.)

12. When, by appointment of different receivers over distinct portions of the deft.'s estates, the entire is extended, the Court will remove all the receivers except one, who will be retained for the benefit of all parties.—*Kelly v. Rutledge*, 8 I. E. R. 228. (R.)

13. When a party in the cause, tenant of the deft., was appointed receiver, all (except one) of the ptf's. who had the carriage of the order concurring in the appointment, the Court refused to set aside the report of the Master on the application of the dissenting ptf.—*Turner v. Lord Donegal*, 8 I. E. R. 285. (R.)

14. W. mortgaged leasehold premises to the ptf. The deed contained a clause of redemption on payment of the principal and interest on the 1st May 1842. By deed of the same date, reciting an agreement on the treaty for the mortgage, that the principal should not be called in until after the death of W., and that by mistake it was stated in the mortgage deed that it might be called in after the 1st of May 1842, the ptf. covenanted that the principal should not be called in until after the decease of W. He became insolvent; the interest fell in arrear. The ptf. paid an arrear of head-rent to save the premises from eviction by the head landlord. *Held*, that the ptf. was not entitled to foreclose the mortgage during the life of W., but was entitled to a receiver to keep down the interest on the mortgage and his advances.

The premises were subject to an annuity prior to the ptf.'s mortgage, and the annuitant was made a party to the suit in respect of the salvage claim. *Held*, that he was not a

proper party to the suit, and the bill was dismissed against him with costs.—*Burrores v. Molloy*, 8 I. E. R. 452; 2 Jo. & L. 521. (C.)

1. When a prior creditor applies for a receiver in his cause in this Court, there being a receiver in the Exchequer appointed by a *pau-ne* creditor, this Court will appoint the receiver, the ptf. undertaking to remove the receiver in the Exchequer, the receiver in this Court not to act till then.—*Mills v. M.*, 9 I. E. R. 1. (R.)

2. An injunction against proceedings on a judgment granted, after premitting the opportunity of pleading at law, when the neglect to do so was accounted for by the creditor's solicitor having said that he would proceed no further if the lands were not subject to the judgment.

*Seemle*.—It is good cause against the appointment of a receiver under the Judgment Act, that the party against whom the judgment was obtained was only a trustee of the lands.—*O'Neill v. Browne*, 9 I. E. R. 131. (C.)

3. The 143rd G. O. applies as well to the extension, as to the appointment of a receiver. Where a solicitor's clerk was appointed a receiver before the making of the order, he will not be extended to other lands of the debtor, on the application of another judgment creditor.—*Meara v. Egan*, 9 I. E. R. 259. (R.)

4. An order appointing a receiver should state that the Court has been informed by petitioner's solicitor that no order appointing a receiver has been made over any part of the respondent's lands, either in this Court, or in the Court of Exchequer, unless a special case for appointing a second receiver is made.—*Clarke v. M'Mahon*, 9 I. E. R. 462. (R.)

5. The 3 & 4 Vic., c. 105, s. 21, does not authorise the appointment of a receiver in a case of constructive trust. The Court refused to appoint a receiver when the interest of the conuzor of a judgment in a lease had been evicted for non-payment of rent, and a new lease had been granted to a third party under circumstances which would constitute the new lease a graft.

Leave given to show cause after the appointment of a receiver, on an affidavit stating that the respondent had been informed and believed that the ten days for showing cause, mentioned in the conditional order for the appointment of the receiver, were sitting days in Term; the respondent paying the costs of the absolute order, and the costs consequential thereto.—*Cassidy v. Hopkins*, 10 I. E. R. 208. (R.)

6. The Court refused a receiver in a foreclosure suit, after a decree to account and a report finding but half a year's interest due, there being no special circumstances.—*Hackett v. Snow*, 10 I. E. R. 220. (R.)

7. Real property of the wife was on the marriage conveyed to trustees to the use of

the husband for life; or until he should commit an act of bankruptcy; or until he should make a composition with his creditors, or should assign his effects for the benefit of his creditors; or until he should become insolvent, or take the benefit of any Act, &c.; or until an *elegit* should issue against the lands; and, after the husband's death, or the happening of any of those events, to the separate use of the wife. The husband assigned all his real and personal estate to a trustee for the benefit of his creditors. On a bill filed by a judgment creditor of the husband, the Court refused to appoint a receiver, his life estate having determined by the assignment.—*Hayes v. Marshall*, 10 I. E. R. 429. (R.)

8. *Hayes v. Marshall*, affirmed on appeal; the Court considering that the receiver should be refused also on the ground that the suit was defective for want of parties.—*Hayes v. Marshall*, 10 I. E. R. 445. (C.)

9. The doctrine of civil death by profession ceased to be law at the Reformation, and was not revived by the R. C. Emancipation Act (10 G. 4, c. 7). The Court granted a receiver, on a bill filed to raise the arrears of an annuity devised in trust for a lady who afterwards became a nun, during such period of her natural life as she should continue unmarried.—*Evans v. Cassidy*, 11 I. E. R. 243. (R.)

10. When a petition is presented under the Mortgage Act, the mere impeachment of the mortgage by affidavit, without showing probable grounds for such impeachment, will not prevent the Court from making the usual reference to appoint a receiver.

*Seemle*.—If a bill should be filed to impeach the mortgage, the Court would not distribute the fund received by the receiver until such suit was disposed of.

*Cosgrave v. Gannon*, 3 I. E. R., approved of.—*Whaley v. W.*, 11 I. E. R. 276. (R.)

11. A, B., and C. were judgment creditors, B. and C. being sureties for A. The Court appointed a receiver over lands which came to C. from A. by *quasi* descent.

*Seemle*.—When all the conuzors of a joint judgment are principal debtors, and one dies, the Court will not appoint a receiver over the lands of the survivor alone.—*Mercer v. M'Kee*, 11 I. E. R. 322. (R.)

12. The petitioner in the second matter was receiver in the first. The Court refused to extend him to the second matter, though the respondent consented.—*Harvey v. Wallace*, 11 I. E. R. 339. (R.)

13. Lord D. was tenant for life of certain estates, subject to a charge on the inheritance vested in S. A bill was filed by Lord D.'s own creditors, and a receiver was appointed over the estates. S. filed a bill to raise his charge. Lord D. died in October 1844; and S. obtained an order in January 1845, that the receiver should be extended to S.'s cause, so far as related to the rents due at the time of

the decease of Lord D. and then remaining uncollected. A sum being in the receiver's hands, consisting of rents due in Lord D.'s lifetime.—*Held*, that the creditors of Lord D.'s life estate were entitled to the rents received before, and S. to the rents received after, the order of January 1845.

The extension of a receiver in an abated suit against a tenant for life, after his death, to a suit by a creditor on the inheritance, is not irregular.—*Moore v. Donegal*, 11 I. E. R. 412. (C.)—[Affg. 11 I. E. R. 364. (R.)]

1. The appointment of a person as receiver over a kind of property, the management of which he does not understand, with an undertaking to act under the direction of a person who does understand it, is improper.

The appointment of a receiver who acts under the directions of a defendant is objectionable.

A reference to appoint a receiver, sent back to the Master, though the Master's selection had been affirmed by the M. R.—*Lupton v. Stephenson*, 11 I. E. R. 484. (C.)

2. Receiver appointed on a judgment, notwithstanding a voluntary deed executed the same day as the judgment was entered, the judgment having relation back to the first day of the preceding Term.—*Beamish v. Phaire*, 11 I. E. R. 559. (R.)

3. The Court is not bound to make an order under the 102nd Rule in favour of a puisne incumbrancer. A petition was presented by a party, the consideration of whose security was impeached by affidavit: the Court made no rule on the petition, without prejudice to the petitioner filing a bill.—*Heenan v. Berry*, 11 I. E. R. 587. (R.)

4. A bill filed to raise the amount of a judgment was taken *pro confesso*. The bill did not pray for a receiver; but a motion for a receiver was granted.—*Richardson v. Austen*, 1 I. Jur. 20. (R.)

5. A receiver will not be appointed under the 5 & 6 W. 4, c. 55, pending a writ of error on a judgment at Law, although the petition be presented before the issuing of the writ of error, and security for costs be not entered into; the ptf. in error being the ptf. in the Court below. A Court of Equity will not entertain the question of irregularity in proceedings at Law.—*Nugent v. Waters*, 1 I. Jur. 35. (R.)

6. When a receiver dies, it is of course to obtain an order of reference for the appointment of a new receiver.—*Wright v. O'Brien*, 2 I. Jur. 20. (R.)

7. A creditor proved a charge in the Master's office, on foot of several judgments. Afterwards, he presented a petition to have a receiver extended to the matter of one of the judgments. *Held*, that filing the charge was not cause against the extension of the receiver,

and the order was made; but no costs of the petition were given.—*Geale v. Nugent*, 2 I. Jur. 33. (R.)

8. Bill to raise an annuity. Answer by purchaser of part of the lands charged, claiming to be exonerated from payment of the annuity. Upon motion for a receiver, the ptf. relied on an affidavit showing that, to obtain payment of the arrears, it was necessary to have the receiver over the sold lands. An order was made referring it to the Master to appoint the receiver over sufficient part of the lands to secure payment of the annuity.—*Bonyngne v. Colgan*, 2 I. Jur. 156. (R.)

9. In future it will not be necessary to present a petition in order to show cause against an order for a receiver under the Mortgage Act; and all applications under that Act, after an order made on the first petition, may be by motion.—*Hart v. Carleton*, 1 I. C. R. 281; 3 I. Jur. 131. (R.)

10. The petitioner is entitled to be paid the costs of the appointment of a receiver out of a fund realised by him in priority to the landlord's claim for rent.—*Read v. Corcoran*, 1 I. C. R. 235. (R.)

11. A receiver cannot be appointed or extended over tithe rentcharge by petition under the 5 & 6 W. 4, c. 55, or 3 & 4 Vic., c. 105.—*Lymberry v. Helsham*, 1 I. C. R. 633. (R.)

12. A judgment in *sci. fa.* on a recognizance, being merely an award of execution, a receiver may be appointed on a recognizance (notwithstanding the 12 & 13 Vic., c. 95, s. 10), if it was enrolled more than a year before the petition is presented, though the judgment was entered within the year.

Petitions for receivers on tenants' and receivers' recognizances should be entitled in the name of the Queen; the Attorney-General should be the petitioner.—*The Queen v. Cruise*, 2 I. C. R. 65. (C.)

13. The Court will, in order to save expense, refer in the first instance to the Receiver Master a cause petition under the Ch. Reg. Act, s. 15, praying the appointment of a receiver over lands in respect of an annuity charged thereupon.—*Murphy v. Harman*, 2 I. C. R. 39. (C.)

14. Lands were devised in trust to pay a rentcharge to a husband and his wife for their natural lives, and the natural life of the survivor. A receiver was appointed on a petition of a judgment creditor of the husband, by his consent. The rentcharge was not received by the receiver during the husband's life. *Held*, after his death, that as the rentcharge, if a legal one, might have been extended by the creditor, an *elegit* bill would lie for it; and therefore the receiver had been rightly appointed, and was entitled to the arrears.

An estate to husband and wife by entireties

may be extended by a judgment creditor of the husband.—*Crofton v. Bunbury*, 2 I. C. R. 465. (R.)

1. In a case under 12 & 13 Vic., c. 95, when a judgment in case was entered for a sum under £150, but which, including costs, amounted to more than £150—*Held*, that this was not a judgment on which a receiver could be appointed.—*M'Donnell v. Malone*, 4 I. Jur. 124. (R.)

2. Lands were devised in trust, to pay a rentcharge to a husband and his wife, for their natural lives, and the natural life of the survivor. A receiver was appointed on a petition of a judgment creditor of the husband, by his consent. The rentcharge was not received by the receiver during the husband's life. *Held*, after his death, that as the rentcharge, if a legal one, might have been extended by the creditor, an *elegit* bill would lie for it, and therefore the receiver had been rightly appointed, and was entitled to the arrears.

An estate to husband and wife by entireties may be extended by a judgment creditor of the husband.—*Crofton v. Bunbury*, 2 I. C. R. 465. (R.)

3. A. obtained, as of H. Term 1850, a judgment against B., whose interest in a term of years was sold at the close of that year under an execution issued on foot of a judgment obtained against B. in T. Term 1850. The purchaser had no notice of the judgment vested in A., who applied for a receiver under the Sheriffs Act. *Held*, that A. was not entitled to a receiver, without first establishing at law his rights against the purchaser.—*Power v. Kelly*, 5 I. Jur. 57. (R.)

4. In a foreclosure suit the Court will not appoint a receiver unless a year's interest is due, or that there is danger to the security.—*Herbert v. Greene*, 3 I. C. R. 270. (R.)

5. After a judgment debtor has become bankrupt, a receiver cannot be appointed on petition of the judgment creditor, though cause is shown only by a puisne mortgagee in possession.—*Ryan v. Lefroy*, 3 I. C. R. 351. (C.)

6. Order made extending the receiver under the Judgment Acts, on a petition verified by the petitioner's solicitor, without the leave of the Court (the petitioner residing out of the jurisdiction), on production of an attested copy of the affidavit of the petitioner, filed in the Court of Law, on which the judgment was revived, and which verified the material facts in the case.—*Casement v. Rorke*, 4 I. C. R. 36. (R.)

7. Two judgments were obtained in 1803, and another in 1805, against A., who, being seized in fee of lands, died; and they descended on B. and C., his daughters and co-heiresses. In 1809, on the marriage of C., her moiety was settled to uses, under which the respondents M'C. and wife claimed. An agreement, which was never carried into legal

execution, for a partition, was afterwards made between the owners of the two moieties. One of its terms was, that the judgment should be thrown on B.'s moiety. In 1843, B.'s moiety was mortgaged, in trust, to the petitioner, who had notice of the agreement for the partition. The judgments were also assigned as a collateral security. Petitions were filed in the I. E. Court to sell both moieties, but the Commissioners stayed the sale of C.'s moiety, until it should be ascertained whether B.'s moiety would be inadequate to pay the judgments and the mortgage. A petition was filed in this Court for a receiver, pending the proceedings in the I. E. Court. The Master appointed a receiver over both moieties.

On appeal from his order—*Semble*, that the petition was not sustainable as against the appellants, M'C. and wife; because no *elegit* had issued on the judgments, and the suit was not for the administration of the conuzor's assets; because the judgments were not made charges by the 3 & 4 Vic., c. 105, as against M'C. and wife, as purchasers under the settlement of 1809.

*Held*, that the petitioners having had notice of the agreement to throw the judgments on B.'s moiety, the Court would not, until it was ascertained that that moiety was insufficient to pay them, appoint a receiver over C.'s moiety.

*Semble*, that the petitioner, as mortgagee of B.'s moiety, having had notice of the said agreement, was not entitled to throw the judgments on C.'s moiety, in order that the proceeds of B.'s moiety might be sufficient to pay off the mortgage.

The Court, in appointing a receiver, whether by interlocutory motion or by decree, exercises a discretion to appoint him over a competent part of the lands charged with the debt. An incumbrancer has no right to a decree for a receiver over the entire of the lands, without reference to the question of the amount of security, and the value of the lands.

The Court will not in general admit affidavits not used before the Masters, on appeals from orders made by them in cases referred under the 15th sec. of the Ch. Reg. Act; more especially when they refer to matters not put in issue by the petition or discharge.

In this case, such affidavits were admitted by consent.—*Tressilian v. Caniffe & others*, 4 I. C. R. 399. (R.)

8. When a judgment has been revived within six years, and no interest paid on it, a receiver will be extended to pay the amount of such judgment and interest.—*Viridet v. Evans*, 7 I. Jur. 17. (R.)

9. When a receiver has been appointed under the Judgment Acts, to pay the amount of a judgment out of lands, he may, on motion upon notice, be extended to other lands to pay the same judgment.

If a receiver petition be presented for this purpose, the Taxing Master will be directed to tax the costs of the petition as costs of a motion.—*Minchin v. Dillon*, 7 I. Jur. 325. (R.)

1. In motions for a receiver, the applicant must, in consequence of the 19 & 20 *Vic.*, c. 77, state the value of the property over which the receiver is sought to be appointed.—*Colvex v. Gregg*, 2 I. Jur. N. S. 46. (R.)

2. When there are no proceedings in the L. E. C., a receiver will not be appointed, unless a sale is prayed.—*Ryan v. Fitzgerald*, 5 I. C. R. 228. (C.)

3. When the receiver under the Mortgage Act, in a matter pending at the passing of the 19 & 20 *Vic.*, c. 77, dies, the Court has power to appoint a new receiver, notwithstanding the repeal of the former by the 5th sec. of the latter Act.—*Hartstonge v. Tottenham*, 6 I. C. R. 144. (R.)

4. Under Pigot's Act, a judgment creditor may obtain a receiver over Ecclesiastical property of his debtor.

Form of order in such case.—*Winter v. Ho-man*, 6 I. C. R. 479. (C.)

5. A. demised lands for lives renewable for ever, at £70 a-year, and afterwards agreed to purchase the lessee's interest, then vested in B., in consideration of a perpetual rentcharge of £20 a-year. To carry out the contract, B. demised the lands for the same lives, renewable for ever, at a rent of £90 a-year, to C., in trust for A. C. died. The interest in the latter lease vested in B., C.'s heir-at-law. *Held*, that a suit could be maintained by B., for a receiver, to recover the arrears of the profit rent of £20, there being no remedy for it at Law.—*Tobin v. Redmond*, 11 I. C. R. 445; 6 I. Jur. N. S. 121. (R.)

#### LXXVIII. 2. b. *Appointment of Receiver before Appearance and Answer.*

6. A receiver, to compel deft.'s appearance, will not be granted in a suit instituted by a bond or simple contract creditor to pay his debt out of the debtor's real estate.—*Williams v. Dillon*, Hay. & J. 704. (E.E.)

7. It is the daily practice of the Court to appoint receivers over real estate, and to order the tenants to pay their rents to the receiver, although those rents are in fact debts founded on contract, and there may be a dispute as to the person entitled to them.

Upon a creditor's bill, founded on the equity of the 38 G. 2 (Bankers Act), against the public officer of a joint-stock banking company, incorporated and registered pursuant to the 6 G. 4, c. 42, the bank having stopped payment, an injunction was granted to restrain the directors, &c., from interfering, and a receiver to collect the joint property, &c., was appointed before answer, the deft. having made an affidavit for the purpose of resisting the motion, and going into the merits of the case.

Form of order in such case, authority and duties of receiver, his recognizance, sureties, and remuneration.—*Acheson v. Hodges*, 3 I. E. R. 516, 522. (R.)

8. The head landlord threatened to evict mortgaged premises for non-payment of rent. On a foreclosure bill being filed, and before answer or process, the Court granted a conditional order for a receiver.—*Barrett v. Mitchell*, 5 I. E. R. 501. (E.E.)

9. The Court having decided that the ptf. was entitled to an annuity on the lands of G., on which persons not parties to the suit were entitled to a charge; and a question of priority having arisen between the ptf. and them; the cause stood over to make them parties. *Held*, that they must be made answering parties, and that it was not sufficient to serve them with notice under the 15th G. Rule of March 1843.—*Sullivan v. S.*, 8 I. E. R. 72. (C.)

10. When a receiver has been appointed by a puisne incumbrancer, the Court will not extend him to the suit of a prior incumbrancer before answer, upon the consent of the inheritor, as the puisne incumbrancers would be thereby deprived of the rents received until the receiver could be extended after answer.—*Lynch v. Nolan*, 10 I. E. R. 57. (R.)

11. The Court, upon the application of the ptf., appointed a receiver over the lands of a minor deft. before his appearance or answer, upon an affidavit that the rents could not be enforced from the under-tenants of the minor (who was not a ward in Ch.), and that his interest was in danger of being evicted; the head landlord having served ejectments for the non-payment of the head-rent.—*Whitelaw v. Sandys*, 12 I. E. R. 393. (E.E.)

12. A creditor who has obtained a receiver under the Judgment Acts is a necessary answering party in a cause seeking a sale of the lands. Therefore the receiver cannot be extended from the matter to the cause, unless the creditor has filed his answer, and has had notice of the motion to extend.

But when it is sought to extend a receiver from one matter to another, or from a matter to a cause, in which a receiver only is prayed for, the debtor only, and not the creditor who has obtained the receiver, should be served with notice of the motion.—*Le Grand v. O'Neill*, 2 I. C. R. 569. (R.)

#### LXXVIII. 2. c. *Who may be Receiver.*

13. It is no objection to a receiver, that he is a party in the cause.

There should not be two receivers over the same land. This Court will, therefore, order that a receiver already appointed by the Court of Ch. be extended to a cause here, upon his giving security proportionate to the additional lands over which he may be appointed.—*Downshire v. Tyrrell*, Hay. & J. 354. (E.E.)

14. A receiver appointed in a cause in the Exchequer will not be extended to a Chancery suit.—*Weldon v. O'Reilly*, Fl. & K. 320. (R.)



1. A receiver appointed by the Court of Ch. in an adverse suit is not the inheritor's receiver within the 4 & 5 W. 4, c. 82.—*Anon.*, 8 I. E. R. 501. (E.E.)

2. The terms of the 143rd Rule (prohibiting the appointment of a solicitor's clerk or agent as receiver) are general, and are not confined to the clerks or agents of the solicitors in the cause or matter.—*In re Stokes*, 7 I. E. R. 450; 1 Jo. & L. 675. (C.)

3. An attorney or solicitor ought not to be appointed a receiver; and the Court will, upon motion, direct a solicitor who has been appointed receiver to be removed on that ground.

When several judgments are vested in one person, separate petitions for the appointment of receivers should not be presented on foot of each judgment—they should be included in one petition.

Any solicitor who nominates a solicitor's clerk or apprentice to the office of receiver will be suspended from practising in this Court.

If a solicitor, solicitor's clerk, or apprentice, shop-keeper, or person carrying on a profession or trade, is nominated or appointed receiver, he will be removed; and the person having the carriage of the proceedings must pay the costs of appointing another receiver.—*Geale v. Nugent*; *Molony v. Nugent*, 1 I. Jur. 819. (R.)—[Rev'd.: 1 I. Jur. 841. (C.)]

4. A receiver may be appointed or extended under the Sheriffs Act, though an order for a sale has been made by the Commissioners for Sale of I. Estates.—*Corban v. Lord Mountcashel*, 1 I. C. R. 234. (R.)

5. Upon a consent entered into *bona fide* by the parties in a cause; by B., the receiver; and A., a person proposed to fill that office; the Court will order that A. be substituted for B. as receiver, and that persons be approved of as his sureties, and the security measured at a given sum, without reference; and that B. and his sureties be discharged from their recognizance; that A. should pay to B. an advance previously made by him for the benefit of the property, and all his costs; that A. should have credit in his accounts for such payment; that a policy of insurance effected on B.'s life should be discontinued; that the life of a third party already insured by B. should be kept so by A. out of the rents; that the proceeds of such insurance, when realised, should be applied by the latter in recouping his advances; and that he might, from the balance of the rents, effect an insurance on his own life as additional security for those advances.

*Secus*—When there appears to be an attempt to traffic in the office of receiver.—*Farran v. Morris*, 1 I. C. R. 680. (C.)

6. An accountant in the office of an attorney, though not strictly an attorney's clerk, and notwithstanding that he holds other occupations, is a clerk or agent of the attorney within the meaning of the 143rd G. O. (1843),

and is incapable of holding the office of receiver under the Court.—*Crawford v. Chaine*, 3 I. Jur. 361. (C.)

7. A consent to appoint as receiver a particular person, nominated in the consent, is not one which ought to be made a rule of Court.—*Leach v. Tisdall*, 4 I. C. R. 209. (C.)

8. The M. R. may, under special circumstances, appoint a solicitor receiver: 41st G. O. (1850)—*Cromie v. Peyton*, 5 I. Jur. 142. (R.)

9. Petitioner was appointed guardian of the persons and fortunes of a testator's children; and, though a barrister, was appointed receiver over the property, in consequence of a direction in the testator's will. The collection of the property was accompanied with some expense. Under these circumstances, the receiver was allowed poundage fees for collection at £5 percent.; but without deciding the general question that the 2nd G. O. of 1844 did not apply to such cases. There having been two separate orders, one directing the receiver to account for dividends of stock before the Master in the matter, and another directing him to account before the Receiver Master for the rents, an order was made directing both accounts for the future to be taken before the Receiver Master.—*In re Doolys*, 7 I. Jur. 285. (R.)

#### LXXVIII. 2. d. *Against Executors, Administrators, and Trustees.*

10. The petitioner issued an *elegit*, and obtained a finding on the inquisition. The Court refused to appoint a receiver unless the petitioner consented to waive his costs at law.—*Hudson v. Williams*, 1 Jones, 630. (E.E.)

#### LXXVIII. 2. e. *Appointment of Receiver over Infant's Estate.*

11. Before the Court of Ch. Reg. Act 1850, no step could have been taken in a minor matter without a petition. Under that statute, minors may be made wards of Court by cause petition; and if they were now made wards of Court by cause petition instead of an ordinary petition, all subsequent orders might be made on motion, and without petition; and expense would then be saved to the minors' estate.—*Hart v. Carleton*, 1 I. C. R. 231; 3 I. Jur. 131. (R.)

12. The Lord Chancellor of Ireland has power, under the 4 & 5 W. 4, c. 78, s. 7, to appoint a receiver over the estate of the minor, upon a petition, and without the filing of a bill for that purpose.—*In re Goode*, 1 I. C. R. 256; 3 I. Jur. 50. (C.)

#### LXXVIII. 2. f. *Against Joint Tenants and Tenants in Common.*

13. A receiver will not be granted on a bill of partition, filed by one tenant in common

against another, unless a case of exclusion is shown.—*Spratt v. Ahearne*, 1 Jones, 50. (E.E.)

**LXXVIII. 2. g. Receiver against Mortgagor or Mortgagee, and other Incumbrancers.**

1. A receiver will not be appointed over a life estate to raise arrears of interest which accrued due during the time of a former tenant for life.—*Garnett v. Pratt*, Hay. & J. 303. (E.E.)

2. An order to appoint a receiver under the 5 & 6 W. 4, c. 55, will not be suspended upon an allegation that the consideration for the judgment was fraudulent or usurious; but the order for payment will be stayed, to allow the consideration for the judgment to be impeached.

*Semble*—A receiver will be appointed over an equity of redemption, when the debtor is in receipt of the rents.—*Maxwell v. O'Dell*, S. & Sc. 194. (R.)

3. It is not a sufficient cause against the appointment of a receiver upon a judgment under the 5 & 6 W. 4, c. 55, that the debtor is seized only of an equity of redemption, unless the mortgagee be in possession, or will go into possession.

The impeachment of the security may be good cause against distributing the funds, but not against granting a receiver.—*Smith v. Egan*, S. & Sc. 238. (R.)

4. The Court will not appoint a receiver on a judgment under 5 & 6 W. 4, c. 55, without the consent of a prior creditor who is in receipt of the rents.

The affidavit to show cause against appointing a receiver under that Act, need not be made by a party interested in the lands. The Court will listen to any person who states that a third party, not the respondent, is in receipt of the rents, and may be affected by the order.

The statute gives the creditor, at whose instance the order is obtained, a right to costs in certain cases, out of the funds brought in by the receiver. In other respects, the Court has complete control over these funds.—*Kennedy v. Whitney*, S. & Sc. 375. (R.)

5. In a suit for payment of an annuity, the Court of Exchequer will appoint a receiver on the answer, and an affidavit of the sum due, though an issuable Term and Vacation have elapsed since the answer was filed.—*Fay v. F.*, 2 Jon. 350. (E.E.)

6. *Quære*—Whether the filing of a petition under the 5 & 6 W. 4, c. 55, is not, for the purpose of a suit to have equitable execution, equivalent to issuing an *elegit*?—*Handley v. Lord Langford*, 2 Jo. 421. (E.E.)

7. A receiver was appointed in an equity cause, and was afterwards extended to the matter of a petition presented by a prior mortgagee under the Mortgage Act. *Held*,

that rents received by the receiver before the conditional order for extension, and which were still in Court, belonged to the annuitant.—*Davoren v. Collins*, 2 Jo. 806. (E.E.)

8. Deft. executed a deed purporting to grant ptf. an annuity of £52, for deft.'s life, in consideration of £350 paid by ptf. to deft. upon the execution of the deed. The annuity becoming in arrear, ptf. filed a bill to raise the arrears, by selling the premises charged, and a receiver in the meantime. Ptf. now moved on the bill for a receiver. Deft., by her answer and affidavit, impeached the grant of the annuity on several grounds; and insisted that the deed was not *bona fide*, but merely an evasion of the statutes against usury; that the real agreement was for an usurious loan, of which the repayment was secured by an insurance on deft.'s life, to be maintained at her cost; and referred to letters of ptf.'s agent, which treated the transaction as a loan, not as a purchase. Deft. also denied that the consideration was duly paid. *Held*, that there was a *prima facie* case for a receiver, since deft.'s unproved allegations could not avail against her solemn deed.—*Kelly v. Butler*, 1 I. E. R. 435. (R.)

9. When, upon a decree *pro confesso* in a foreclosure suit, ptf. moves for a receiver, he must show, by affidavit, the sum due for principal, interest, and costs, after all just allowances, and that deft. is in possession. The statement in the bill respecting the sum due is not enough.—*Rogers v. Newton*, 2 I. E. R. 40. (R.)

10. When the deed reserving a f.f. rent out of lands thereby conveyed in fee, was of ancient date, and the rent, after various mesne assignments, was vested in the ptf., as assignee, and was in arrear; and the estate conveyed by the deed, after various mesne assignments, was vested in the deft., as assignee; upon a bill by the assignee of the rent, praying a receiver, &c., and the deft.'s answer admitting the ptf.'s title, but insisting that his remedy was at law, the Court granted a receiver over the premises conveyed by the deed, to pay the arrears and future accruing gales of the rent, although the deed contained clauses of distress and re-entry in case of non-payment.—*Stevelly v. Murphy*, 2 I. E. R. 448. (R.)

11. A judgment creditor is entitled to a receiver under the 5 & 6 W. 4, c. 55, in every case in which at law he could issue an *elegit*. In such a case, although the parties in possession may show, as cause against the receiver's appointment, an equitable defence which, upon a bill filed for that purpose, would probably entitle them to a decree, the Court will appoint the receiver on the judgment creditor's petition; but will retain the fund until the party relying upon the equity has had the opportunity of having it regularly established by a decree.—*Walsh v. Keane*, 3 I. E. R. 426; Fl. & K. 174. (R.)

1. It is contrary to the practice of the Court of Exchequer to appoint a receiver after a final decree.

*Semble*—That the practice is different in the Court of Chancery.—*Barber v. Roe, Long. & T.* 662. (E.E.)

2. As cause against the conditional order for the appointment of a receiver under the Mortgage Act (11 & 12 G. 3, c. 10), the respondent impeached the mortgage, and showed by affidavits very strong grounds to induce the Court to believe that it was obtained without good consideration and by fraud. The cause was allowed without costs, it having been the practice hitherto not to appoint a receiver under the Mortgage Act, except where the right of the mortgagee was uncontroverted; and it appearing by the petition in this case, that from the date of the mortgage to the present time (thirteen years) no payment had been made or demanded, as the respondent alleged, on foot of the mortgage, although the parties were close neighbours all the time. But the M. R. declared it should not be understood that petitions under this Act may be defeated whenever the respondent comes in on motion and impeaches the mortgage; that for the future the conditional order for a receiver shall be made absolute notwithstanding such impeachment, unless the grounds for such impeachment clearly appear: and that the former practice held out a strong temptation to parties in receipt of the rents to make improper statements upon oath, and ought not to be followed.—*Cosgrave v. Gannon*, 8 I. E. R. 433; *Flan. & K.* 228. (R.)—[Approved: *Whaley v. W.*, 11 I. E. R. 276. (R.)]

3. Ptf., as mortgagee of the tithe rentcharge, filed a bill against the incumbent, and against a sequestration creditor in possession; and that creditor's answer submitted that the mortgage was void under the 10 & 11 Car. 1, c. 3. The Court appointed a receiver.—*Kenny v. Cumming*, FL & K. 321. (R.)

4. A puisne mortgagee having obtained a receiver under the Mortgage Act, a prior mortgagee in a year after extended the receiver, no rents having in the meantime been collected by him. *Held*, that the prior mortgagee was entitled to all the rents due before the extension by him, but not collected until afterwards.—*Boyd v. Burke*, 8 I. E. R. 660. (R.)

5. A judgment creditor having obtained a receiver under the Judgment Acts, over lands of his debtor, may, after the lapse of more than a year, get a receiver under the Acts over other lands of the debtor, without reviving his judgment.—*Clendinning v. Oranmore*, 9 I. E. R. 150. (R.)

6. A judgment creditor, in 1836, obtained a conditional order for a receiver. In 1837 a consent order directed that the respondent should pay the instalments; and, in default, that a receiver should be appointed. In 1846, upon default being made, the creditor presented a petition to extend a receiver appointed in the meantime in the matter of a

puisne creditor. *Held*, that the petition was a continuation of the original petition, and that it was not necessary to revive the judgment.

That, properly, the application should be made by motion.—*Dyas v. Cruise*, 9 I. E. R. 256. (R.)

7. A cause petition, for the appointment of a receiver to keep down the interest upon a charge, is not in general regular. The fact of the charge having been put in settlement is not a sufficient reason for presenting such a petition.

*Bennett v. Briscoe* (1 I. C. R. 594) disapproved of.—*Ryan v. Fitzgerald*, 5 I. C. R. 223. (C.)

8. The appointment of a receiver in a mortgage cause does not take the case out of the operation of the 81st G. O. of 1843.—*Woodroffe v. Greene*, 15 I. C. R. 176. (C.A.)

9. The receiver of the rents of a mortgaged estate is the mortgagor's receiver.—*Chinnery v. Evans*, 9 I. Jur. N. S. 281. (H.L.)

#### LXXVIII. 2. h. In Partnership Cases.

##### LXXVIII. 2. i. *Pendente lite*.

10. Upon the hearing, the Court, though entertaining a strong opinion in favour of the ptf., directed an ejectment against the deft., who obtained a verdict, which was afterwards set aside. The Court granted a receiver over the deft.'s possession, it being shown that the rents were in danger.—*Scott v. S.*, 13 I. E. R. 212. (C.)

11. B. was donee of a general power of appointment enabling him to charge respondent's estate with £1500 and interest. He exercised it in the petitioner's favour, who was B.'s only son by a second marriage, and who now sought to have a receiver appointed over the estates, as no interest had been paid for fifteen or sixteen years.

The respondents impeached the petitioner's security, on the ground—that the power of appointment was contained in a deed intended to carry out a prior contract; that the power was too general, and should have been confined to the children of the first marriage; and that a cross-bill to remedy the mistake had been already filed. *Held*, that a receiver should, notwithstanding this impeachment, be appointed pending the litigation.—*Blake v. B.*, 8 I. Jur. N. S. 301. (R.)

12. C., being entitled to an equity of redemption, confessed a judgment. Afterwards, C., and the mortgagee, by C.'s direction, conveyed the estate to a purchaser with notice of the judgment. The Court would not, at the judgment creditor's instance, appoint a receiver over the estates in the purchaser's hands.—*Barrett v. Merrick*, 2 Jones, 193. (E. E.)

1. A purchaser, without notice of a prior judgment, at the time of the purchase, took to a trustee for himself an assignment of an outstanding mortgage prior to the judgment. Upon the petition of the judgment creditor, under the 5 & 6 W. 4, c. 55, the Court refused to appoint a receiver.—*Chapman v. Dunbar*, 3 I. E. R. 202; Fl. & K. 86. (R.)

LXXVIII. 2. j. *Against Vendor and Purchaser.*

LXXVIII. 2. k. *In cases of Judgment and Custodiam Creditors, under the Sheriff's Act, 5 & 6 W. 4, c. 55, and under the Rentcharge Acts.*

2. When a bill is filed against a debt., residing out of the jurisdiction, to raise a charge specifically affecting his lands, a receiver will be appointed, to compel his appearance.—*Nash v. Hughes*, Hay. & J. 400. (E.E.)

3. A prior creditor, having obtained a receiver in a Chancery suit to which a puisne creditor is a party, cannot remove a receiver appointed by the Exchequer in the puisne creditor's suit in that Court, to which the prior creditor is not a party.

*Semble*—At the desire of the prior creditor, the Exchequer will direct the puisne creditor to make him a party to the suit.

But the Exchequer will not remove its receiver when the receiver in Chancery was collusively appointed to obstruct the puisne creditor.—*Barry v. B.*, Hay. & J. 508. (E.E.)

4. A receiver to compel the debt.'s appearance will not be granted in a suit instituted by a bond, or simple contract creditor, for payment of his debt out of his debtor's real estate.—*Williams v. Dillon*, H. & J. 704. (E.E.)

5. An order to appoint a receiver under the 5 & 6 W. 4, c. 55, will not be suspended on an allegation that the consideration for the judgment was fraudulent or usurious; but the order to pay will be stayed, to give an opportunity to impeach it.—*Maxwell v. O'Dell*, S. & Sc. 194. (R.)

6. A judgment is not a sum charged upon, or payable out of land, within the 3 & 4 W. 4, c. 27, s. 42. Therefore, an application for an order to discharge a receiver, under the 5 & 6 W. 4, c. 55, on payment of the principal due on the judgment, with six years' interest, was refused.—*Kealy v. Bodkin*, S. & Sc. 211. (R.)

7. A petition for a receiver under the 5 & 6 W. 4, c. 55, should be verified by the affidavit of the person interested, whenever it is possible to procure such an affidavit.—*Cloncurry v. Piers*, S. & Sc. 669. (R.)

8. *Semble*—A receiver will not be appointed over a term of years, upon a judgment creditor's petition under the 5 & 6 W. 4, c. 55.—

*Littlewood v. Brierley*, 1 Jo. 606. (E.E.)—*White v. W.*, 1 Jo. 610. (E.E.)

9. The Court will not appoint a receiver under the 5 & 6 W. 4, c. 55, over the possession of a prior *elegit* creditor.—*Hobson v. Murphy*, 2 Jo. 169. (E.E.)

10. On the Attorney-General's consent, a receiver will be appointed under the 5 & 6 W. 4, s. 55, when the conuzor of the judgment has died intestate, and without heirs.—*Fox v. Auldjo*, 2 Jo., 180. (E.E.)

11. The Court will not appoint a receiver, under the 5 & 6 W. 4, c. 55, over a prior creditor who, by an agreement entered into with the debtor after the petitioner's judgment, is in possession of the debtor's estate, to pay off an incumbrance.—*Balfé v. Lynch*, 2 Jo. 185. (E.E.)

12. The 5 & 6 W. 4, c. 55, applies only to cases in which the creditor has not had the benefit of his judgment.

A judgment creditor filed an *'elegit* bill, and got into possession of part of his debtor's estates by a receiver appointed under a decree in that suit. Under this Act, the Court refused to appoint a receiver over other parts of the debtor's estate.—*Davidson v. Langford*, 2 Jo. 189. (E.E.)

13. Under the 5 & 6 W. 4, c. 55, this Court has not jurisdiction to appoint a receiver over an equity of redemption in fee, even though the conuzor of the judgment be in possession of the lands.—*Handley v. Lord Langford*, 2 Jo. 343. (E.E.)

14. In an affidavit, verifying a petition for a receiver, under the 5 & 6 W. 4, c. 55, it is sufficient to state a lump sum to be due on foot of the judgment for principal, interest, and costs, when the only costs incurred are the ordinary costs of entering judgment.—*Anon.*, 2 Jo. 349. (E.E.)

15. The Court will appoint a receiver, under the 5 & 6 W. 4, c. 55, over a reversion in fee expectant on a term of years. Against an application for a receiver, the respondent showed cause that the conuzor had, before the rendition of the judgment, conveyed all his estates to respondent. It being alleged that the conveyance was voluntary, and void as against creditors, the Court directed an enquiry into the consideration for the deed.—*Costello v. Jones*, 2 Jo. 352. (E.E.)

16. A receiver will not be appointed over an ecclesiastical benefice, with cure of souls, if no sequestration has issued, and the bishop was not a party to the suit.—*M'Curdy v. Chester*, 2 Jo. 358. (E.E.)

17. In answer to a petition for a receiver to pay tithe composition, under 2 & 3 W. 4, c. 119, s. 15, the respondent cannot set up as a defence that the lands are in the occupation

of his under-tenants, who hold under unstamped accepted proposals in writing, executed prior to the 16th August 1832.—*Orpen v. Allen*, 2 Jo. 434. (E.E.)

1. *Semble*—A person in possession of lands under a contract for a lease thereof for a term greater than three years, but upon which an action at law could not be maintained, is not a person having an estate or interest therein greater than a tenancy from year to year, within the meaning of 2 & 3 W. 4, c. 119, s. 12, though a Court of Equity would decree specific execution of the contract, on the ground of part performance.—*Orpen v. Moore*, 2 Jo. 435. (E.E.)

2. After the appointment of a receiver, under the 5 & 6 W. 4, c. 55, the petitioner died, having appointed two executors, of whom only one proved the will. *Held*, that the proceedings on the petition must be continued in the names of both executors.—*Anon.* 2 Jo. 781. (E.E.)

3. Under the 5 & 6 W. 4, c. 55, and before the G. O. of March 1843, the absolute order was the order appointing the receiver, and to the date of it, and not of the conditional order, his appointment had reference, so as to give priority over the rights of a bankrupt's assignee.—*Burt v. Bernard*, 2 Con. & L. 271. (C.); 3 Dr. & War. 464: confirming, on appeal, the judgment of the M. R.; Fl. & K. 414. (R.)

4. The order extending a receiver under 5 & 6 W. 4, c. 55, does not attach, for the benefit of the extending creditor, the arrears of rent accrued due before, and received after the extension.—*Rede v. Henry*, Fl. & K. 97. (R.)

5. An affidavit to verify a petition under 5 & 6 W. 4, c. 55, made by the agent of the petitioner, will not suffice; the affidavit, unless some special facts are stated, must be made by the petitioner himself.—*Phelan v. P.*, Fl. & K. 177. (R.)

6. In proceedings under 5 & 6 W. 4, c. 55, the Court will not refer it to a Master to ascertain the priorities of the judgment creditors, but will itself decide upon them, on the motion to draw out of Court the money brought in by the receiver.—*Hinton v. Gill*, Fl. & K. 188. (R.)

7. A receiver appointed in a cause over a life estate, and not discharged upon the death of the tenant for life, will be extended to the matter of a petition upon a judgment obtained against the tenant in tail.

*Semble*—That a receiver appointed over a life estate is not discharged by the death of the tenant for life.—*Vincent v. Going*, Fl. & K. 275. (R.)

8. On application by a judgment creditor for a receiver over a chattel interest, the Court will not consider the year limited by the 3 & 4 Vic. c. 105, s. 22, to have elapsed, unless it has

elapsed before the date of the conditional order appointing the receiver.

The proviso in the 22nd sec. of 3 & 4 Vic. c. 105, requiring the judgment to have been a year entered, applies to cases in which the judgment creditor petitions for a receiver, as well as to cases in which he proceeds by bill.—*M'Dermott v. Moylan*, Long. & T. 555. (E.E.)

9. An *elegit* issued twenty-four years before, but never executed, is not such an *elegit* as will support a petition for a receiver under the Sheriffs Act.

A party in possession under an *elegit* must abandon the proceedings which he has taken thereunder, before the Court will grant him a receiver under the Sheriffs Act.—*Mahon v. Fitzgibbon*, 1 I. E. R. 6; 1 Dr. & Wal. 651. (C.)

10. A mortgagee in possession, having a collateral judgment duly revived, may, under the 5 & 6 W. 4, c. 55, have a receiver extended over the freehold in his possession, but subject to an account of the rents, &c., received, or which might, without wilful default, have been received out of the premises during the period of possession under the mortgage. If petitioner omits to state a material fact, which is within his knowledge, and the respondent or a third person comes in to show cause against a conditional order thus obtained, and shows the fact withheld, the petitioner must pay the costs, even though the cause be disallowed.—*Adams v. Horn*, 1 I. E. R. 69. (R.)

11. It is still unsettled in this Court whether a receiver, under the 5 & 6 W. 4, c. 55, will be extended over a term of years. If a party in receipt of the rent shows, as cause against a conditional order for a receiver under that Act, that it has not been served on himself, that cause will be allowed; and the petitioner will be compelled to pay the costs.—*Reynolds v. Falkiner*, 1 I. E. R. 95. (R.)

12. On consent, a provision will be allowed to maintain the tenant for life over whose estate a receiver has been appointed under the 5 & 6 W. 4, c. 55; but that provision will be made by discharging the receiver from over so much of the lands as will give respondent a sufficient income; not by directing the receiver to pay respondent a specific portion of the rents.—*Evans v. Blennerhasset*, 1 I. E. R. 115. (E.E.)

13. A mortgagee, who has extended a receiver under the 5 & 6 W. 4, c. 55, to the matter of a judgment collateral to the mortgage, will not be allowed afterwards to set up the mortgage against a creditor whose judgment is pulse to the mortgage, and who seeks to extend the receiver to his judgment.—*Waller v. Blennerhasset*, 1 I. E. R. 386. (E.E.)

14. The petition, under the 5 & 6 W. 4, c. 55, must be presented in the name of the person entitled at law to issue execution on the judgment.—*Hanley v. Blennerhasset*, 1 I. E. R. 478; 2 Jo. 188. (E.E.)

1. It is not an answer to an application for a receiver under 5 & 6 W. 4, c. 55, that the party in possession is a purchaser of the legal estate affected by the judgment, without notice of it.—*Fletcher v. Eley*, 2 Jo. 505. (E.E.)

2. In an application for a receiver under 5 & 6 W. 4, c. 55, the judgment of revivor upon the *sci. fa.* to revive the original judgment, is conclusive to show that the petitioner is entitled to issue an *elegit*, and therefore to have a receiver appointed.—*Crofts v. Hewson*, 2 Jo. 499. (E.E.)

3. An affidavit to verify a petition under 5 & 6 W. 4, c. 55, which merely states, in general terms, that the contents of the petition are true, is insufficient.—*Johnson v. J.*, 2 Jo. 430. (E.E.)

4. An *elegit* which, by lapse of time, cannot be acted upon, is not a sufficient foundation for a petition for a receiver under 5 & 6 W. 4, c. 55.—*Colville v. Adams*, 2 Jo. 540. (E.E.)

5. A judgment creditor who has obtained a conditional order to extend a receiver in another matter to his demand, which order is afterwards made absolute, though prior to the creditor on whose adjudication the receiver has been first appointed, is not entitled to the arrears of rent due at the date of the order extending the receiver, and subsequently received by him.

The words "money received," in the 38th sec. of 5 & 6 W. 4, c. 55, must be taken to include money which there is a right to receive, that is, rents due.

When there has been a final decree, and a subpoena for the amount of the costs which have been taxed and ascertained, no second order for their payment is necessary to entitle the person to whom they are to be paid, to have a receiver appointed under the 27th sec. of 3 & 4 Vic., c. 105.—*Gregory v. Hand*, Fl. & K. 480, note, (R.)

6. When a bill filed by husband and wife to foreclose a mortgage, the separate property of the wife, was dismissed with costs, the Court, upon petition under 3 & 4 Vic., c. 105, refused to appoint a receiver, as a means of enforcing payment of those costs, over certain other property, to which the wife was entitled to her sole and separate use.—*Hackett v. Farrell*, Fl. & K. 549; 4 I. E. R. 515. (R.)

7. In the Court of Ch., when a judgment creditor presents a petition for a receiver, under the 5 & 6 W. 4, c. 55, the affidavit to verify need not state separately the sums due for principal, for interest, and for costs on foot of the judgment.

Petition to appoint a receiver over lands. It afterwards appeared, and that very obscurely, that the respondent had an estate in the lands, but only in portion thereof. The Court refused to make the conditional order absolute.—*Tredennick v. Graydon*, 1 Dr. & Wal. 316. (C.)

8. A receiver would not be extended to the matter of a petition under the Sheriffs Act, over a chattel interest, although the receiver had been appointed in a cause.—*Cashen v. Hayes*, Jo. & Car. 103. (E.E.)

9. When a receiver, appointed under the 5 & 6 W. 4, c. 55, has been extended to the matter of a second petition under the same statute, in which second petition the judgment is prior to that of the first petitioner, the latter is entitled to the entire rents received before the receiver was so extended; and also to be paid the costs of appointing the receiver out of the rents to be subsequently received, in priority to the demand of the petitioner in the second matter. But the costs of orders and references, obtained by the petitioner in the first matter for his own benefit, are to be paid in the same priority with the residue of his demand.—*Keough v. Waring*, Jo. & Car. 189. (E.E.)

10. A puisne judgment creditor was in possession, under an *elegit*, of a small portion, called P., of the conuzor's estate. A prior judgment creditor, proceeding under the 5 & 6 W. 4, c. 55, sought a receiver over P.; and, as to the rest of the estate, K., only stated that persons were in possession to pay private charges. A conditional order having been obtained, the *elegit* creditor showed cause, charging that the petitioners were in collusion with the respondents; that all K. was not subject to the prior charges; and that, therefore, the petitioner should go against those lands, and not disturb him. There was not any evidence of collusion. *Held*, that the prior creditor should not be put to search whether any part of K. was unaffected by the prior charges, when P. was in possession of a creditor by an inferior title; and that the judgment creditor, proceeding under the Judgment Act, must be deemed entitled to all the rights of priority which he should have had if he had sued out an *elegit* at law. The cause was, therefore, disallowed, and the conditional order was made absolute.—*Harnett v. H.*, 2 I. E. R. 20. (R.)

11. The Court will extend a receiver on a judgment, under the 5 & 6 W. 4, c. 55, over a trust term, unless it appears that the trustees are in possession. It is not cause against extending a receiver, that the judgment is only a collateral security, and that the petitioner has filed a charge in a Chancery suit on foot of the same demand.—*White v. Blake*, 2 I. E. R. 111. (E.E.)

12. *Semble*—The absolute order is the order for the appointment of a receiver within the 5 & 6 W. 4, c. 55, s. 37.—*Baker v. Pettigree*, 2 I. E. R. 144. (R.)

13. A lease under the Court for seven years, pending the cause, being about to expire, the lands were sold under the decree. The purchaser stated that he did not wish a new letting; but that the receiver should levy the accruing rents from the tenants until the

conveyance should be executed. After the lease had expired, the tenant continued to occupy, and the receiver to take the rent as before, but without any express agreement respecting a new tenancy. Afterwards, the purchaser, by injunction, took actual possession, and turned out the tenant. On motion for a writ of restitution, on the ground that a tenancy from year to year had been created, and that the tenant was entitled to a notice to quit—*Held*, that, as to the tenancy under the Court, the cause was determined by the execution of the conveyance; and that the tenant overholding, without special agreement, held impliedly subject to the conditions of the lease, so that his tenancy was determined by the execution of the conveyance.—*Johnson v. Reardon*, 2 I. E. R. 123. (R.)

1. An agent's affidavit, to verify a petition under the Sheriffs Act, will not be admitted unless a strong case be made for dispensing with the principal's oath.—*Sligo v. O'Malley*, 2 I. E. R. 163. (C.)

2. In proceedings under 5 & 6 W. 4, c. 55, the Court will not refer it to the Master to ascertain the priorities of the judgment creditors, but will itself decide the question, upon the motion to draw out of Court the money brought in by the receiver.—*Hinton v. Gill, Flan. & K.* 183. (R.)

3. A receiver under the Sheriffs Act will be directed to pay money in his hands to the petitioner, although he has not accounted, when it appears that the petitioner is the only creditor in Court.—*In re —*, 2 I. E. R. 412. (E.E.)

4. Upon an application for a receiver under the 5 & 6 W. 4, c. 55, over premises held under a lease, the tenant's interest in which had been evicted by ejectment for non-payment of rent, but the time for redemption had not expired, the Court made an order for a receiver; the petitioner undertaking to pay the sum due to the landlord for debt and costs, and will not put the party to a redemption bill.—*In re Executors of Hill v. Kerr*, 2 I. E. R. 410. (E.E.)

5. The affidavit upon which it is sought to obtain a receiver under the Sheriffs Act must state expressly when the judgment is revived. It is not sufficient to state that the petitioner is entitled to sue out an *elegit*.—*In re —*, 2 I. E. R. 418. (E.E.)

6. A conditional order for a receiver will be discharged, if there be no verifying affidavit by the attorney, as to the service of the conditional order.—*Keogh v. K.*, 2 I. E. R. 412. (E.E.)

7. On petition of a judgment creditor under the first sec. of 5 & 6 W. 4, c. 55, this Court will appoint a receiver over a term for years. *Semble*—In such case, the relative priority of several judgment creditors is to be ascer-

tained by the date of the absolute order for the appointment or extension of the receiver obtained by them respectively.—*Egan v. Mulholland*, 2 I. E. R. 454. (R.)

8. When the receiver had been extended on the petitions of other judgment creditors, after the Remembrancer had made his report, ascertaining the priorities of those who had appointed the receiver, the Court would not order the report to be amended (it being originally correct); but referred it to the Remembrancer to take an account of what was due on foot of the judgments of the present petitioners, having regard to the previous report, the respective priorities of the parties, and the orders made in the matters; the payments theretofore made not to be disturbed.—*Kavenagh v. Murphy*, Jon. & Ca. 273. (E.E.)

9. The conditional order for the appointment of a receiver, on a judgment under the 5 & 6 W. 4, c. 55, is the order appointing the receiver within the meaning of that Act, it being subsequently made absolute.

The order appointing or extending a receiver on a judgment attaches the arrears of rent then in the tenant's hands, for the benefit of the person obtaining it. *Quære?*

Tenant for life confesses a judgment, is afterwards discharged as an insolvent, and then dies. The Court has jurisdiction, under the 5 & 6 W. 4, c. 55, after his death, to make absolute, as against his assignees, a conditional order for extending a receiver, obtained in the lifetime of the insolvent, upon a petition against him, so far as to give effect to the lien of the petitioner on the life estate, and the rents received by the receiver thereout, and the purposes necessarily connected therewith.

Before the passing of the 5 & 6 W. 4, c. 55, a judgment creditor proceeded by *elegit* and inquisition, but was kept out of the possession of the estate by prior creditors. He afterwards obtained an order extending a receiver obtained on the petition of a prior creditor to the matter of his petition on his judgment. *Held*, that he was entitled to the costs of his proceedings at law in the same priority with his demand.—*Barry v. Wilkinson*, 3 I. E. R. 121. (E.E.)

10. Upon an application to let lands in the possession of A., in the matter of a petitioner upon a judgment against the conuzor, it appeared that A. was the alienee of the conuzor by deed subsequent to the rendition of the judgment. The Court refused to make the order, holding that the petition and orders thereon were wrong, for that the petition should have been presented against the person over whose estate the receiver was sought to be appointed.—*Dunn v. Massey*, 3 I. E. R. 129, *note*. (E.E.)

11. A creditor by judgment, entered pursuant to a warrant of attorney, obtained an order for a receiver under the 5 & 6 W. 4, c.

55, more than two calendar months before the issuing of a commission of bankrupt against the respondent, the conuzor. *Held*, that his execution was protected by the 95th sec. from the operation of the 126th sec. of the 6 W. 4, c. 14.—*Read v. Davis*, 3 I. E. R. 153. (E.E.)

1. When a receiver on a judgment is appointed over a portion of lands held under one lease, the residue remaining in the possession of the respondent, the latter must either pay his proportion of the head rent, or submit to a receiver over the whole of the lands. If otherwise, the lands over which the receiver has been appointed would be insufficient to pay the petitioner within any reasonable time.—*Henegan v. Little*, 3 I. E. R. 189. (E.E.)

2. A receiver will not be appointed under 5 & 6 W. 4, c. 55, on the petition of a judgment creditor, over lands which such creditor could not have extended upon an *elegit*, as where the judgment attached only upon an equity of redemption, unless the equitable title to relief is clear. Therefore, a receiver was refused over the possession of a purchaser of the equity of redemption for valuable consideration, when it appeared that the judgment in question, having been entered as against J. D., his full name being J. K. D., was not discovered by negative searches made on behalf of the purchaser for judgments against J. K. D., and there being contradictory affidavits as to the fact of the purchase having been made with notice of the judgment; it also appearing that the legal estate outstanding in a prior mortgagee had been assigned to a trustee for the purchaser of the equity of redemption, and there being nothing before the Court to show that the petitioner's judgment was at any time redocketed.—*Chapman v. Dunbar*, 3 I. E. R. 202; Fl. & K. 86. (R.)

3. A judgment creditor is entitled to a receiver, under the 5 & 6 W. 4, c. 55, in every case in which he could at law issue an *elegit*. In such case, although the parties in possession may come in and show, as cause against the appointment of a receiver, such an equitable defence as, upon a bill filed for that purpose, would probably entitle them to a decree, the Court will appoint the receiver on the judgment creditor's petition, but retain the fund until the party relying upon the equity has had the opportunity of having it regularly established by a decree.—*Walsh v. Keane*, 3 I. E. R. 426; Fl. & K. 174. (R.)

4. The matter of a petition under the 5 & 6 W. 4, c. 55, having abated by the death of the respondent, the Court will not, on the petition of another judgment creditor, order the proceeding in the first matter to be revived, and the receiver appointed therein to be extended to the second matter; but will order that the receiver already appointed be appointed in the matter of the second petition.—*O'Brien v. Kenny*, 3 I. E. R. 55. (E.E.)

5. An absolute order for the appointment of a receiver on a judgment under the 5 & 6 W. 4, c. 65, which has not been acted on for more than a year, will not be renewed, unless it appear that the judgment has been revived within the year previous to the application.—*Carr v. Austin*, 3 I. E. R. 492. (E.E.)

6. When a receiver has been appointed under the 5 & 6 W. 4, c. 55, and not extended to any other matter, the Court will not, at the instance of the petitioner, make an order for him merely to pay the petitioner the costs of his appointment, unless the latter take the order at his own expense.—*Anon.*, 3 I. E. R. 504. (E.E.)

7. A receiver appointed over lands on a judgment creditor's petition under the 5 & 6 W. 4, c. 55, collects the arrears as well as the accruing rents; but the petitioner's right is analogous to that of an *elegit* creditor proceeding at law, and attaches only the rents accruing after the appointment of the receiver, the arrears being collected for the debtor, in order to prevent the inconvenience of two receivers over the same premises.

In the Court of Ch., the order extending a receiver from the matter of one petition to that of another, is absolute in the first instance; but attaches only the after-accruing rents, and not those which had accrued due before, although received after such order was pronounced.—*Marquis of Sligo v. O'Malley*, 3 I. E. R. 527. (R.)

8. The Court of Exchequer has not decided in *Barry v. Wilkinson*, 3 I. E. R. 121, that the order appointing a receiver on a judgment attaches the arrears in the tenant's hands for the benefit of the person obtaining it.—*Barry v. Wilkinson*, 3 I. E. R. 564. (E.E.)

9. The Court of Ch. refused to appoint a receiver under the Mortgage Act, when it appeared that the petitioner had a foreclosure suit pending in the Court of Exchequer.—*Chamley v. O'Brien*, 3 I. E. R. 440, n. (C.)

10. Upon a bill filed to raise the arrears of an annuity, it is quite settled that the debt cannot resist the appointment of a receiver by coming in on the receiver's motion and impeaching the security.—*Cosgrave v. Gannon*, 3 I. E. R. 487. (R.)

11. A receiver on a judgment was appointed over a rentcharge issuing out of the lands of a third person. The Court refused to make an order on that person to pay the rentcharge to the receiver.—*Walsh v. W.*, 4 I. E. R. 428. (E.E.)

12. A suit by husband and wife, as co-pts., although for the wife's sole benefit, and relating exclusively to her separate property, is the husband's suit; he is alone liable for the costs. When the bill was dismissed with costs, the Court refused to appoint a receiver over the separate estate of the wife, under the 3 & 4 Vic., c. 105, s. 27.



*Quere*—Whether, if a bill by a married woman, suing by her next friend, be dismissed with costs, the Court has jurisdiction, on petition under 3 & 4 Vic., c. 105, or otherwise, to appoint a receiver for payment of the costs, over separate property of the married woman, which was not the subject of her suit?—*Hackett v. Farrell*, 4 I. E. R. 515. (R.)

1. On a judgment creditor's petition for a receiver under 5 & 6 W. 4, c. 55, the debtor is entitled to all rents due before the conditional order for the receiver has been made absolute. After the absolute order he is guilty of contempt by interfering with the receipt of the rents, although the tenants, before service on them of the order to pay to the receiver, will be justified in paying him.—*M'Loughlin v. Longan*, 4 I. E. R. 325. (R.)

2. The absolute order for the appointment of a receiver on a judgment under the 5 & 6 W. 4, c. 55, is the order within the meaning of the 37th section of that Act. Decision in *Barry v. Wilkinson*, 3 I. E. R. 121, considered, and disapproved of.—*Burt v. Bernard*, 4 I. E. R. 328; Fl. & K. 414. (R.)—[Affd.: 5 I. E. R. 425. (C.)]

3. Rents which have accrued due before the pronouncing of an order extending a receiver upon a judgment to the matter of a prior judgment creditor, although received afterwards, are to be distributed as if the order extending the receiver had not been made.—*Coleman v. Mason*, 4 I. E. R. 421. (E.E.)

4. After a final decree, a receiver in a cause will not be extended to the matter of a petition on a judgment, if the petitioner could have proved his judgment under the decree. The proper course is, to apply for liberty to prove his demand under the decree.—*Furlong v. Bateman*, 4 I. E. R. 699. (E.E.)

5. The 3 & 4 Vic., c. 105, s. 21, disallows the costs of any further petition under the 5 & 6 W. 4, c. 55, or that Act, presented during the sitting of the Court; and after an order made on the original petition, such further petition ought not to be received. Any fees taken in the office in respect of it are illegal.—*Keene v. Bannon*, 4 I. E. R. 521. (R.)

6. Neither a person in contempt, nor a third person, will be heard to show cause against making a conditional order for a receiver on process absolute.—*Creed v. Moore*, 4 I. E. R. 684. (E.E.)

7. An affidavit verifying a petition for a receiver on a judgment, which is entitled in the law cause as well as in the petition matter, cannot be used.—*Wilson v. W.*, 5 I. E. R. 117. (E.E.)

8. It is no objection to a conditional order for a receiver under the 5 & 6 W. 4, c. 55, that it is granted upon reading an affidavit verifying the petition, made by a third person; and that there is not an order of Court

directing the petition to be verified in that manner.—*Bennett v. Power*, 5 I. E. R. 152. (E.E.)

9. Upon a judgment creditor's petition, under the 5 & 6 W. 4, c. 55, a receiver was appointed on the 9th of May 1840, over the lands of the debtor. That receiver was extended, on the 16th of June 1842, to the cause of a prior and specific incumbrancer, to whom a large sum was due, and whose rights were clear, and fully admitted. After the extension of the receiver, the prior incumbrancer applied for payment of arrears of interest out of the fund in Court, which was the produce of rents received in the matter before the receiver was extended to the cause, and not more than enough to pay the sum due on foot of the judgment.—*Held*, that the rents were not attached in the prior incumbrancer's cause until the receiver was extended to it; the Court declining to follow the decision in *Bland v. Goold* (1 I. E. R. 5.)

That the fund in Court should be considered as bygone rents belonging to the puisne creditor; as it was realised by him before the prior incumbrancer attached the rents, and by a proceeding to which the prior incumbrancer was not a party, and in which no account could be taken of his demand.

That the puisne creditor in the present case was entitled to the fund now in Court, on another ground; namely, that it was realised by means of a receiver in the matter of a judgment creditor's petition under the 5 & 6 W. 4, c. 55; and was therefore (to the extent of the sum due on foot of the judgment and costs) to be considered as if it had been received by the judgment creditor himself after an execution executed under an *elegit*.—*Morrogh v. Hoare*, 5 I. E. R. 195. (R.)

10. The affidavit verifying a petition under the 1 & 2 Vic., c. 109 (Tithe Rentcharge Act), s. 80, may be, in a proper case, made by the agent of the petitioner; as, where the agent has peculiar knowledge of the facts.—*Kellett v. Sturgeon*, 5 I. E. R. 159. (E.E.)

11. The ptf. having been appointed B.'s assignee, under the Insolvent Court, filed a bill against B., and a former assignee of B., for an account. B., by answer, denied the debt of the ptf. *Held*, that ptf. was not entitled to have a receiver appointed.—*Fogarty v. Burke*, 2 Dr. & War. 580; 1 Con. & L. 565. (C.)

12. In a petition matter under the 5 & 6 W. 4, c. 55, the respondent, tenant for life, died; there being at the time of his death a fund in Court, brought in by the receiver. *Held*, that the proceedings must be revived against the personal representative of the respondent; and that there must be a petition presented for that purpose.—*Anon.* 5 I. E. R. 245. (E.E.)

13. A judgment creditor's petition for a receiver under 5 & 6 W. 4, c. 55, ought to state how much of the demand on foot of the

judgment is for principal, how much for interest, and how much for costs.—*Fahy v. Blake* 5 I. E. R. 406. (R.)

1. A judgment creditor of a trader presented a petition for the appointment of a receiver over his lands, under the Sheriff's Act, and obtained a conditional order for that purpose, which was made absolute. Before that order was made absolute, the debtor committed an act of bankruptcy, and was declared a bankrupt after it was made absolute. *Held*, that the assignee of the bankrupt was entitled to have the receiver discharged, as the judgment creditor was not in the position of a creditor having an "execution executed."

The conditional order pronounced in such cases was only notice to the debtor, and did not bind the lands.

*Semble*—The order which did bind the lands was the order which, according to the practice previously to the Rules of 27th of March 1843, was made upon the return of the Master's report, directing the tenants to pay their rents to the receiver.—*Burt v. Bernard*, 5 I. E. R. 425; 3 Dr. & War. 464; 2 Con. & L. 271. (C.)—[*Affg.* 4 I. E. R. 328: Fl. & K. 414.]

2. A receiver will not be appointed on the petition of a judgment creditor under the 5 & 6 W. 4, c. 55, if there be a clear equity to restrain him from proceeding at law.—*Whaley v. Clarke*, 5 I. E. R. 444. (R.)

3. The words, "entitled to sue out, or who has already sued out a writ of *elegit*," in the 5 & 6 W. 4, c. 55, s. 31, refer to the time of presenting the petition for a receiver.

If, at the time of presenting a petition for a receiver, the judgment creditor have the legal title required by the Act, it is not necessary for him to continue his proceedings at law, to keep alive the legal title pending the proceedings in the petition matter.—*Alcock v. Bernard*, 5 I. E. R. 529. (R.)

4. When, by marriage settlement, freehold lands of the wife were conveyed upon trust to pay the rents and profits, after payment of the head rent and renewal fines, to the wife, during her life, to her separate use, and a judgment was afterwards obtained against the husband and wife, the Court refused to appoint a receiver over such separate estate, upon the petition of the judgment creditors, under the 5 & 6 W. 4, c. 55, and 3 & 4 Vic., c. 105; holding, that the separate estate of a *femme covert* is cognizable only in a Court of Equity; that her right of disposition over it is not within the meaning of "a disposing power" in the 3 & 4 Vic., c. 105, s. 19; and that that sec. does not render extendible under an *elegit* any species of trust estate which was not extendible under the Statute of Frauds.—*Digby v. Irvine*, 6 I. E. R. 149. (R.)

5. A judgment creditor's petition for a receiver under the 5 & 6 W. 4, c. 55, must state the amount due for principal, for interest, and for costs, each separately.—*Jackson v. Rutledge*, 6 I. E. R. 364. (R.)

6. A renewable freehold was by settlement limited to R., *quasi* in tail, remainder over (in default of issue of R.) to W., his next brother. R. confessed a judgment, and afterwards died without issue, and without having opened the estate. W. was heir of R.; and a *sci. fa.* to revive the judgment against the heir and terretenants having issued, W., being summoned simply as heir, allowed judgment to go. The judgment creditor then presented a petition for a receiver, against which W. came in to show as cause that he was in by title paramount; and not as heir of R. The M. R. would not entertain the question of title; being of opinion that W. should have pleaded specially to the *sci. fa.*, and that on the judgment creditor's petition, the Court could not look behind the judgment in *sci. fa.* by which the petitioner appeared to be clearly entitled to sue out an *elegit* and extend the lands.—*Fletcher v. Steele*, 6 I. E. R. 376. (R.)

7. When a receiver, having obtained leave from the Court, brought an ejectment, and the deft. filed a bill in equity to restrain the proceedings in the ejectment action—*Held* that the receiver was not entitled to the costs of defending the suit, he not having obtained the leave of the Court to take defence to it.—*Conyers v. Crosbie*, 6 I. E. R. 657. (E.E.)

8. It is not necessary that the petition or other proceedings under the Judgment Creditors Acts, should be entitled of those Acts.—*Nayle v. Creagh*, 6 I. E. R. 265. (R.)

9. On the death of a respondent over whose lands a receiver has been extended to the matters of several judgment creditors' petitions, the proper order under the 5 & 6 W. 4, c. 55, s. 32, is to continue the proceedings in all the matters.—*Brady v. Fitzgibbon*, 7 I. E. R. 1. (R.)

10. On a notice of motion to appoint a receiver, the Court will not entertain an application to extend one.—*Fringie v. Little*, 7 I. E. R. 205. (R.)

11. The 154th G. O. applies to the appointment of a receiver under the Judgment Acts, and not to the extension of one already appointed.—*Taylor v. Emerson*, 7 I. E. R. 280. (R.)

12. The time of presenting the petition, under the Judgment Creditors Act, as appearing by the endorsement of the Chancellor's Secretary, and not the date of the fiat, is the period at which the petitioner must be entitled to sue out his *elegit*. If the petition be presented within a year after the judgment has been obtained, that suffices, though the petition be not dated until after the year has expired.—*Robertson v. M'Cabe*, 7 I. E. R. 477. (R.)

13. A bequest of chattels real to a *femme sole*, to her sole and separate use and benefit, vests the property in her to the exclusion of marital control; and, in equity, her husband

is merely a trustee for her. A receiver will not be appointed over the property on the petition of a judgment creditor of the husband.—*Archer v. Rorke*, 7 I. E. R. 478. (R.)

1. A judgment creditor, in applying for a receiver under the Judgment Acts, should state every material fact affecting his demand: otherwise he will not be allowed his costs. In calculating his demand, interest barred by the statute should be deducted.—*Lane v. Townsend*, 8 I. E. R. 53. (R.)

2. In a petition matter, a conditional order to appoint a receiver to pay £1506, stated to be due to the petitioner on the judgment, was made absolute, with liberty to the Master, at the respondent's instance, to ascertain the sum due.—*Costello v. Burke*, 2 Jon. & L. 665. (C.)

3. The wife's estate was, on her marriage, conveyed to trustees, to the husband's use, until bankruptcy, insolvency, or until an *elegit* should issue against the lands on foot of any judgment against the husband; and, from the happening of any of those events, then to the use of the wife for her sole and separate use. *Held*, that a judgment creditor of the husband could not appoint a receiver over the lands.—*Woodroffe v. Marshall*, 8 I. E. R. 670. (R.)

4. Real property of the wife was, on her marriage, conveyed to trustees, to the husband's use for life, or until he should commit an act of bankruptcy, or until he should make a composition with his creditors, or should make any assignment of his effects for the benefit of his creditors, or until he should become insolvent, or take the benefit, &c., or until an *elegit* should issue against the lands; after the husband's death, or the happening of any of those events, to the wife's separate use. The husband assigned all his real and personal estate to a trustee for the benefit of his creditors. A judgment creditor of the husband filed a bill. *Held*, that the Court would not appoint a receiver, since the husband's life estate had been determined by the assignment.—*Hayes v. Marshall*, 10 I. E. R. 429. (R.)—[*Affid.*: 10 I. E. R. 445. (C.)]

5. Joint judgment against A., B., and C.: A. was the principal; B. and C. were sureties. A. dies. Judgment revived against B. and C. C. was heir-at-law of A., but the revival was against him as one of the surviving conuzors and not as heir. The Court appointed a receiver, on petition, over the lands which had come to C. by *quasi* descent from A., the principal debtor.

*Semble*—As a general rule, when there is a joint judgment, and all the conuzors are principal debtors, and one of them dies, the Court will not appoint a receiver over the lands of the surviving conuzors alone. The judgment ought to be revived against the surviving conuzors, and the heir and terretenants of the deceased conuzor, and the Court should appoint a receiver over the lands of the heir and terretenants of the deceased conuzor, as

well as over the lands of the survivors, in order to enforce contribution.

An arrest under a *cr. sa.*, and discharge under the Insolvent Act, is not cause against the appointment of a receiver on the judgment.—*Merriv v. M'Kee*, 11 I. E. R. 322. (R.)

6. A receiver was appointed on a judgment, notwithstanding that a voluntary deed had been executed on the day on which the judgment was entered, the judgment relating back to the first day of the preceding Term.—*Beamish v. Phuire*, 11 I. E. R. 559. (R.)

7. Pending a creditor's suit, a petition was presented by a judgment creditor, a debt, in the suit, for a receiver over the lands in the pleadings mentioned. *Held*, that the pendency of the suit was not sufficient cause against the appointment of the receiver, and that the petitioner was entitled to his costs.—*Townshend v. Barry*, 1 I. Jur. 19. (R.)

8. The Court refused to appoint a receiver, on the petition of a judgment creditor, over an allowance directed by the Court to be paid to the inheritor for maintenance.—*Gardiner v. Blessington*; *Byrne v. Gardiner*, 1 I. Jur. 250. (R.)

9. By marriage settlement, lands, the property of the husband, were settled upon M. and N., husband and wife, to their use, during their joint lives, independently of the husband, and without being subject to his debts or engagements; but so that M. and N. should not have power to affect them by any sale, mortgage, or charge in the way of anticipation. The Court refused to appoint a receiver over these lands, at the suit of a judgment creditor of the husband.—*Manning v. M'Garry*, 2 I. Jur. 29. (R.)

10. A receiver will not be appointed over lands upon the application of a judgment creditor, there being a prior equitable mortgagee who offers to go into possession.—*Fitzsimon v. Mannix*, 2 I. Jur. 34. (R.)

11. A mortgagee being in possession of an estate in respect of a salvage advance, the Court refused to appoint a receiver upon the application of a prior judgment creditor.—*Lurkin v. Kenny*, 2 I. Jur. 35. (R.)

12. A. and B., claiming by title paramount to a judgment creditor, were served with *sci. fa.*, as tenants of the lands of the conuzor, and, having neglected to plead thereto, were not permitted to show cause against the appointment of a receiver on foot of the judgment.—*Johnson v. M'Donnell*, 2 I. Jur. 59. (R.)

13. On the 26th Nov. 1849, a petition was presented to extend a receiver on foot of an old judgment, which had been revived in H. Term, 1848. A *fi. fa.* issued in M. Term, 1849, but had not been returned or filed at the time of presenting the petition. *Held*, that the petitioner was entitled to have the receiver extended.—*Carr v. Robbins*, 2 I. Jur. 83. (R.)

1. The appointment of sequestrators, for disobedience of an order on a receiver to bring in the balance due by him on foot of his account, is good cause against the appointment of a receiver, by a creditor whose judgment is p<sup>u</sup>isne to the recognizance.—*Warren v. W.*, 13 I. E. R. 69. (R.)

2. A decree against several, to pay costs, is joint and several; and a receiver may be appointed over the lands of one of them, under the 3 & 4 Vic., c. 105, without making the others parties to the petition.—*Archbp. of Dublin v. Lord Trimleston*, 13 I. E. R. 98. (R.)

3. Sequestrators being in possession, to enforce a decree, will not prevent the appointment of a receiver on petition of a prior judgment creditor. He cannot be paid out of rents to be received by continuing the sequestrators.—*Reeves v. Cox*, 13 I. E. R. 247. (C.)

4. Under a decree in 1817, in a suit by the grantee of an annuity, charged upon lands, against judgment creditors of the grantor, in possession by virtue of writs of *elegit*, an account was taken of what was due to the grantee; and a receiver was appointed over the lands.

The grantor of the annuity, not a party to that suit, died in 1842, without having impeached the accuracy of that account. The grantee having also died, his executor in 1848 (up to which time the receiver had continued in possession), filed a bill against the co-heiresses of the grantor, praying a revivor of the former suit, an account of what was due for arrears of the annuity, and that the sum found due should be declared a charge upon the lands. The defts. insisted that the account taken in the former suit, in the absence of the grantor, was not binding upon them. *Held*, that, in consequence of the acquiescence of the grantor during a period of twenty-five years, and the subsequent acquiescence of the defts. for six years, they were not entitled to have the account taken *de novo*, but that they should be at liberty to surcharge and falsify it.—*L'Estrange v. White*, 1 I. C. R. 15. (C.)

5. A receiver may be appointed or extended under the Sheriffs Act, though the I. E. Court has ordered a sale.—*Corban v. Lord Mountcashell*, 1 I. C. R. 234. (R.)

6. A suit for foreclosure and sale having been instituted in 1833, a judgment was in 1835 recovered against the owner of the equity of redemption in the lands, before any decree in the cause. In 1838, a decree to account was pronounced; and in 1842 a final decree for a sale of all the mortgaged estates was made. In 1844, the judgment creditor, who had not at any time been a party to the cause, obtained on petition a receiver on foot of his judgment over a part of the mortgaged estates. *Held*, reversing the decision at the Rolls, that the ptf. in the cause was entitled on motion to have the receiver appointed in

the petition matter extended to the cause, inasmuch as the judgment having been recovered *pendente lite*, gave the conuzee no right as against the mortgagee, the ptf.—*Trye v. Aldborough*, 1 I. C. R. 666; 4 I. Jur. 53. (C.)

7. The Crown, though not bound by the 3 & 4 W. 4, c. 55, s. 31, and the 3 & 4 Vic., c. 105, s. 20, which gives to creditors by judgment or recognizance a right to have a receiver appointed on petition, may take advantage of those Acts, but is bound by the restrictions imposed on that right by the 12 & 13 Vic., c. 95, s. 10.

A judgment in *sci fa.*, on a recognizance, being merely an award of execution, a receiver may be appointed on a recognizance (notwithstanding the 12 & 13 Vic., c. 95, s. 10), if it was enrolled more than a year before the petition is presented, though the judgment was entered within the year.

Petitions for receivers on tenants' and receivers' recognizances should be entitled in the name of the Queen; and the Attorney-General should be the petitioner.—*The Queen v. Cruise*, 2 I. C. R. 65. (C.)

8. The 2nd sec. of the 12 & 13 Vic., c. 95, applies to all judgments, whether recovered in an adverse action, or entered upon a warrant of attorney. The Court therefore refused to appoint a receiver on petition in a judgment in case, recovered in 1850, for £120, exclusive of costs.—*McDonnell v. Malone*, 2 I. C. R. 103; 4 I. Jur. 124. (R.)

9. This Court will not appoint a receiver in a foreclosure suit, or a suit to raise a charge affecting lands, unless a year's interest is due, or the property is in danger of being evicted (*e. g.*, for non-payment of head rent), or there is reason to apprehend that it will be insufficient to pay the charges on it. An absolute order for a sale in the I. E. Court will not of itself induce the Court to vary the rule.

But where a judgment creditor, who had registered an affidavit of ownership, under the 13 & 14 Vic., c. 29, on the same day filed a cause petition, which was referred to the Master, under the Ch. Reg. Act, 1850, s. 15; and the Master made a decretal order, appointing a receiver for the payment of the sum due on foot of the judgment; the Court, on appeal, it appearing by affidavit that the lands would be insufficient to pay the judgment, extended the receiver, who had been appointed in another matter, but reserved the question of costs until the produce of a sale which was pending in the I. E. Court should be ascertained.—*Herbert v. Greene*, 3 I. C. R. 270. (R.)

10. After a judgment debtor has become bankrupt, a receiver cannot be appointed on petition of the judgment creditor, though cause is shown only by a p<sup>u</sup>isne mortgagee in possession.—*Ryan v. Lefroy*, 3 I. C. R. 351. (C.)

11. A judgment creditor, by arresting his debtor, forfeits the benefit, conferred by the

3 & 4 Vic., c. 105, of the charge on the debtor's lands. Without suing out an *elegit*, such a creditor cannot, in his debtor's lifetime, obtain in a plenary suit a decree to raise the amount of his judgment, by receiver or sale, out of the debtor's lands.—*Sawyer v. Norris*, 7 I. C. R. 314; 3 I. Jur. N. S. 291. (R.)

#### LXXVIII. 2. 1. In other Cases.

1. It is not the practice of this Court to entertain an application for a receiver upon the answer, when the bill is not filed by a creditor, and when no special case, as of irreparable mischief, is made out.—*Galway v. Barron*, 2 Jon. 723. (E.E.)

2. A receiver appointed in a cause over a life estate, and not discharged upon the death of the tenant for life, extended to the matter of a petition upon a judgment obtained against the tenant in tail.—*Vincent v. Going*, 275. (R.)

3. The Court granted a receiver on a bill filed to raise arrears of an annuity devised in trust for a lady (who became a nun) during whatever time she remained unmarried.—*Evans v. Cassidy*, 11 I. E. R. 243. (R.)

4. A bill having been filed to recover a f.f. rent, the Court appointed a receiver, as the bill contained an averment that there was a confusion of boundaries.—*Ogleby v. Campbell*, 1 I. Jur. 106. (R.)

5. In an action by husband and wife for use and occupation of lands (the separate property of the wife), judgment, as in case of non-suit, was obtained. The Court refused to appoint a receiver over the separate estate of the wife, upon the application of the judgment creditor.—*Cotes v. Hassard*, 2 I. Jur. 20. (R.)

6. Bill to raise an annuity. Answer, by purchaser of the lands charged therewith, claiming to be exonerated from paying it. Affidavit on behalf of ptf., that, in order to obtain payment of the arrears, a receiver must be appointed over the purchased lands. *Held*, that a receiver should be appointed over so much of the lands as would suffice for payment of the annuity.—*Bonyng v. Colgan*, 2 I. Jur. 156. (R.)

7. By marriage settlement, the lands of A. were settled on B. for life, with power of appointment among the children of the marriage. By deed purporting to be in exercise of the power, a rentcharge was given to R., one of the children, which was immediately after assigned to the ptf. Bill filed to raise the rentcharge. Answer; that the assignment was invalid, as the consideration went to the father alone, and R. received no benefit. A receiver was appointed on motion, notwithstanding the impeachment of the transaction by the answer.

In order properly to raise the question as to the validity of the deed, a cross-bill is necessary.

*Semble*—That even if a cross-bill were filed, a receiver would be appointed to preserve the fund.—*Kane v. Delany*, 2 I. Jur. 165. (R.)

8. A receiver will be appointed over a compensation allowance.—*Johnson v. Mason*, 2 I. Jur. 170. (R.)

9. Bill filed to raise an annuity; receiver appointed. The arrears having been paid in 1844, the receiver was removed. In 1849, the annuity having again fallen into arrear, the Court refused to re-appoint the receiver without a new bill. The case of *Allen v. Blessington*, 2 Moll., considered.—*M' Caul v. M' C.*, 2 I. Jur. 170. (R.)

10. A receiver cannot be appointed or extended over the tithe rentcharge, by petition under the 5 & 6 W. 4, c. 55, or 3 & 4 Vic., c. 105.—*Lymberry v. Helsham*, 1 I. C. R. 633. (R.)

11. Upon a consent entered into *bona fide*, by the parties in a cause, and by B., the receiver, and A., a person proposed to fill that office, the Court will order that A. be substituted for B. as receiver, and that certain persons be approved of as his sureties, and the security measured at a given sum, without reference, and that B. and his sureties be discharged from their recognizance, and that A. should pay to B. an advance previously made by him for the benefit of the property, and all his costs; and that A. should have credit in his accounts for such payment; and that a policy of insurance effected on B.'s life should be discontinued, and that the life of a third party, already insured by B., should be kept so by A. out of the rents, and that the proceeds of such insurance, when realised, should be applied by the latter in recouping his advances; and that he might, from the balance of the rents, also effect an insurance on his own life, as additional security for those advances.

*Secus autem*, where there appears to be an attempt to traffic in the office of receiver.—*Farran v. Morris*, 1 I. C. R. 680. (C.)

12. The Court will not appoint a receiver under the 3 & 4 Vic., c. 105, s. 21, over the rents and profits of an ecclesiastical benefice.—*Vincent v. Helsham*, 4 I. Jur. 213. (C.)

13. Under the 3 & 4 Vic., c. 105, ss. 19, 21, 22, a judgment is a valid charge upon an ecclesiastical benefice, without issuing a sequestration. In a plenary suit the Court will appoint a receiver over the benefice.—*Hale v. Carpendale*, 5 I. Jur. 121. (C.)

14. A husband represented to his wife that, unless she signed a promissory note, he would be arrested, and she and their children left to starve. She signed it. *Held*, that there was not any such exercise of undue influence as prevented the amount of the note from being a charge on her separate estate, which

however, being small, and a creditor already in possession, the Court refused to appoint a receiver; but directed the trustees to pay the amount out of the income as it reached their hands.—*Boyce v. Johnston*, 3 I. Jur. N. S. 401. (R.)

1. A debt, not interested in the real estate, moved for a receiver. Motion refused; but the ptf.'s nominee was appointed, the ptf. being interested.—*McCarthy v. Mathews*, 10 I. Jur. N. S. 276. (P.)

### LXXVIII. 3. Powers, Duties, and Liabilities of Receiver.

2. The Court will not direct the receiver what course he should pursue respecting taking defence to ejectments brought against the lands over which he is receiver; but will leave him to act on his own responsibility.—*Anon.*, *Hayes*, 16. (E.E.)

3. A receiver need not apply to the Court for leave to set for six months, subject to redemption, lands recovered in an ejectment for non-payment of rent.—*Vincent v. Gubbins*, *Hayes*, 29. (E.E.)

4. The Court will not, on the receiver's motion, order that any arrears of rent be forgiven.—*Woodward v. W.*, H. & J. 126. (E.E.)

5. A receiver under the Mortgage Act, 11 & 12 G. 3, c. 10, will be permitted to pay over money to a third person, upon consent of all parties.—*Kelly v. O'Brien*, *Hay*, & J. 377. (E.E.)

6. The Court will not, at the receiver's instance, order a remission of arrears, or a reduction of rents.—*Robinson v. Shearer*, H. & J. 799. (E.E.)

7. An application by the receiver to stay proceedings in an action brought against his bailiff, for ill-treating a distress, was refused with costs, there not being an affidavit or distinct admission by the receiver that he had authorised the bailiff to do the act complained of.

*Semble*—A receiver can authorise a bailiff to make a distress.—*Birch v. Oldis*, S. & Sc., 116. (R.)

8. On an affidavit by the receiver stating the facts fully, on notice to all the parties in the cause, and no objection raised, the receiver will be permitted to accept a surrender, &c., from an insolvent tenant, without putting the parties to the expense of a reference.—*Davidson v. Armstrong*, S. & Sc. 135. (R.)

9. A receiver in a mortgage cause will not be permitted to bring an ejectment on the title against a lessee of the mortgagor after mortgage executed, the lessee having been in possession for twenty years, and the consideration for the mortgage having been im-

peached, by a cross-bill, but no account taken between the parties.—*Martin v. Walker*, S. & Sc. 139. (R.)

10. Upon an affidavit by the receiver stating an application to the head landlord, and disclosing the other necessary facts, the Court will, without any reference, make an order for the receiver to obtain a renewal of a lease.—*Mulhall v. O'Brien*, S. & Sc. 150. (R.)

11. A reference, touching the propriety of abating the tenants' rents, and forgiving them their arrears, &c., was refused, when made at the receiver's instance only, but was afterwards granted on the concurrence of the parties.—*Evans v. Taylor*, S. & Sc. 681. (R.)

12. A receiver's duty is, to collect the rents, but not to assume the management of the cause.—*Callaghan v. Reardon*, S. & Sc., 682. (R.)—[See *Callaghan v. Reardon*, 1 Cr. & Dix, Notes of Cas. 231. (R.)]

13. A motion, on the receiver's part, for a reference, whether it would be for the benefit of all parties that proceedings to impeach certain leases should be taken, was refused; it being no part of the receiver's duty to bring forward such a motion.—*Clarke v. Fisher*, S. & Sc., 684. (R.)

14. An order, that certain tenants of a minor should have liberty to execute a surrender, was granted on the receiver's motion made by the Master's direction, it being plainly for the minor's benefit that a surrender should be accepted; but the concurrence of his guardian was required.—*Davis v. Cotter*, S. & Sc. 685. (R.)

15. The Court will not set up land to be let subject to the interests of the tenants resident thereon.—*Anon.*, 2 Jones, 680. (E.E.)

16. A receiver, appointed in an annuity cause, was extended to the matter of a petition presented by a prior mortgagee under the Mortgage Act. *Held*, that the rents, received before the date of the conditional order to extend the receiver, and which were still in Court, belonged to the annuitant.—*Davoren v. Collins*, 2 Jon. 807. (E.E.)

17. The Court will not, upon a receiver's application, grant an injunction to restrain a contractor, under the 6 & 7 W. 4, c. 116, s. 162, from quarrying, on the lands over which the applicant is receiver, stones for the public works.—*O'Kelly v. Gregg*, Jon. & Car. 76. (E.E.)

18. Practice as to timber trees blown down on an estate over which a receiver had been appointed.—*Crofts v. Poe*, Jon. & Car. 193. (E.E.)

19. A motion by a receiver for a reference to enquire and report whether any and what sum is due on foot of a mortgage, and whether it

would be advantageous to the parties that the receiver should make certain payments on account of any sum reported due, will be refused with costs; because the receiver should not thus interfere with the rights of the parties in the cause.—*O'Connor v. Malone*, 1 I. E. R. 20. (R.)

1. The receiver over a leasehold, or other derivative interest or estate, should pay the head rent regularly. If the landlord is obliged to apply for leave to proceed, the Court will make the receiver pay the costs of the application, if he had funds to pay the rent; otherwise, the landlord will get his costs against the funds in the cause.

*Semble*—In such a case, the landlord may proceed for his rent without asking the Court's leave.—*Walsh v. W.*, 1 I. E. R. 209. (R.)

2. A receiver should not move that his balance may be invested. That is not properly his motion. As the petitioner may, under G. O. 11, of Feb. 1839, have the balance invested, without applying to the Court, the costs will not be allowed, unless the applicant shows satisfactorily why he had not the money invested under the Rule.—*Cooper v. C.*, 2 I. E. R. 155. (R.)

3. Parties, being solvent, who rescued a distress made by a receiver, the Court granted a conditional order for an attachment against them, and intimated that the receiver should also proceed at Quarter Sessions.—*Mahon v. M.*, Fl. & K. 18. (R.)

4. The order extending a receiver under the 5 & 6 W. 4, c. 55, does not attach, for the benefit of the extending creditor, the arrears of rent which accrued due before, but were received after the order.—*Rule v. Henry*, Fl. & K. 97. (R.)

5. A consent, that a receiver may be appointed, and that he need not account before the Master, will not be made a rule of Court.—*Richey v. Gleeson*, Fl & K. 99. (R.)

6. A purchase in trust for a receiver, of lands over which he had been appointed receiver, will not be permitted to stand, unless it has been had with the leave of the Court.

Neither can a receiver, without the special leave of the Court, become tenant of any part of the lands over which he has been appointed.—*Alven v. Bond*, Flan. & K. 196; 3 I. E. R. 365. (R.). *White v. Tomney*, cited Flan. & K. 224.

7. A motion to let lands in the actual occupation of the deft. or respondent in a cause or matter, should be made by the ptf. or petitioner, and not by the receiver in such cause or matter. If such motion be made by the receiver, and be unopposed, the Court will not make any order upon it; if opposed, it will be refused with costs.—*Wrixon v. Vize*, 5 I. E. R. 276. (R.)

8. The personal representative of a receiver having submitted to account for the rents

received by the receiver in his lifetime, the Court has jurisdiction to order him to pay in the sum appearing to be due on foot of the account.

Form of the order in such case.—*Magan v. Fallon*, 5 I. E. R. 490. (E.E.)

9. A. demised to B. two acres of M. B., on the next day, re-demised to A. the two acres of M., together with six acres of S., at a gross rent. A. then mortgaged the lands of M. A receiver was appointed over the lands of M. in a suit to foreclose the mortgage. An arrear of the rent reserved in the lease from B. to A. having accrued, the receiver was ordered to pay to B. the sum in his hands, the produce of the two acres of M.; and it was referred to the Remembrancer to ascertain the sum in the receiver's hands, and the rent properly payable out of the two acres of M., having regard to the value of the whole of the lands comprised in the lease from B. to A., and the part included and not included in the mortgage; with liberty to B. to proceed at law, as he might be advised, in regard to any balance that might remain due to him, after payment by the receiver as aforesaid.—*Peard v. Foulke*, 5 I. E. R. 589. (E.E.)

10. It is the duty of a receiver to render the estate over which he is appointed as productive as he can; and it is the duty of the Court, whose officer he is, to take care that he does so. But, although in the present case the receiver might not be chargeable with any positive misfeasance or intentional omission of material matters in the preparation of the rental, yet this case showed what very serious mischief might follow if a receiver in the cause were permitted to be a purchaser under the decree, if he could have an interest in depreciating that estate, the value of which it was his duty to enhance. Such an interest might extend far beyond the preparation of the rental; it might be the operative principle during the whole term of the receivership. Therefore in no case would the Court sanction a sale to the receiver, unless it clearly appears that it would be for the benefit of the parties in the cause to hold him to his purchase.—*Alven v. Bond*, 3 I. E. R. 372. (R.)

11. The Court, upon a motion on behalf of a landlord, for liberty to proceed at law, notwithstanding the appointment of a receiver, will not enter into any question of equities between the landlord and tenant; but will, in a proper case, refer it to the Master to enquire and report whether any proceedings should be taken in defending the ejectment, or in relation thereto.—*Cramer v. Griffith*, 3 I. E. R. 230. (R.)

12. When the Remembrancer has allocated a sum to be paid by a receiver as the tithe rentcharge due out of the lands over which he has been appointed, and his certificate has been served upon the receiver, and a personal demand made for the amount of such rentcharge, upon non-payment of same, the party

entitled will obtain an attachment against the receiver.—*Brown v. B.*, 2 I. E. R. 409. (E.E.)

1. The order extending a receiver under 5 & 6 W. 4, c. 55, does not attach, for the benefit of the extending creditor, the arrears of rent accrued due before, but received after the receiver has been extended.—*Marquis of Sligo v. O'Malley*, Fl. & K. 300; 3 I. E. R. 527. (R.)

2. In a motion to extend a receiver under 5 & 6 W. 4, c. 55, it is not necessary to serve notice thereof upon the creditor who has appointed the receiver.

In a petition matter, under 5 & 6 W. 4, c. 55, a motion to let lands in the possession of the respondent should be on behalf of the petitioner, and not of the receiver.—*Cuffe v. Banin*, Fl. & K. 403. (R.)

3. The receiver in a petition matter has no right to move for liberty to let lands in the possession of the respondent, such being properly the motion of the petitioner. It is otherwise as to the receiver in a cause.—*Meares v. Bannon*, 4 I. E. R. 168. (R.)

4. *Semble*—A receiver who has been ordered to pay money, to a party, and who has that sum in his hands when he is served with the order, but wilfully and improperly refuses to pay it, will be ordered to pay interest on it from the date of the service of the order on him; and also all costs to which the party has been necessarily put, by reason of his disobedience of the order.

Filing an account in the office is not cause against a conditional order for an attachment against a receiver for not accounting.—*Fetnam v. Kirby*, 4 I. E. R. 320. (E.E.)

5. A receiver applied for a reference touching the liability of a lunatic to renew the lease of the land over which he was receiver; but was ordered to pay the costs of the enquiry, since he had not previously applied to the lunatic's committee to make the application.—*In re Doolan*, 3 Dr. & War. 442; 2 Con. & L. 232. (C.)

6. A motion, to set aside a letting made in a cause or matter, should not be made by the receiver. If he makes it, the Court will refuse it, with costs.—*Richards v. Gould*, 7 I. E. R. 209. (R.)

7. The Court will not, on a receiver's application, sell civil-bill decrees obtained for arrears of rent.

*Semble*—The Court cannot sell arrears.—*Ford v. Head*, 8 I. E. R. 368. (R.)

8. It is contrary to the practice and policy of this Court to permit the receiver in the cause to bid at the sale of lands over which he had been appointed.—*Anderson v. A.*, 9 I. E. R. 23. (R.)

9. Amendment in the title of an order to extend a receiver, by inserting the words "and another," it being admitted that the words had been left out by mistake, although

the alteration deprived the ptf., in the suit in which the receiver was originally appointed, of the funds in the receiver's hands.—*Corbet v. Mahon*, 10 I. E. R. 201. (R.)

10. B. purchased, during A.'s life, the portion of one of A.'s younger children, which was not payable till A.'s death. It was charged on lands over which B. was receiver, but there was not any evidence of under-value. After thirteen years, the inheritor who had during that time been out of the jurisdiction filed a bill against B.'s personal representative. The Court set aside the purchase.—*Kelly v. Bonyngs*, 1 I. Jur. 3. (E.E.)

11. When an ejectment has been brought without leave of the Court, against lands over which a receiver has been appointed, the proceedings will be stayed; and, if the receiver have funds applicable to the payment of the rent, he may be liable to the costs.—*Callaghan v. C.*, 1 I. Jur. 42. (R.)

12. Though a motion to set lands in the occupation of the deft. should not be made by a receiver, yet where a receiver, having advanced a sum to pay head rent, and save lands from eviction, had obtained an order to set lands in the possession of the deft., the Court refused to set it aside.—*Phibbs v. Farrell*, 1 I. Jur. 265. (R.)

13. A receiver will not be permitted to become tenant to the lands over which he is appointed, even upon consent of the parties to the cause.—*Stannus v. French*, 1 I. Jur. 299. (R.)

14. After execution by the head landlord of an *habere* in ejectment for non-payment of rent, the receiver passed his account, from which it appeared that, after the execution of the *habere*, he had received rents, and paid them away under orders of the Court. The head landlord applied that the receiver be directed to pay him the rent. Application refused.—*Balfre v. Blake*, 2 I. Jur. 236. (R.)—[But see the next case.]

15. The primary duty of a receiver over a leasehold is, out of the sub-rents, to discharge the head rent; this he is bound to do without an order of the Court for the purpose. A receiver had suffered the lease to be evicted by ejectment for non-payment of rent, and it appeared that, during the period intervening between the last payment of head rent and the execution of the *habere*, he had received rent from a sub-tenant considerably more than sufficient to pay the head rent, and had applied all that sub-rent in discharge of various demands, amongst which were the annual premiums upon policies of insurance in which, as a creditor of the estate, he was interested; and although he was directed to make those payments by an order of the Court, he was compelled by the Court to pay to the landlord the arrears of head rent.—*Balfre v. Blake*, 1 I. C. R. 365; 2 I. Jur. 257. (C.)



1. When one of a receiver's sureties dies, or goes abroad, and the receiver is unable to procure another surety, it is not the practice to charge him with the expense of his discharge, or of the appointment of a new receiver.—*Lane v. Townsend*, 2 I. C. R. 120. (R.)

2. A receiver is not entitled to the costs of taking out the order appointing him, it being the duty of the party at whose instance the receiver is appointed to do so.

Nor will he be allowed the costs of his solicitor attending the passing of a former receiver's account, unless the Master certifies that such attendance was proper.

Nor the costs of notice and service thereof on the sheriff, requiring him to pay rent due, before levying an execution on the goods of a tenant.

He will be allowed the costs of one draft and copy of a notice to quit, by way of precedent only, and not the costs of preparing a notice to quit served on the tenants, unless under special circumstances.

The costs of an attested copy of a memorial of a lease, and of a clerk to prove the same at the trial of an ejectment, will be allowed, on taxation, to the receiver, if necessarily incurred.—*Woodroffe v. Green*, 2 I. C. R. 330. (R.)

3. A receiver having been appointed over the estate of a tenant for life, for payment of tithe rentcharge, the Court after the death of the tenant for life, continued the receiver—*Held*, that as against the remainderman the petitioner was entitled to one year's rentcharge only.—*Labarte v. Constable*, 2 I. C. R. 554. (R.)

4. Purchase by a receiver, of an annuity, at an undervalue—set aside in a suit by the vendor's personal representatives. Form of the order.—*Eyre v. McDonnell*, 15 I. C. R. 534. (C.)

5. Purchase by a receiver, of a jointure charged upon the lands over which he was receiver, declared a trust for the benefit of those entitled to the estate.

The receiver over the estates of L. purchased from L.'s widow a jointure charged on the estate. In a suit, instituted by an incumbrancer on the estate, to set aside this purchase, the widow declaring herself satisfied with the terms of the arrangement, the purchase was upheld as regarded her; but was declared a trust for those beneficially entitled to the estate. Form of decree.—*Boddington v. Langford*, 15 I. C. R. 558, note. (C.)

6. One, seized in fee, in 1820, demised the lands to A., the respondent, and died, having devised the reversion to A., with remainder to A.'s first and other sons in tail male. This suit was subsequently instituted by the petitioner to raise the amount of incumbrances, and the appellant was appointed, receiver. The Master let the lands to the appellant's father for seven years, pending the cause. Upon the death of appellant's father, the ap-

pellant entered into possession, with the Master's approval. Afterwards, A. conveyed to appellant his interest in the lease of 1820; and died. Thereupon, the appellant was discharged from his receivership, the suit having abated; and the M. R. ordered the appellant to deliver up possession of the lands to A.'s eldest son, because they had been assigned without leave of the Court. Against that order this appeal was brought. *Held*, that the order should be reversed, as a receiver over a reversioner's estate is not incapacitated from purchasing the interest in a lease of the same lands which the reversioner has in another right.—*King v. O'Brien*, 11 I. Jur. N. S. 141. (C.A.)

#### LXXVIII. 4. Receiver's Security: Rights and Liabilities of their Sureties.

8. The surety of a receiver need not qualify out of freehold estate.—*Tottenham v. T.*, Hay. 575. (E.E.)

9. Even upon consent, a receiver will not be appointed without a recognizance.—*Conolly v. Codd*, H. & J. 624. (E.E.)

10. A receiver, when extended over additional lands, must perfect additional security, or be wholly removed from the receivership. If he is removed, and seeks the costs incident to his original appointment, he must make a special case for them.—*Wise v. Ashe*, 1 I. E. R. 210. (R.)

11. The Court of Ch. will not in any case appoint a receiver upon his own security only.—*Bailie v. B.*, 1 I. E. R. 413. (R.)

12. When one of the sureties of a receiver died, not leaving any property, the Court directed a new surety to be appointed.—*Averall v. Wade*, Fl. & K. 341. (R.)

12. The Court will not vacate a receiver's recognizance at the same time that he is discharged, even upon the consent of all the parties in the cause.—*Fitzgerald v. Hill*, 2 I. E. R. 398. (E.E.)

13. A receiver passed his final account in 1829, when a small sum was due to him. It appeared further that the purchaser under the decree in the cause was put into possession in the same year, and that the receiver had not received any of the rents since his last account. The Court ordered his recognizance to be vacated, though he had not been formally discharged.

An injunction, to put the purchaser into possession, amounts to a discharge of the receiver.—*Anon.*, 2 I. E. R. 416. (E.E.)

14. To a *sci. fa.* on a receiver's recognizance the sureties pleaded performance of the condition of the recognizance. Replication: that after the making of, and entering into the recognizance, the receiver was directed to account, and that on the passing of that account a balance was certified as being in his

hands; that afterwards an order was made to lodge the balance; but that the receiver had wholly refused to do so. On demurrer—*Held*, that the record sufficiently alleged that the receiver had notice of the order.

*Quære*—Is an averment of notice necessary? *The King v. Lidwell*, 1 Dr. & Wal. 26. (C.)

1. The surety of a defaulting receiver, having paid the sum due, obtained leave to proceed against him on his recognizance for recovery thereof, and, having obtained judgment, presented a petition under the 5 & 6 W. 4, c. 55, and 3 & 4 Vic., c. 105, for a receiver over his estate. The Court granted the prayer of the petition.—*Henderson v. Skerrett*, 5 I. E. R. 404. (R.)

2. A judgment having been entered on a bond executed by two sureties for a land agent—*Held*, that interest on the balance due by him could not be claimed under the 3 & 4 Vic., c. 105, s. 26.—*Lord Templeton v. Murdock*, 7 I. E. R. 470. (C.)

3. A receiver having been appointed by the Court of Ch. in England, over estates in Ireland, and the recognizance directed to be taken and enrolled in this Court, this Court refused to do so, having no jurisdiction without a bill filed here.—*In re The Earl of Portarlington*, 8 I. E. R. 369. (R.)

4. A receiver not having passed his account was attached, but discharged. A new receiver was appointed. *Held*, that the discharged receiver's sureties were liable, under the recognizance, to the costs of the attachment, and to all costs of discharging the defaulting receiver, and appointing his successor.—*Maunsell v. Egan*, 8 I. E. R. 372. (R.)

5. To vacate a recognizance as to one surety, it is necessary that the principal and the remaining sureties shall sign a consent that the recognizance shall continue binding on them, notwithstanding the vacate as to the other.—*Callaghan v. C.*, 8 I. E. R. 572. (R.)

6. The sureties for a receiver are liable, under the recognizance, for the costs of an attachment against the receiver for not passing his account, and for all costs incurred in discharging him and appointing a new receiver.—*Maunsell v. Egan*, 9 I. E. R. 283; 3 Jon. & L. 251. (C.)

7. A tenant's recognizance was executed at the same time as his lease, but was not enrolled for four years after. The tenant in the meantime became insolvent, and incumbered his property. *Held*, that the neglect to enrol the recognizance, when the lease was executed, did not discharge the surety.

*Quære*—Whose duty is it to enrol the recognizance?—*Jephson v. Maunsell*, 10 I. E. R. 88. (R.)

8. The proceeding by *sci. fa.* on a receiver's recognizance is an award of execution, and not a judgment recovered, and does not bear

interest under 3 & 4 Vic., c. 105, s. 26.—*Feely v. Kilkenny*, 10 I. E. R. 443. (C.)

9. A receiver's sureties are not liable beyond the amount of the recognizance. The sureties having paid the amount of the recognizance into Court—*Held*, that they were not liable to the costs of removing the receiver, who was in default, and of appointing a new receiver, nor to the costs of a *sci. fa.* against themselves or their principal.—*Watters v. W.*, 11 I. E. R. 335. (R.)

10. The receiver being insane, the Court ordered that his surviving surety might pass the account; and that, on the balance being lodged, the recognizance should be vacated; and gave the surety costs of the motion, and of vacating the recognizance.—*Webb v. Cashel*, 11 I. E. R. 558. (R.)

11. When the rental is considerable, a receiver will be permitted to divide his security among several; the entire sum for which the sureties qualify need not exceed double the rental.—*O'Connor v. Malone*, 1 I. Jur. 177. (R.)—[See *Scott v. Harman*, *ibid*, 267.]

12. The Court will not make an order allowing a receiver to give security by a guarantee society.—*Campbell v. Brown*, 1 Jur. 267. (R.)

13. When the amount of security to be given by a receiver is very large, he will be allowed to give it by recognizance by himself and three sureties, in different proportions.

In this case, the receiver bound himself in £7500; one surety in £10,000, and the other two sureties in £2500 each.—*Scott v. Harman*, 1 I. Jur. 267. (R.)

14. The discharge of sureties who have entered into recognizance for a receiver must be by entering satisfaction on the roll, by order of the Court of Ch., not by motion at the Rolls, the proceedings being at the Petty-bag side of Chancery.—*Martin v. Waldron*, 2 I. Jur. 82. (C.)

15. The order, prohibiting a practising barrister to be security for a receiver, suspended.—*Kelly v. K.*, 2 I. Jur. 140. (C.)

16. Motion by receiver for liberty to give security by the British Guarantee Association of London. Leave granted; the Master to fix the premium.—*Hobhouse v. Hamilton*, 2 I. Jur. 172. (R.)

17. Motion on behalf of a receiver that he be at liberty to enter into security, himself in the sum of £10,588, and three sureties, one in £3000, one in £1588, and a third in £1000; and that he be at liberty to enter into an additional security in the sum of £5000 by the British Guarantee Association of London, under the 9 & 10 Vic., c. 375 (L. & P.); the security to be approved by the Master if he found the society able to give a security available at law.—*Curia adv. vult.*

[No order was made in this case on that part which related to the British Guarantee Association, as the receiver obtained the security elsewhere.]—*Wyse v. O'Grady*, 2 I. Jur. 212. (R.)

1. *Sci. fa.* on a receiver's recognizance. Plea: *Executio non*—that the recognizance was acknowledged, subject to a condition that the receiver should account within fifteen calendar months, and from time to time thereafter, within the space of thirteen calendar months after the day of filing such account, and as often as he should be required by the Court. That the receiver duly accounted up to the 26th May 1846; that the time within which he was next bound to account expired on the 26th June 1847; that he was not required to account; and that, without the consent, leave or license of the debt., or notice to him, the receiver, by and with the consent of the ptf. in the cause, and the parties and creditors interested in his accounting, obtained a longer time for accounting, which was extended to the 25th Feb. 1848. Replication, averring breaches of the condition, in not investing moneys in the receiver's hands according to the condition. Rejoinder: that the time was extended without the consent of the debt. *Held*, upon demurrer, that such an agreement for the extension of time did not entitle the surety to plead it in bar to a *sci. fa.* on a recognizance of record.—*Regina v. Notter*, 2 I. Jur. 293. (C.)

2. When one surety of a receiver seeks to be discharged, a consent verified by affidavit, and signed by the receiver and remaining surety, must be lodged with the Registrar, stating that they consent that the surety shall be discharged, without prejudice to their liability as to the past and future acts of the receiver; and a declaration that they will not rely on the vacating of the recognizance, as to one of the parties, in any proceeding against them on the recognizance.—*O'Keefe v. Armstrong*, 2 I. C. B. 115. (R.)

3. An order was made in a minor matter, that a receiver, executor to the minors' father, should be at liberty, until March 1847, to manage lands and the stock thereon in the same manner as the minors' father was in the habit of managing them—the receiver undertaking to keep regular accounts of his receipts, and to furnish them to the Master every three months; and, after March 1847, the receiver was ordered to take proper steps for procuring tenants to the property. The receiver continued to manage the lands after March 1847, without a further order.

*Semble*—The receiver's surety was liable for the management by the receiver as such; but not for so much of the quarterly balances as was due by him as executor up to March 1847.

*Quære*—Whether the surety was liable to balances due after March 1847?

It is discretionary to charge a receiver's surety with interest on his balances; and the surety having paid the entire of the balances in this case, the Court refused to do so.

Judgment by default was entered up on a receiver's recognizance; a *levari* issued against the surety, and the sheriff returned goods on hands for want of buyers. An injunction was granted against the *levari*, on payment of the amount of it into Court. The surety applied to set aside the judgment by default; and an order was made that the judgment should stand, but that the surety might be at liberty to plead to the *sci. fa.* He did plead, and a demurrer taken to the rejoinder was allowed; and it was ordered that judgment be entered up for the ptf.; which was accordingly done. *Held*, that the latter judgment was irregular; and the first, not being a continuing judgment, and being determined by the death of the receiver, a *levari* could not be sued out on it.

The practice of the Petty-bag side of the Court, and of the three Law Courts, under those circumstances, certified to the M. R.—*In re Herricks*, 3 I. C. R. 183. (R.)

4. Under special circumstances, the Court discharged a defaulting receiver, who was in custody under an attachment for not accounting, his sureties having passed his account, and paid the balance due on foot thereof; and the receiver undertaking to pay the ptf. his costs of suing out the attachment, and of his own removal. The Court did not require payment of those costs before the receiver's discharge; but discharged him without prejudice to the liability of the sureties.—*Johnson v. Tottenham*, 5 I. Jur. 15. (R.)

5. When a receiver in a minor matter is ordered by the Court to manage grazing farms and the stock thereon, his sureties are liable for the correct performance of those duties, and not alone for the rents received by him.

If the duties were quite alien to the ordinary duties of a receiver, it might be otherwise.—*The Queen v. Herrick*, 5 I. Jur. 289. (C.)

6. A surety signed a receiver's recognizance, knowing it to be such. It recited that it had been duly acknowledged before a Commissioner of the Court, and was sealed. *Held*, that the surety could not, on a motion to show cause against an order *nisi* to put the recognizance in suit, rely on the defence that it was not acknowledged.—*Driscoll v. Blake*, 9 I. C. R. 356. (R.)—*Kelly v. Lennon*, 9 I. C. R. 363; 4 I. Jur. N. S. 147. (R.)

7. A receiver who has gone into receipt of the rents under the Court, will not be allowed to plead, to a *sci. fa.* upon his recognizance, that it was taken by an unauthorised person. *Wellesley v. Mornington*, 13 I. C. R. 559. (C.)

#### LXXVIII. 5. Accounts and Allowances to.

[See G. O. 1843—147 to 150; G. O. Jan. 3rd 1845, 4 & 5; G. O. May 1857—45, 46, 50, 51. See Gamble's Ch. O., p. 225.]

8. A judgment creditor filed a bill, stating that a receiver, appointed in a foreclosure suit instituted by A., had not perfected his

recognizance, or accounted in the office, though he had been 30 years in receipt of the rents; that, having remitted all sums received to A., and having furnished accounts to him, he ought to be treated as A.'s private agent, and that A. ought to be treated as mortgagee in possession. The bill also prayed an account of all sums which had come to the receiver's hands. *Held*, that the Chief Baron's certificate, which was produced, to that effect, disproved the allegation that the receiver had not perfected his recognizance, and that there would be presumed to be an order of the Court directing the receiver to remit the rents, &c., to A.; that the receiver's never having filed accounts was justified by the practice of the Court, which only required a receiver to account when called on by its order; and that, after such a length of time, and under the circumstances, the receiver's executrix should not be required to account for the sums received by him; and that A. should not be treated as mortgagee in possession. — *Armistage v. Forbes*, Hay. 222. (E.E.)

1. A tenant held lands under an unstamped accepted proposal, which rendered him liable to pay tithe composition. On motion, the Court directed the receiver over the landlord's estate, who was a minor, to stamp the proposal, and that the expenses thereof should be allowed him when passing his account. — *Langley v. L.*, 1 Dr. & Wal. 253. (C.)

2. When a receiver has not accounted within the proper time, his fees may, nevertheless, be allowed to him upon the consent of the parties, if they be competent to consent; but when some of them are minors, this cannot be done. — *Dease v. O'Reilly*, 2 Con. & L. 441; 4 Dr. & War. 284. (C.)

3. Pending the passing of a receiver's account, the Remembrancer ordered him to lodge £500 to the credit of the cause within a limited time. He did not. The account not being yet passed, and it not appearing that such sum was in his hands, the Court refused to act upon the order. — *Langrish v. Cottenham*, 2 Jo. 507. (E.E.)

4. When the receiver brings an ejectment under the order of the Court, he will be allowed against the estate, as between attorney and client, all costs and expenses necessarily incurred in bringing an effectual ejectment; *ex. gr.*, the expenses incurred by procuring an additional stamp to be affixed to a lease; and it is not necessary to apply to the Court for the purpose. — *Fitzgerald v. F.*, 5 I. E. R. 525. (E.E.)

5. A consent, the object of which is the allowance of a sum of money paid by a receiver on account of costs, will not be made a rule of Court, unless signed by the parties themselves as well as by their attorneys. — *Coleman v. Mason*, 2 I. E. R. 322. (E.E.)

6. The Statute of Limitations is not pleadable to *sci. fa.* on a receiver's recognizance.

A recognizance to the Crown is not within the 8 G. 1, c. 4.

The period from which the 20 years specified in that statute are to be reckoned, is the issuing of the writ, not the day upon which it bears *teste*. — *Reg. v. Bayly*, 4 I. E. R. 142; 1 Dr. & War. 213. (C.)

7. When a receiver has failed to pass his account within the time prescribed by the 148th G. O. the Court will not make a consent of all the parties to allow him his poundage and costs of accounting, a rule of Court. — *Overend v. O.*, 6 I. E. R. 387. (R.)

8. A receiver, by leave of the Court, brought an ejectment. The deft. filed a bill in Equity to restrain the proceedings in that action. *Held*, that the receiver was not entitled to the costs of defending that suit, without obtaining leave of the Court to do so. — *Conyers v. Crosbie*, 6 I. E. R. 657. (E.E.)

9. When a receiver neglects to lodge the balance due on foot of his account within the time directed by the 147th G. O. the poundage which he is to be disallowed on passing his next account is to be the poundage on this last, and not on the preceding account, the balance of which he has neglected to lodge. — *Maxwell v. Boate*, 7 I. E. R. 281. (R.)

10. When a receiver, by delaying to pass his account for a short time beyond the year, was enabled to collect and bring into Court an additional gale of rent, the Court allowed him his poundage and costs. — *Flood v. Aldborough*, 8 I. E. R. 103. (R.)

11. A third person's application, that a receiver should pass his accounts, and that applicant have liberty to attend, refused. — *Colburn v. Cooper*, 8 I. E. R. 510. (E.E.)

12. If a receiver suffer costs to accrue, which ought to have been prevented, he will be made to pay them. — *Cooke v. Sharman*, 8 I. E. R. 515. (E.E.)

13. Application for receiver's costs of letting, being unnecessary, refused with costs. — *Payne v. Lamb*, 8 I. E. R. 517. (E.E.)

14. The rule that where a receiver is a party to a cause, he shall not have his poundage, applies only to the cases of trustees, executors, owners, and heirs-at-law. Except in those cases the receiver is entitled to poundage, unless the order of appointment provides that he shall not have it.

A deft. entitled to a reversionary interest, being appointed receiver without any such provision, is entitled to his poundage. — *Bevan v. White*, 8 I. E. R. 675. (R.)

15. Rents not received until after the extension of a receiver, though due before, belong to the prior creditor, whether the contest be between claimants under different causes, or between the parties to a suit and a judgment creditor who has proceeded by petition

under the Judgment Acts, or between two judgment creditors one appointing and the other extending the receiver under these Acts.

Arrears of rent due at the time a receiver is appointed under the Judgment Acts, but received after, belong to the judgment creditor.—*Abbott v. Stratton*, 9 I. E. R. 233. (C.)

1. On appeals respecting receivers' accounts it is the practice in this country to entertain objections to the amount of the items, though the Master may have adopted no erroneous principle.—*Beytogh v. Concannon*, 10 I. E. R. 351. (C.)

2. When the receiver, at the instance of the parties and to save them expense, did not pass his account within the time limited by the 148th Order, the Court, on motion, allowed him poundage.—*Purcell v. Woodley*, 10 I. E. R. 422. (R.)

3. Rents received by a receiver after the gale day next succeeding the lodgment of the three-fourths of the purchase-money by a purchaser of lands under a decree, are applicable—first to the payment of solvent arrears, and then to the rent due to the purchaser, whether or not he has gone into possession, or the purchase deed has been executed.

*Lee v. Moorhead*, 2 Mol. 509, and *Hargrave v. Holland*, 5 I. E. R. 169, overruled.

Practice in framing objections to the Master's report allocating rents so received.—*Doorley v. Power*, 11 I. E. R. 577. (R.)

4. A mortgagee having obtained a conditional order for a receiver under the Mortgage Act, payments were made on account of interest, and a receiver was appointed by a judgment creditor. A petition being presented by the mortgagee, the conditional order was made absolute, and the receiver extended to the mortgage, in chamber. On an affidavit stating the intermediate payments, the order was set aside.

A judgment creditor having a receiver is not entitled to notice of a petition by a mortgagee to extend him to the mortgage.—*Goldsmidt v. Lord Glengall*, 11 I. E. R. 608. (C.)

5. A receiver's account was not passed within the time limited by the G. O. The Master therefore disallowed his fees and costs. Motion, upon consent, that the Master be at liberty to allow the receiver his fees and costs. *Held*, that the consent was irregular; and the Court refused to act upon it.

Their solicitors' neglect often causes receivers to lose their poundage. To check that course, this Court will uniformly disallow the costs, upon applications to allow the receiver his poundage, even when the Master, if permitted, allows the poundage.—*Bessonnet v. Waller*, 1 I. Jur. 150. (R.)

6. The Court will not make an order that the receiver be at liberty to account but once in each five years, for the purpose of avoid-

ing expense; the property producing but £10 per annum.—*Darley v. Hunter*, 1 I. Jur. 194. (R.)

7. Motion to allow the receiver his poundage, his account not having been passed within the time limited by the 148th G. O. Poundage allowed; costs not given.—*Lawson v. Griffin*, 1 I. Jur. 225. (R.)

8. The conditional order for the appointment of a receiver in Chancery, is sufficient to render every party to the cause or matter, interfering with the rents, guilty of contempt.—*Delucherois v. Wrixon*, 2 I. Jur. 89. (C.)

9. A receiver claimed £49 over and above his fees, for money paid to a clerk. An order of reference was made to the Remembrancer, who allowed £5 of this sum. The Court, on motion, ordered that the receiver should be paid the costs of the reference, the costs of the motion on which it was founded, and the costs of the application.—*The Queen v. Prim*, 2 I. Jur. 252. (E.E.)

10. When a receiver allows an inheritor, to whom a surplus is payable, and who is tenant to a part of the lands, to retain his rent, without an order for so doing; is charged by the Master with the amount; and is subsequently discharged from the office of receiver; he may be allowed credit for this amount on passing his final account; and will be entitled to have notice of all payments by the new receiver.—*Gibson v. Wills*, 5 I. Jur. 163. (R.)

11. The notice of a distress made by a receiver did not contain all the particulars required by the statute. The tenants replevied. The Court, on payment to the tenants of all their costs, stayed the replevin proceedings. The receiver was given credit for this amount out of the estate, but had to abide his own costs of the motion.—*Graves v. G.*, 5 I. Jur. 309. (R.)

12. A receiver appointed over a renewable leasehold, subject to a heavy head rent, and to the payment of tithe rentcharge, will be required to pay the rentcharge in priority to the head rent.—*Madden v. Wilson*, 6 I. Jur. 129. (R.)

13. If lands are let under the Court, and the tenant refuses to take them, and a conditional order for an attachment is granted against him, but before it is served or made absolute, the lands are re-let under the direction of the Master; the conditional order cannot be made absolute, nor can the tenant be directed to compensate the estate.

Lands were set up by the Court to be let. A. was declared tenant, but refused to execute the leases. The Lord Chancellor granted a conditional order against him on the 1st April, for an attachment for the contempt. He escaped to England, and it was not served until the 3rd May. The lands, by direction of the Master, had been re-let on the 27th May. The receiver presented a petition to the Chancellor, and obtained, on the 25th July, a conditional order for an attachment,

or liberty to accept £20 and costs as compensation to the estate. A. then presented a petition to set aside the conditional order of the 25th July. *Held*, that the cause shown against the conditional order was good, and that it could not be made absolute; that A. could not be compelled to compensate the estate after the lands were re-let.

The receiver was declared entitled to costs of the conditional order, and proceedings thereunder. A., by consent, was directed to pay a sum on account of the receiver's costs.—*In re Filgate a minor*, 6 I. Jur. 131. (R.)

1. The Court will not grant an order on a receiver to pay the several parties appointing and extending him according to their priorities generally.

The proper course is, to have an affidavit and a schedule setting out the priorities of the parties, and then to move to pay according to the priorities therein stated.—*Wilson v. Hoare*, 6 I. Jur. 174. (R.)

#### LXXVIII. 6. Discharge and Removal of Receiver.

2. A prior creditor, who has obtained a receiver in a Ch. suit to which a puisne creditor is a party, is not entitled to remove a receiver appointed by this Court over the same lands in the suit of that puisne creditor, though the prior creditor be not a party to that suit; the receiver of this Court having served the tenants with the order to pay their rents before the receiver of the Court of Ch. did so.

*Semble*—At the prior creditor's desire, this Court will direct the puisne creditor to make him a party to the suit.

But, clearly, this Court will not remove its receiver under the before-mentioned circumstances, when it appears that the receiver of the Court of Ch. has been collusively appointed to obstruct the puisne creditor in asserting his rights.—*Barry v. B.*, H. & J. 508. (E.E.)

3. The Court will not vacate a receiver's recognizance at the time of his discharge, even on consent of all parties.—*Fitzgerald v. Hill*, 2 I. E. R. 398. (E.E.)

4. A motion to vacate the recognizance, at the time when the receiver applies to be discharged, is premature.—*D'Arcy v. Sherry & Callan*, 2 I. E. R. 411. (E.E.)

5. The receiver passed his final account in 1829, when there was a small sum due to him. The purchaser under the decree in the cause was put into possession the same year. The receiver had not received any of the rents since his last account. The Court granted an order to vacate the receiver's recognizance, although the receiver had not been formally discharged. The injunction to put the purchaser into possession amounts to a discharge of the receiver.—*Anon.*, 2 I. E. R. 416. (E.E.)

6. In 1828, a judgment on warrant of attorney was entered up against a trader. On 3rd

March 1841, a conditional order was obtained against him under the 5 & 6 W. 4, c. 55, which was made absolute on the 3rd April. On the 17th May, a commission of bankruptcy issued against respondent. Some of the simple contract creditors, who proved thereunder, had been such before the 3 & 4 Vic., c. 105, came into operation. The respondent's assignee moved to remove the receiver. *Held*, that the absolute order was that meant by the 5 & 6 W. 4, c. 55, s. 37; and that, since petitioner came within the provisos in the 3 & 4 Vic., c. 105, s. 22, the receiver should be discharged.—*Burt v. Bernard*, 4 I. E. R. 328; Fl. & K. 414. (R.)—(Affd.: 5 I. E. R. 425; 3 Dr. & War. 464; 2 Con. & L. 261. (C.))

7. When the estate expires over which a receiver has been appointed, the reversioner or remainderman may enter, notwithstanding the continuance of the receiver, and is not to be considered as committing any contempt by so doing. If, under such circumstances, an application be made to remove a receiver, or for leave to enter into possession, the cost must fall on the applicant. On the other hand, if any attempt be made to attach the reversioner or remainderman for interfering with the possession of the receiver, the costs which he may thereby be put to will be awarded to him.—*Britton v. M'Donnell*, 5 I. E. R. 275. (R.)

8. Upon the death of A., a debtor, over whose freehold estate a receiver had been appointed on a judgment creditor's petition, under the 5 & 6 W. 4, c. 55, his eldest son, J., alleging that by virtue of articles prior to the judgment, and subsequent settlement according to the articles, his father was only tenant for life, and that he was entitled as tenant in tail, applied for the removal of the receiver. The Court declined to make any rule upon the motion. Afterwards the judgment creditor, insisting that the estate liable to the judgments was not determined by A.'s death, applied, under the 32nd sec. of the Act, to continue the proceedings. That motion was refused with costs, having been resisted by J., of whose title (before stated) *prima facie* evidence was produced, and not rebutted.—*Kenny v. Clarke*, 5 I. E. R. 280. (R.)

9. A judgment creditor of a tenant for life presented a petition, and obtained an order to appoint a receiver. Subsequently the trustee of the settlement filed a bill in Ch. against the tenant for life, the infant tenant in tail, and the petitioner, alleging that there were incumbrances affecting the inheritance prior to the judgment of the petitioner, and that the rents were insufficient to keep down the interest on them, and prayed for the appointment of a receiver, and that he might be ordered to keep down the interest. A receiver having been appointed in that suit, the ptf. in it applied to have the receiver of this Court removed. *Held*, that the right, if it existed, to remove the receiver first appointed, was a right which belonged to a prior creditor; and that the ptf. was not in that situation.—*Burke v. Browne*, 6 I. E. R. 218. (E.E.)

1. When an ignorant person has been induced by the misrepresentations of the ptf. to consent to act as receiver, and been accordingly appointed, but afterwards, on discovering the nature of the office, refuses to enter into the recognizance, the Court will not make him pay the costs of his removal and of the new order of reference.—*Hunter v. Pring*, 8 I. E. R. 102. (R.)

2. When, by appointment of different receivers over distinct portions of deft.'s estates, the whole is extended, the Court will remove all the receivers except one, who will be retained for the benefit of all parties.—*Kelly v. Rutledge*, 8 I. E. R. 228. (R.)

3. A receiver, not having passed his account, was attached and subsequently discharged, and a new receiver appointed. *Held*, that the first receiver's sureties were liable under the recognizance, to the costs of the attachment, and to all costs of discharging the defaulting receiver, and appointing the new one.—*Maunsell v. Egan*, 8 I. E. R. 372. (R.)—[*Affd.*: 9 I. E. R. 283; 3 Jon. & L. 251. (C.)]

4. A motion to discharge a receiver over premises in which the respondent's interest had expired, must be on notice to the respondent.—*Johnston v. Henderson*, 8 I. E. R. 521. (E.E.)

5. A receiver who had passed his final account, and paid the balance found against him, and who had been acting for thirty years, discharged without paying the costs of his removal, or of the appointment of a new receiver.—*Cox v. M'Namara*, 11 I. E. R. 356. (R.)

6. A mortgagee having obtained a conditional order for a receiver under the Mortgage Act, payments were made on account of interest, and a receiver was appointed by a judgment creditor. A petition being presented by the mortgagee, the conditional order was made absolute; and the receiver extended to the mortgage, in chamber. On an affidavit stating the intermediate payments, the order was set aside.

A judgment creditor having a receiver is not entitled to notice of a petition by a mortgagee to extend him to the mortgage.—*Goldsmid v. Lord Glengall*, 11 I. E. R. 608. (C.)

7. On the 5th Feb. the Court of Exch. referred it to the Remembrancer to appoint a receiver over lands. On the 30th June following, this Court ordered a receiver over the same lands to be appointed. Motion to discharge the receiver in this Court. Order for his appointment set aside, as the Court had not been informed of the order made by the Court of Exch.—*Bryan v. Richardson*, 1 I. Jur. 298. (R.)

8. A receiver who has acted meritoriously, and, from ill health, is no longer capable of discharging his duties, will be discharged without being compelled to pay the costs of his removal.—*Constable v. C.*, 2 I. Jur. 141. (R.)

9. When a prior order of reference has been obtained in the Exchequer for appointment of a receiver, the Court will discharge such order, when in the meantime a receiver has been appointed by the Court of Ch., notwithstanding that the receiver of the Court of Ch. appears to have been appointed collusively.—*Delmege v. Waller*, 2 I. Jur. 229. (E.E.)

10. A receiver passed his final account, and, without having been discharged, moved to vacate the recognizances of himself and his sureties.

The purchaser had gone into possession.

The Court refused the motion, but discharged the receiver.—*Fitzgerald v. Johnson*, 2 I. Jur. 252. (E.E.)

11. The Court of Ch. will not discharge a receiver acting under its decree, upon the application of a purchaser claiming the lands over which the receiver has been appointed; but will send the parties to a Court of Law to determine the legal right under a conveyance from the I. E. Commissioners, which makes no mention of the receiver being in possession.

*Semble*—There is nothing in the 12 & 13 Vic., c. 77, to interfere with the jurisdiction of the Court of Ch. in considering any question affecting such conveyance, on the ground of fraud, or notice, or any other equitable ground of relief.—*Locke v. Ashe*, 4 I. Jur. 180. (R.)

12. The Court under special circumstances, discharged a defaulting receiver, who was in custody under an attachment for not accounting (when his sureties had passed his account, and paid the balance due on foot thereof), on the receiver's undertaking to pay the ptf. the costs incurred by him in suing out the attachment, and the costs of his own removal, the ptf. not requiring payment of those costs before the discharge of the receiver; but without prejudice to the liability of the sureties.—*Johnson v. Tottenham*, 5 I. Jur. 15. (R.)

13. A notice of motion to discharge a receiver for misconduct, should state the grounds on which his discharge is sought. If it concerns items in his account, the items objected to should be mentioned; if for any other particular acts, they should be stated in the notice. When this is not done, the party applying to discharge the receiver will not get the costs of his motion, though the receiver be discharged. The more direct mode is to get a certificate from the Master, stating the propriety of discharging him, as the M. R. always acts on such a certificate.—*Gibson v. Wills*, 5 I. Jur. 163. (R.)

14. When lands are let in Ch. for seven years pending the cause, and are sold in the I. E. Court, the tenancy does not determine till the receiver has been discharged by the side-bar order.

The gale days in the lease from the Court were the 1st of Feb. and the 1st of August; the sale was on the 6th of July, and the conveyance to the purchaser was made on the

26th of July. An agreement was then made between him and the tenant to commence a new tenancy from the 6th of July. The receiver was discharged on the 28th of July, but having previously received from the tenant the portion of the gale up to the 6th of July, he was directed to pay this amount over to the purchaser.—*Wybrants v. W.*, 7 I. Jur. 327. (R.)

1. A consent that a receiver be discharged must be signed by the receiver's solicitor.—*Moffett v. Rutledge*, 2 I. Jur. N. S. 74. (R.)

2. Order to discharge a receiver who had compromised with his creditors in the Court of Bankruptcy.—*Ellard v. Cooper*, 17 I. C. R. 151. (R.)

#### LXXVIII. 7. Receiver; as respects Rents, Lands, and Tenants under the Court.

[As to who are entitled to rents brought in by a receiver, see INTERMEDIATE PROFITS.]

- a. Generally: respecting Letting, Abatement to Tenants, &c.
- b. Attachment, Distress, &c.

#### LXXVIII. 7. a. Generally: respecting Letting, Abatement, &c., to Tenants.

[See G. O. of 1843, 145 to 150; G. O. of Jan. 1845; 3 & 4 G. O. Jan. 1850; G. O. of 1851, 45 to 51; G. O. of 1857, 30, 31, 35, 36, 42, 43, 44. See Gamble's Ch. O., pp. 200-220.]

3. A distraining order against tenants will not be granted after attachments have been found fruitless, except upon the terms that the costs shall not be a charge on the estate.—*Ryder v. Dickson*, Hayes, 36. (E.E.)

4. The motion for a conditional order for an attachment against tenants for non-payment of rent to a receiver is a side-bar rule; but the affidavit for the motion should state the time of the demand and refusal.—*Locke v. Evans*, Hay. & J. 301. (E.E.)

5. The Court will not order the receiver to pay the inheritor's attorney the expenses incurred by him, without the Court's authority, in legal proceedings respecting the lands.—*Dudgeon v. Bowen*, Hay & J. 717. (E.E.)

6. The Court will not set up lands to be let subject to the interests of the tenants resident thereon.—*Anon.*, 2 Jon. 630. (E.E.)

7. A reference touching the propriety of abating the tenants' rents, and forgiving their arrears, &c., was refused when the application was made by the receiver alone; but was afterwards granted, upon the concurrence of the parties.—*Evans v. Taylor*, S. & Sc. 681. (R.)

8. A reference to determine whether a receiver over impropriate tithes should proceed

against the defaulters by bill in equity or otherwise, was granted upon the receiver's motion; the ptf. concurring.

A receiver's duty is, to collect the rents, but not to assume the management of the cause.—*Callaghan v. Reardon*, S. & Sc. 682. (R.)—[See *Callaghan v. Reardon*, 1 Cr. & Dix, Notes of Cas. 231. (R.)]

9. A reference, whether any sum should be expended in repairing premises held under the Court, was refused; because *prima facie* a tenant is bound to repair the demised premises, and the motion was a voluntary application on the receiver's part.—*Duke of Dorset v. Crosbie*, S. & Sc. 683. (R.)

10. An order, that tenants of a minor should have liberty to execute a surrender, was granted upon the receiver's motion made by the Master's direction; it being plainly for the minor's benefit that a surrender should be accepted; but his guardian's concurrence was required.—*Davis v. Cotter*, S. & Sc. 685. (R.)

11. A motion by a tenant, holding at an exorbitant rent, for an abatement, was refused, with costs, though not opposed by the parties in the cause.—*Maguire v. Richards*, S. & Sc. 690. (R.)

12. A motion by a tenant under the Court for a sum towards building a new house on the demised lands was refused; the tenant being bound by his lease and recognizance to pay his rent, and keep the old house in repair.—*Palmer v. Newport*, S. & Sc. 691. (R.)

13. A motion by sureties of a tenant under the Court to reduce his rent was granted, under the circumstances, upon the terms of all arrears due being paid: the receiver and the interested parties consenting.—*M'Evoy v. M'E.*, S. & Sc. 699. (R.)

14. Rents, accrued since bill filed, and received by the receiver in another cause, are not bygone rents; and, when the receiver is extended, they will be transferred to the credit of a suit by a prior incumbrancer, all parties being before the Court.—*Bland v. Gould*, 1 I. E. R. 5. (C.)

15. After the receiver's discharge, the Court will not retain a reference touching arrears of rent. But when, because of a dispute between the tenants and the receiver, the tenants obtained a reference to enquire and report what rent was due; and, pending the reference, ptf. and defts., by consent, obtained the receiver's discharge, which determined the reference; the Court ordered the ptf. and defts. to pay the tenants the costs of the order of reference, and of all proceedings had thereunder.—*Hutchins v. H.*, 1 I. E. R. 378. (R.)

16. When the respondent, in a petition matter, under 5 & 6 W. 4, c. 56, held under a lease containing a non-alienation clause, the Court



directed the receiver to manage the lands himself.—*Rogers v. Bateman*, Fl. & K. 432. (R.)

1. When timber trees had been blown down upon a mortgaged estate, over which a receiver had been appointed in a foreclosure cause, the Court directed the receiver to sell them to the best advantage, and to keep a separate account of the produce of the sale; with liberty to the parties to apply at any future time as they should be advised.—*Crofts v. Poe, Jones & C.* 198. (E.E.)

2. The head landlord applied for liberty to bring an ejectment against a tenant over whose interest a receiver had been appointed. It was ordered that he should be at liberty to eject if the receiver did not pay him the head rent before a month elapsed. The costs of the motion to be paid by the receiver if he should pay the rent, without prejudice to his being disallowed them if the motion was made necessary by his misconduct in not paying the head rent.—*Evans v. Norcott, Long. & T.* 380. (E.E.)

3. A house and lands were let at an annual rent of £418, for seven years pending the cause, to A., upon whose motion they were set up again, without prejudice to the question of compensation; and re-let at £306. 16s. a-year. The Court referred it to the Master to ascertain what compensation A. should make. Upon the Master's report, assessing the compensation at £35 a-year, during the term, the Court ordered A. to enter into a recognizance in the sum of £150, to pay the receiver £35 per annum in half-yearly gales; and ordered A. to pay the costs.—*Cox v. C.*, 2 I. E. R. 160, note. (R.)

4. The Court deals with its tenants as tenants at will. When a tenant has been let into possession under the Court for seven years, or pending the cause, the Court will not grant an injunction to dispossess him, without an affidavit as to the state of his crops.—*O'Connell v. O'Callaghan, Long. & T.* 157; 8 I. E. R. 199. (E.E.)

5. Where lands, let under the Court for seven years, pending the cause, are sold under the decree, and the tenancy is determined before the expiration of the term, the purchaser having notice of the tenancy at the time of the sale, and going into possession, is not entitled to the crops sown by the late tenant, and growing on the lands. The late tenant is entitled to emblements, and his right is not affected by the custom of the country as to the outgoing tenant's right after the expiration of his lease.—*Creed v. C.*, 3 I. E. R. 207. (R.)

6. A tenant under a letting made by the Court for seven years pending the cause, who has been put out of possession, by the injunction of the purchaser, in the interval between two gale days, is bound to pay rent for the period he continued in occupation after the last gale

day. It will be referred to the Remembrancer to ascertain what is the amount of such rent, having regard to the season of the year when the broken gale occurred, and the nature of the demised premises.—*Jameson v. Farrer*, 3 I. E. R. 518. (E.E.)

7. Lands were let under the Court for seven years, pending the matter of a judgment creditor's petition. Before the expiration of the seven years the lands were sold out of Court, with the consent of the petitioners, to pay their demands, and the tenant gave up possession to the purchaser. Held, that he was bound to pay rent for the time he continued in possession from the last gale day to the day when he gave up possession to the purchaser.—*Jackson v. J.*, 5 I. E. R. 591. (E.E.)

8. It is not necessary to serve an inheritor with an order to furnish a rental, personally.—*Watkins v. Lloyd*, 5 I. E. R. 244. (E.E.)

9. The sureties of a tenant under the Court can have no greater claim to relief from a letting alleged to be at an over-value, than the tenant himself would have. *Seemle*—If the tenant would be entitled to relief, so would the sureties.—*In re Langfords*, 6 I. E. R. 398. (C.)

10. When sequestrators seized, under the writ, the issues and profits of the lands before the second gale of rent became due to the head landlord, but the two gales were due before accounting—Held, that the landlord was entitled in the first instance to the two gales out of the funds.—*Stafford v. S.*, 7 I. E. R. 197. (R.)

11. A motion to set aside a letting made in a cause or matter should not be made by the receiver, and the Court will refuse such motion by the receiver, with costs.—*Richards v. Gould*, 7 I. E. R. 209. (R.)

12. The declaration by the Master, of the tenant, at the bidding for lands, is not conclusive; the letting may be set aside by the Court.

It is the duty of the Master to declare the highest solvent bidder, unless he is objectionable on some grounds of disqualification or misconduct.

When the Master has declared as tenant the person who was not the highest bidder, the Court will entertain a motion to set the letting aside, if made by the inheritor or person interested in the estate; but not by the highest bidder, as no contract has been made with him, and he has no equity or right to enforce.—*In re Costellus*, 7 I. E. R. 491. (R.)

13. When lands (subject to a charge, to raise which the suit has been instituted) are set by the inheritor, *pendente lite*, the Court will consider the lands as in his possession; and under an order to let the lands in his possession, will permit them to be let discharged of the leases.—*Kenny v. Jessop*, 7 I. E. R. 494. (R.)

1. When the Master in Ch. refused to take a bidding, for the inheritor and a party in the cause, at the letting of the lands, on the ground that he had not obtained the previous permission of the Court, and declared as tenants bidders of a less rent; the Court, upon obtaining a certificate of their practice from the Masters, directed a new letting of the lands.—*Sproule v. S.*, 7 I. E. R. 633. (R.)

2. When tenants have, without leave of the Court, replevied distresses for rent, made by the receiver, the Court will restrain them from proceeding in the replevin suits, and direct a reference as to the rent due.—*In re Perse*, 8 I. E. R. 111. (R.)

3. Under the 145th G. O. the Master has not jurisdiction to give allowance or compensation to a tenant for improvements.

A tenant for a term pending the cause will not be allowed for improvements made without sanction of the Court, on notice to all parties, although he may have been misled as to his tenure by the receiver.—*Wildridge v. M'Kane*, 8 I. E. R. 231. (R.)

4. The Court will not, on the application of the receiver, sell civil-bill decrees obtained for arrears of rent. *Semble*, the Court cannot sell arrears.—*Ford v. Head*, 8 I. E. R. 368. (R.)

5. Order for reference to enquire and report whether the rents payable by tenants under the Court should be abated, granted, upon consent of inheritor's solicitor given in open Court.—*Morrow v. Sausse*, 8 I. E. R. 519. (E.E.)

6. When the landlord insists on his right to have liberty to eject, unless all his rent be paid, he will not get the costs of the motion; but if he waive any of his rights he will be entitled to the costs.—*Harris v. Shea*, 8 I. E. R. 571. (R.)

7. The Master has no jurisdiction to direct a receiver to proceed by civil-bill for arrears of rent; the 146th G. O. not including such a case.—*Hamilton v. Jackson*, 8 I. E. R. 581. (R.)

8. The receiver in the cause having distrained for rent (due by a tenant who held in reality for the deft.), as it was alleged by the deft., on lands in the possession of the deft., and not those over which the receiver was appointed, the Court restrained an action of trespass brought by the deft.; and granted the usual reference to the Master; there being no good reason to suppose that the receiver acted maliciously or *mala fide*, or that any substantial damage was sustained by the deft.—*Parr v. Bell*, 9 I. E. R. 55. (R.)

9. A lessee for years having leased for his own term, reserving a profit rent, with a clause of re-entry on non-payment of it, subsequently mortgaged the lands. *Held*, that the rent reserved was not a rentcharge, but in the nature of rent upon a demise; and that the personal representative of the mortgagor could recover the lands by ejectment at Common Law, and would be a trustee for the

mortgagee, and, therefore, that a receiver appointed over the lands under the Mortgage Act was justified in enforcing the rent.—*Cremen v. Johnson*, 9 I. E. R. 148. (R.)

10. In a petition matter under the Mortgage Act, the Court will not decide equities between owners of different parts of the mortgaged premises. When a receiver had received all the rents out of the portion of A., who had a right to be indemnified out of the portion of B., who had been required to pay nothing to the receiver for some years; the Court refused to charge the receiver as for default, at the instance of A.; the mortgagee having been paid all his interest.—*Lane v. Lynch*, 9 I. E. R. 501. (C.)

11. A judgment creditor, having procured the appointment of a person in his own employment as receiver over his debtor's land, brought forward a person of the same name as the respondent to bid at the letting, in trust for himself, who was declared the tenant at an under-value, under the supposition that he was bidding for the respondent. The Court set aside the letting as fraudulent, though three years had elapsed, and the petitioner had laid out money in improvements; but refused to make him accountable as for wilful default, on motion.

A petitioner in a matter cannot bid without leave of the Court.—*Malcolnson v. Eagar*, 10 I. E. R. 1. (R.)

12. Practice as to costs on a motion by a landlord for leave to proceed for non-payment of rent.—*Clendinning v. Knox*, 12 I. E. R. 309. (R.)

13. A judgment for poor-rate against the immediate lessor, under the 6 & 7 Vic., c. 92, s. 2, does not deprive the poor-law guardians of their remedy against the occupiers, under s. 3 of the same Act.

Therefore, the Court directed the receiver to pay a rate struck before his appointment, and the costs of a judgment obtained for it against the immediate lessor.—*De Montmorency v. Pratt*, 12 I. E. R. 411. (R.)

14. Upon an order for a receiver under the Mortgage Act (10 & 11 G. 3, c. 10), it is the absolute and not the conditional order which attaches the rents.—*Cully v. Lucas*, 1 I. Jur. 344. (R.)

15. A receiver had been appointed over lands, a portion of which were subsequently sold under a decree of the Court of Ch. The Court would not give a creditor permission to proceed against the tenants of that estate, to recover their arrears.—*Armstrong v. Southwell*, 2 I. Jur. 115. (E.E.)

16. When the contents of a farm let under the Court were mis-stated in the advertisement, and the tenant asserted by affidavit that he had been misled, the Court directed a survey of the lands by the tenant and the receiver, and a reference to ascertain what

reduction ought to be made in the rent.—*Ball v. West*, 2 I. Jur. 142. (E.E.)

1. Upon consent of the parties in a cause claiming substantial interests in the lands in litigation, the receiver over those lands was permitted to become a tenant of part of them, the adoption of such a course appearing to be for the benefit of the estate.—*Stannus v. French*, 13 I. E. R. 161. (C.)

2. When tenants hold under leases of a date prior to that of the appointment of a receiver in a foreclosure suit over the lands which they hold, the Court has not jurisdiction either to remit arrears or to grant a prospective abatement of the rents, which by their leases the tenants are bound to pay, unless the owner of the lands and the ptf., and other parties interested in the rents, consent to such remission or abatement. *Secus* *autem* in the case of the estate of an infant or lunatic under the control of the Court.—*Hamilton v. Nagle*, 1 I. C. R. 513; 3 I. Jur. 366. (C.)

3. Objections and exceptions to reports should state the exact proposition which the Court is called on to decide.

When a receiver is appointed over tithe rentcharge, the funds realised by him are applicable in the first instance to the repairs of the church.—*Cullen v. The Dean and Chapter of Killaloe*, 2 I. C. R. 133. (R.)

4. An order of reference, to appoint a receiver, was made on the 10th of July 1851, over mines which had been demised by the principal deft. by a lease, reserving one-twelfth of the ore, to be weighed and delivered at the pits, and containing a covenant by the lessee to weigh and deliver it. A portion of the ore was weighed and removed before the 10th of July 1851, by the lessee, who, as he usually did, sent it with his own ore to be sold, and gave bills for the amount to the deft. after that date. *Held*, that the deft. was bound to bring in the amount of the bills of exchange, as the ore had not been delivered, and the covenant in the lease had not therefore been performed when the order of reference for the appointment of the receiver was made.

A receiver is entitled to all arrears of rent unpaid, when the order of reference to appoint a receiver is made; and, although the tenants are only responsible from the time when the order to pay their rents to the receiver is served on them, yet the person entitled to receive such rent and arrears is bound from the date of the order of reference to appoint a receiver, when he has notice of such order.—*Hollier v. Hedges*, 2 I. C. R. 370. (R.)

5. A receiver was appointed on the 23rd of June 1852. On the 22nd of April 1852, the respondent's agent took I. O. Us. and promissory notes from the tenants for the previous November rents, which the Court ordered to be brought in.—*Russell v. R.*, 2 I. C. R. 574. (R.)

6. Except in lunacy and minor matters, the Court of Ch. has not jurisdiction to abate the

arrears of rent of a tenant by lease made before the appointment of the receiver, if the respondent or inheritor object.—*Byrne v. Kelly*, 3 I. Jur. 177. (C.)

7. A receiver had been appointed over the estate of H., and extended to several causes and matters. The different incumbrancers on the estate came to an arrangement between themselves that the funds collected by the receiver should be applied to keep down the accruing interest and gales of annuities. H. objected to this arrangement. *Held*, reversing the order at the Rolls, 1 I. C. R. 146, that H. had a right to insist that the whole of the principal, interest, and costs of the prior demands should be paid before any portion of the fund was applied to liquidate the puisne charges.—*Hutchins v. H.*, 4 I. C. R. 224. (C.)

8. If lands are let under the Court, and the tenant refuses to take them, and a conditional order for an attachment is granted against him, but, before it is served or made absolute, the lands are re-let under the direction of the Master, the conditional order cannot then be made absolute; nor can the tenant be directed to compensate the estate.

Lands were set up by the Court to be let. A. was declared tenant, but refused to execute the leases. The Lord Chancellor granted a conditional order against him on the 1st April for an attachment for the contempt. He escaped to England, and it was not served until the 3rd May. The lands, by direction of the Master, were re-let on the 27th May. The receiver presented a petition to the Chancellor, and obtained, on the 25th July, a conditional order for an attachment, or liberty to accept £20, and costs, as compensation to the estate. A. then presented a petition to set aside the conditional order of the 25th July. *Held*, that the cause shown against the conditional order was good, and that it could not be made absolute; that A. could not be compelled to compensate the estate after the lands were re-let.

The receiver was declared entitled to costs of the conditional order, and proceedings thereunder. A., by consent, was directed to pay a sum on account of the receiver's costs.—*In re Filgate a minor*, 6 I. Jur. 131. (R.)

9. Lands were let under the Court for seven years pending the suit. The tenant paid a year's rent in advance on getting possession; entered and expended money on the lands; and the suit was compromised before the end of the first half year.

Cause shown against an injunction to put the owner in possession was allowed, with costs; and the issuing of the injunction was stayed until the end of the year of the tenancy created by the Court.

Practice of taking rent in advance from tenants under the Court disapproved of.—*Lalor v. Netterville*, 6 I. Jur. 261. (R.)

[N.B.—This case was not a decision under the Emblements Act (14 & 15 Vic., c. 25), though the report, having been altered by the

Editor, after it had left the Reporter's hands, is made to appear as if it was. It was merely a decision as to what was fair to the tenants, under the circumstances of the case.—*R. W. G.*]

1. A. had an equitable mortgage of premises granted in 1843, and obtained a judgment at law, in 1846, for the amount of his debt. In May 1847, A. appointed a receiver, under the Judgment Acts, over the premises in the mortgage, and over other premises of the debtor. B. had a mortgage of 1844 (with judgment collateral) over these last premises and others not in A.'s mortgage. In March 1847, B. filed his bill to foreclose his mortgage, praying a sale of the premises comprised in his mortgage, and a receiver over them, and making A. a notice party, as a judgment creditor. In 1848, the receiver, who had been appointed by A., was extended to B.'s cause, and was appointed over the further premises in B.'s mortgage. A considerable amount of the rents received generally by the receiver was paid under orders of the Court to B. *Held*, that the payments to B. should have been made out of the rents of those premises only which were comprised in his mortgage; and that the extension of the receiver could not affect the rents received out of the premises not comprised therein.

That although B.'s collateral judgment might have been made a charge on all the lands, yet as no specific relief was sought on foot of it in the foreclosure suit, the rents of the premises not in B.'s mortgage were not attached, nor the rights of the parties to the fund in Court altered.

A reference was made to the Master to allocate the funds, and report the rights of the parties, without having regard to any previous orders of the Court respecting payment out of the rents received.

If a person who could not be made a notice party under the Rules, is only made a notice party, he will not be bound by the proceedings.

The petitioner and ptf. were each declared entitled to the costs of the motion.—*Bristow v. Millar*, 6 I. Jur. 285. (R.)

2. When lands are to be let under the Court, the owner in occupation of the mansion-house and lands attached is not entitled as of right to be declared the tenant at an occupation rent. This is an indulgence given by the Court, and if the owner has it in his power to make a fair settlement for the creditors and does not do so, the indulgence will not be granted.

When the owner had only a life estate, and was himself old, and his eldest son, who had the first charge thereon, refused to have the owner's life insured for the benefit of another creditor on the life estate, the Court refused a motion to have the owner declared tenant at an occupation rent, and with costs.—*Averal v. Wade*, 7 I. Jur. 219. (R.)

3. When a receiver has been appointed over a minor's estate, and a lease made by

the Master of a part of the estate, the Court cannot, without the consent of the creditors, direct a surrender of such lease to be accepted on behalf of the minor.—*Massey v. O'Dell*, 1 I. Jur. N. S. 6. (R.)

4. When lands have been sold and the purchase-money is not sufficient to pay off the incumbrances, and none of the parties interested object, the arrears of rent due out of the lands up to the gale day preceding the sale, may be set up and sold, if such sale would be for the benefit of those interested in the estate.—*Clayton v. Chichester*, 1 I. Jur. N. S. 170. (R.)

5. When abatements are given in bad times to tenants under the Court, holding under leases with the consent of the inheritor, they will be withdrawn when times improve, and the inheritor refuses his consent.—*Butler v. Collins*, 1 I. Jur. N. S. 272. (R.)

6. A tenant seeking a f.-f. grant, there being a receiver over the owner's interest, should, before proceeding, require the receiver to take the proper proceedings to have the f.-f. grant made.

*Seem*—If the receiver refuses, the tenant should proceed by motion in the cause, and not by petition under the Ren. Lease. Conv. Act.—*Ex parte Hanks*, 7 I. Jur. N. S. 199. (R.)

7. Before decree, a deft. in an incumbrancer's suit is not in privity with the rents received by the receiver, though he files an answer claiming a charge on the lands.—*Foss v. F.*, 15 I. C. R. 215. (R.)

8. Although the petitioner does not dispute the respondent's right to one moiety of the rents of the property, the subject of the suit, yet the Court, when directing the appointment of a receiver pending the suit, will not direct any part of them to be paid to the respondent.—*Sweetman v. S.*, 11 I. Jur. N. S. 143. (R.)

#### LXXVIII. 7. b. Attachment, Distress, &c.

[See G. O. of April 5, 1847, 2; G. O. of May 1857, 43: Gam. Ch. O., pp. 218, 221, &c.]

9. A distraining order will not be granted against tenants after attachments have been found fruitless, unless upon terms that the costs shall not be a charge on the estate.—*Ryder v. Dickson*, Hayes, 36. (E.E.)

10. A receiver will not be permitted to proceed by ejectment and attachment for non-payment of the same rent.

The G. O. to pay rent to the receiver need not be personally served.—*Pope v. P.*, Hayes, 481. (E.E.)

11. The Court will not on the receiver's motion order that any arrears of rent be forgiven.—*Woodward v. W.*, H. & J. 126. (E.E.)

12. When the premises are of small value, the receiver will be permitted to let, and to

distrain from time to time as may be necessary.—*Dean v. Donovan*, Hayes & J. 218. (E. E.)

1. The Court will not, at the receiver's instance, order a remission of arrears, or a reduction of rents.—*Robinson v. Shearer*, H. & J. 799. (E.E.)

2. When premises had been sold, and the purchaser was about to get into possession, the receiver, on swearing that one half year's rent was due, and that the rents would be lost unless he distrained, was allowed to distrain.—*Anon.*, 1 Jones, 613. (E.E.)

3. A tenant, who was not served with the order to pay his rent until after the expiration of the interest over which the receiver had been appointed, will not be attached for non-payment of an arrear which accrued due before the expiration of that interest, even though he had previously paid rent to the receiver.—*Anon.*, 2 Jones, 280. (E.E.)—[See *ibid.*, 348.]

4. Goods of a defaulting tenant had been seized by a third person under a civil-bill decree, and sold notwithstanding a notice given by the receiver of the claim for rent due. The receiver was permitted to take proceedings to recover the produce of the sale, the Court considering that an action would lie under the 9 Anne, c. 8 (*Ir.*)

The receiver was not permitted to oppose the discharge of the tenant as an insolvent, in order to induce the Insolvent Court to compel a surrender of the tenant's lease: the Court considering that the Insolvent Court has not any jurisdiction to enforce such surrender.—*Hawkes v. Smith*, S. & Sc. 712. (R.)

5. The letting of land in con-acre is but a mode of farming it.

Therefore the Court will not attach the inheritor for receiving rent from his con-acre tenants, though they have been served with the order to pay their rents to the receiver.—*Close v. Brady*, Jon. & Ca. 186. (E.E.)

6. It is necessary to apply to the Court for an attachment against a tenant for non-payment of rent, when he has not been served with the G. O. to pay rent to the receiver.—*Armstrong v. Southwell*, 1 I. E. R. 32. (E.E.)

7. Parties who rescued a distress made by a receiver were solvent. The Court granted a conditional order to attach them, intimating that the receiver should also proceed at Q. Sessions to punish them for the rescue.—*Mahon v. M.*, Fl. & K. 18. (R.)

8. The Court will, upon motion by the receiver, grant a conditional order to restrain tenants under the Court from committing waste, without a bill being filed for the purpose.—*Cronin M'Carthy*, Fl. & K. 49. (R.)

9 A receiver was appointed over premises held under a lease containing a covenant declaring the lease void in certain events. A

tenant held under a sub-lease containing a similar covenant. The Court, upon motion by the receiver, restrained the sub-tenant from doing an act whereby the title of the mesne tenant, over whose interest the receiver had been appointed, might be forfeited.—*Mason v. M.*, Fl. & K. 429. (R.)

10. When a respondent interferes with rents over which a receiver has been appointed, the Court will, upon notice to the party, grant in the first instance an absolute order for an attachment.—*Thomas v. T.*, Fl. & K. 621. (R.)

11. On the receiver's application, the Court granted an injunction to restrain one tenant of the estate from quarrying on a private road, part of the premises, which was common to all the tenants.—*Dorman v. D.*, 3 I. E. R. 385. (E. E.)

12. A distraining order will not be granted unless it appear by affidavit that the receiver personally demanded the rent to be distrained for, from the tenants. It is not necessary that the affidavit should state in terms, that he personally demanded the rent, if it state facts from which it appears to the Court that the demand was personally made.—*Langley v. Aylmer*, 3 I. E. R. 492. (E.E.)

13. On the 14th May 1838, the purchaser of lands sold under a decree, and over which a receiver had been appointed, went into possession. The receiver died. In May 1842, the inheritor, who was beneficially entitled to the arrears of rent due on the 1st Nov. 1837, applied for attachments against the under-tenants for non-payment of the arrears.

After such a lapse of time the Court refused the aid of its process.—*D'Arcy v. Sherry*, 4 I. E. R. 690. (E.E.)

14. A writ of assistance will not be granted to aid the sheriff in executing an attachment directed to him, which issued against a tenant under the Court, for non-payment of his rent.—*Meagher v. M.*, 1 Jon. & L. 31. (C.)

15. When an attachment, issued against a tenant under the Court, cannot be executed by reason of his being out of the jurisdiction, the Court will grant a sequestration against the tenant having other lands in this country.—*Withington v. Blake*, 8 I. E. R. 32. (R.)

16. When the rental furnished by the deft., pursuant to the side-bar order is defective, the Court will direct an amended rental to be furnished in order to grant an attachment in case of non-compliance.—*Young v. Avrell*, 8 I. E. R. 159. (R.)

17. The Court will not attach tenants who have rescued distresses for rent, but will leave the receiver to his remedy at law.—*Ford v. Head*, 8 I. E. R. 371. (R.)

18. When tenants under the Court, having, by consent, agreed to accept leases at rents to be fixed by valuers, afterwards refused

to keep their agreement; leave was given to the receiver to proceed as he might be advised.—*Conyers v. Crosbie*, 8 I. E. R. 518. (E.E.)

1. A., having become tenant under the Court in trust for B., afterwards denied the trust. Motion for an injunction to put the c. g. t. into possession refused.—*Conyers v. Crosbie*, 8 I. E. R. 519. (E.E.)

2. The receiver in the cause is the proper person to present the petition, and to make the verifying affidavit, for a receiver under the 5 & 6 W. 4, c. 55, upon a tenant's recognition.—*Daly v. Lynch*, 9 I. E. R. 2. (R.)

3. When a receiver has been appointed, an attachment will be granted against a party, who, before service of the order upon the tenants, interferes with the rents—he having had notice of the receiver's appointment.—*McAlpine v. St. George*, 1 I. Jur. 129. (R.)

4. When the order to pay rent has been served on all tenants of the lands, and A. succeeds one of them in possession, it is not necessary to serve A. with the order to pay, in order to obtain an attachment against him for non-payment of rent.—*Roche v. Collins*, 1 I. Jur. 282. (R.)

5. When a tenant of the Court replevied a distress made by the receiver, and the receiver entered a rule to declare in the replevin suit, but subsequently offered the tenant the costs of the rule, which the latter declined to receive, the Court ordered the proceedings in the replevin suit to be stayed, and directed a reference to the Remembrancer to report what sum was due by the tenant; the order to be without prejudice to any question as to the liabilities of the sureties in the replevin suit, or the costs of that suit or of the motion.—*Whitelaw v. Sundys*, 12 I. E. R. 396. (E.E.)

6. A., tenant of lands in the pleadings mentioned, died in May 1847, having bequeathed her interest in the lease to B. B. continued in possession till Nov. 1849, and, during that period paid two years' rent. At the Summer Assizes, 1849, there was a verdict in an ejectment on the title found against B. He delivered up possession before notice of this motion. At A.'s death two years' rent was due; and it was alleged that B. had wrongfully possessed himself of her effects, sufficient to pay the arrears due at A.'s death. The receiver filed a statement of facts to ground an attachment against B., in March 1849. In May 1849, he received a year's rent from B., and, in July following, obtained a conditional order for an attachment for the sum set forth in the statement of facts. *Held*, that this was not a case for an attachment, and that the proceedings were altogether irregular.

The Court will not grant an attachment against the personal representative of a tenant for arrears of rent accrued in his life.—*Todd v. Chichester*, 2 I. Jur. 65. (R.)

7. The interest in the lease of lands, over which a receiver had been appointed, was evicted by the head landlord, for non-payment of rent. Afterwards the lands were redeemed by a mortgagee, and the receiver restored. The Court refused to grant an attachment against sub-tenants for non-payment of rent during the period of the broken gales; one before the eviction, and the other after.—*Barrett v. Connellan*, 2 I. Jur. 66. (R.)

8. An absolute order for sale having been pronounced, and timber afterwards felled upon the lands, an injunction was issued against the owner, and everybody else, to restrain them from committing waste and felling timber, or carrying away the trees already felled.

Such trees having been seized and sold by the poor-rate collector, an application made to the Court for leave to remove them should be supported by an affidavit showing that there was not on the lands any other property capable of being distrained.

The sale will be set aside if collusion existed between the poor-rate collector and the purchaser.—*In re Gould's Estate*, 3 I. Jur. 181. (I.E.C.)

9. When a receiver is in actual occupation and managing under the direction of the Master, a county rate-collector, seizing, without leave of the Court, cattle grazing on the land, is liable to be attached for contempt.

*Quære*—If the lands be in the possession of a tenant?—*Harvey v. Wallis*, 3 I. Jur. 409. (C.)

10. A rentcharge of £100 was granted out of lands, part of which were let to two tenants whose rents amounted to £155, and who by the same deed attorned to the grantee. A receiver having been appointed over the rentcharge, on petition under the Judgment Acts, the grantor distrained the tenants for £55, the balance of their rent over the rentcharge. *Held*, that the Court, by appointing the receiver, had attached the whole rent payable by the tenants, and an attachment was awarded in the petition matter.—*Hayden v. Shearman*, 2 I. C. R. 137. (R.)

11. A sequestration on a final decree abates with the suit. A deft. was arrested for contempt in not furnishing a rental to sequestrators, under an attachment sued out pending abatement by the death of a sole ptf. He was discharged by the Court.—*Brennan v. Kenny*, 2 I. C. R. 579; 4 I. Jur. 112. (R.)

12. A sum was received by a respondent from the tenants subsequently to the appointment of a receiver by a puisne creditor. The receiver, in his account, was charged with the sum as received by him, and a conditional order for an attachment was obtained against the respondent, before the extension of the receiver, by a prior creditor. *Held*, that as the tenants paid the sum before the extending order, it was to be considered as paid by them

for the receiver, and that the petitioner in the first matter was entitled to it.—*O'Callaghan v. O'C.*, 3 I. C. R. 376. (R.)

1. A tenant held premises under the Court on a six months' lease, ending March 1850, at £45 rent; when applied to by the receiver at the end of the term, she refused possession, and in May 1851, when the rent was demanded, she, by letter, denied tenancy except for six months; she still continued in possession, and, in March 1852, the receiver's clerk filed for her a proposal for the premises at £50 per annum; which proposal was sent in, but there was no new letting. In Jan. 1853, the receiver distrained for two and a half years' rent, at £90 per annum, and the tenant replied. On application of the receiver, the proceedings were directed to be stayed, and a reference was given to the Master to fix what rent should be paid from the end of the six months, and to allow credit thereout for the damages by distress, and for the costs at law. Each party was directed to abide his own costs of this motion, and the order to be without prejudice to the liability of the receiver for his neglect in not having let the lands in 1850.—*Barron v. O'Brien*, 6 I. Jur. 250. (R.)

2. According to the practice of the I. E. Court, the purchaser is entitled to the rents from the last gale day before the purchase; as the Commissioners charge the purchaser interest at £5 per cent. from the expiration of fourteen days from the day of purchase or confirmation of the sale. The sale took place on the 21st of July. The purchaser was declared entitled to the gale due on the 29th of Sept. following, although he did not lodge his purchase-money until the 21st of October.

After a receiver has been discharged and the purchaser has gone into possession, the Court will not make an order that the tenants shall pay to the purchaser the rent which fell due before the discharge of the receiver; the receiver is to receive the arrear due before his discharge, although the purchaser may be entitled to a portion of such arrear. The Court of Ch. does not order the tenant to pay such arrears to the purchaser.

The practice of the Court of Exchequer, as stated in *Jackson v. J.* (5 I. E. R. 591), and *Jameson v. Farrer* (3 I. E. R. 346) is not the practice of this Court.

Form of order in such case.

The Side-bar Rule, discharging a receiver, on the certificate of a sale in the I. E. Court, does not operate as an absolute discharge. Although he cannot proceed against the lands for arrears of rent, he may proceed against the tenant by attachment or sequestration on the Master's certificate, or by an action in the name of the Master, when the tenant holds by lease under the Court, for the arrears due when the receiver was discharged.—*Walcott v. Condon*, 3 I. C. R. 431; 6 I. Jur. 381. (R.)

3. A. owned a life estate in lands over which a receiver had been appointed.

B., a judgment creditor, had the receiver extended, in Nov. 1849, to pay his judgment.

C., D., and F., owners of a mortgage, the first charge on the life estate, had the receiver extended in Dec. 1849, to pay them. In Jan. 1854, an order permitted A., the owner, to remain in possession of the lands at an occupation rent to be fixed by the Master, otherwise the Master was to let the lands. A. at first agreed, but subsequently refused to give the usual security for the rent.

The Master then posted the lands for letting; but C. who appeared to act in collusion with A., issued an execution upon a judgment of 1843, and seized the growing crops, and, by giving public notice thereof, prevented the lands being let. Under these circumstances, B. obtained an order for an injunction to the sheriff to put the receiver in possession of the house and lands, which the Master was then directed to let; and an attachment was awarded against C. for contempt in seizing the crops; and that B. should be paid the costs of the order of Jan. 1854, and of this motion.—*Reeves v. Cox*, 6 I. Jur. 403. (R.)

4. The appointment, in a suit in the Court of Ch. in England, of a receiver over lands in Ireland, operates only as against the parties in that suit, but does not affect the jurisdiction of the Court of Ch. in Ireland to appoint a receiver over the same lands, and to punish by attachment any interference with him in the exercise of his duties. An attachment was accordingly awarded against the bailiff of a receiver appointed by the Court of Ch. in England, over lands in the county Cork, for interfering with the collection of rent by a receiver subsequently appointed by the Court of Ch. in Ireland.—*Ferguson v. Coote*, 7 I. Jur. 175. (M. O.)

5. If the tenancy of lands, over which a receiver has been appointed, is disputed, the Court will not issue an attachment for non-payment of rent.

*Semble*—A stamped copy of a lost unstamped document, requiring a stamp, is admissible in evidence.

*Connor v. Cronin*, 7 I. C. L. R. 480, doubted.—*Herbert v. Rae*, 13 I. C. R. 25. (R.)

6. When only six months' rent is in arrear, an attachment will not be granted against tenants for non-payment of rent to a receiver; nor will any order to proceed by civil-bill, or otherwise, be made.—*McCarthy v. Mathews*, 11 I. Jur. N. S. 97. (P.)

LXXVIII.\* REFERENCE. See PRACTICE, MASTER, REFERENCE.

LXXVIII.\* REFERENCE FOR SCANDAL. See PRACTICE, ANSWER — PRACTICE, MASTER, REFERENCE TO.

LXXVIII.\* REGISTRAR. See PRACTICE, OFFICERS OF COURT.

LXXIX. RE-HEARING. See PRACTICE, HEARING, &c.—PRACTICE, APPEAL—PRACTICE, EVIDENCE.

[See G. O. (1867), 164.]

1. A cause will not be re-heard for costs alone. A re-hearing having been granted on certain points, the cause is open generally to the respondents. The petitioner, however, must confine himself, as against each respondent, to the points stated in his petition.—*Blackwood v. Gregg*, Hay. & J. 310. (E.E.)

2. Even after enrolment of a decree, on a minor deft.'s application, who had attained age after the enrolment, the Court will re-hear the cause respecting a particular matter appearing on the face of the Master's report.—*Jackson v. Welsh*, 1 Dr. & Wal. 255. (C.)

3. It is not necessary, by the practice of this Court, that a petition for re-hearing should be presented within six months from the time of pronouncing the decree. Such a petition must be signed by two counsel who were present at the hearing; but neither need be leading counsel in the cause.—*Faussett v. Ormsby*, 1 I. E. R. 388. (E.E.)

4. A creditor, deft. in an administration suit, will not, on a re-hearing, be entitled to rely upon matters whereof he might have had the benefit by taking exceptions and objections to the Master's report.—*Brownlow v. Earl of Meath*, 2 I. E. R. 383; 2 Dr. & Wal. 674. (C.)

4. The enrolment of a decree vacated on the ground of surprise.—*Enraght v. Fitzgerald*, 4 I. E. R. 276; 1 Dr. & War. 72. (C.)

5. The Court will not re-hear a cause in which the decree is not made up, but remains in minutes.—*The Commrs. of Char. Don. & Beg. v. Hunter*, 1 Dr. & War. 544. (C.)

6. When counsel has relied upon some only of several grounds of defence, that selection does not amount to a waiver of the rest. In such a case, an appeal having been taken to the H. L., a petition was allowed for a re-hearing, to amend the notes of the decree, without withdrawing the appeal.—*Galway v. Barron*, Long. & T. 76. (E.E.)

7. On a re-hearing, if deft. does not appear, ptf. must take a decree, such as he can abide by.—*M'Cann v. O'Connor*, 2 Dr. & War. 42. (C.)

8. A petition for a re-hearing may be dismissed with costs, though some relief be given to the petitioners.—*Uppington v. Bullen*, 2 Dr. & War. 184; 1 Con. & L. 291. (C.)

9. It is not necessary that counsel who certify for a re-hearing should have been previously engaged in the case.

When, at the original hearing, counsel abandon an objection as to parties, or as to

proof of a document, that objection cannot be made on a re-hearing.

On a re-hearing, petitioners cannot rely on any point not specified in the petition.

It is a matter of course to dismiss with costs a petition of re-hearing presented while the decree is still in minutes.—*Malone v. Geraghty*, 5 I. E. R. 549; 3 Dr. & War. 252; 2 Con. & L. 235. (C.)

10. On a bill to carry into execution a former decree, grounded on a question of construction then discussed, the Court will not re-open the question, though of opinion that the decision was wrong. The original cause must be re-heard.—*Persse v. Daly*, 9 I. E. R. 508. (C.)

11. In a renewal suit against the deft., tenant for life, and his eldest son, the question was, whether denomination X. was included in the lease, or was part of an adjoining farm held by the ptf. for a determinable interest. A decree for a renewal referred it to the Master to enquire and ascertain the boundaries. The interest in the farm having expired, the deft. brought an ejectment for X., which the ptf. defended. He obtained a verdict. Deft.'s son having died, and his second son, a minor, become tenant in tail, a new bill was filed against the deft. and this son, which stated the ejectment, and that the question tried in it was identical with that involved in the reference; but the decree, made in 1844, which accorded with the prayer, only directed the former decree to be carried out between the parties. In 1845, the son, being of age, barred the entail, and conveyed the fee to the deft. A bill was then filed, relying on the ejectment, and praying a declaration that it was unnecessary to carry on the reference, and that the former decrees might be in other respects carried out. Held, that such relief was a variation of the decree of 1844, which could not be given without re-hearing the cause.

*Semble*—This was a bill of review, which should not have been filed without leave of the Court.—*Chute v. M'Gillicuddy*, 11 I. E. R. 312. (C.)

12. The rule against re-hearing an appeal motion is not inflexible. It is a sufficient ground for refusing it that the case has been already anxiously considered.—*Lady Langford v. Mahony*, 11 I. E. R. 319. (C.)

13. After a decree to account, a minor deft. attained age. On a re-hearing, at his application, new enquiries were directed, though no new answer was filed, and although the minor had, after attaining age, contested the case under the former decree.—*Purcell v. Ruckley*, 12 I. E. R. 55. (C.)

14. An order to re-hear a cause petition will be granted on a motion of course, founded upon the certificate of counsel that the case is a proper one for re-hearing.—*Blount v. Gt. S. & W. Railway Co.*, 1 I. C. R. 590. (C.)



1. Under the 3 & 4 Vic., c. 107, s. 85, this Court has not jurisdiction to order that an insolvent be re-heard before an Assistant-Barrister, who has already adjudicated upon the case, but has made a mistake.

A re-hearing before an Asst.-Bar. can be directed only when the previous adjudication has been obtained by perjury, fraud, or other like acts, done by the parties.

*Semble*—The application for an order to re-hear should be made at the earliest opportunity.—*In re G.*, 2 I. C. R. 361; 3 I. Jur. 136, 279. (I.)

2. When a person not a party to a cause, but who has proved a demand in the office, is aggrieved by an omission in the final decree to provide for his rights, the Court will, notwithstanding some delay, give leave to present a petition of re-hearing, when he would have been entitled to a re-hearing as of right, if he had been a party to the cause.—*Guinness v. Darley*, 5 I. C. R. 227. (C.)

3. On a re-hearing documentary evidence, not offered at the original hearing, may be received; but depositions cannot be given for any purpose beyond identifying such documentary evidence.—*Johnson v. Mid. Gt. W. of Ir. Ry. Co.*, 5 I. C. R. 264. (C.)—[*See s. c.*, 6 H. L. Cas. 798; 4 Jur. N. S. 643.]

4. A respondent, who has had a petition dismissed with costs as against him, cannot, upon a subsequent change of circumstances, have the cause re-heard.—*Folliott v. Evanson*, 6 I. Jur. 51. (C.)

5. The M. R., on motion, before the passing of the C. A. Court (*Ir.*) Act 1856 (19 & 20 Vic., c. 92), made an order, which was reversed by the Lord Chancellor, from whose decision a motion, by way of appeal, was brought to the Court of C. A. *Held*, that the motion was in the nature of a second re-hearing, and should not be heard, since there were not any special grounds.—*Dobbyn v. Adams*, 6 I. C. R. 170; 2 I. Jur. N. S. 217. (C.A.)

6. The I. E. Court refused to grant a re-hearing *pro forma*, to enable an appeal to be brought to the Court of C. A., the intending appellant having permitted the month (allowed by the 12 & 13 Vic., c. 77) to elapse, under a mistaken idea that the time, within which he might appeal, had been extended by the 19 & 20 Vic., c. 92, to three months.—*In re Ashe's Estate*, 6 I. C. R. 33. (I.E.C.)—[*Affid.*: 6 I. C. R. 177; 2 I. Jur. N. S. 217. (C.A.)]

7. On re-hearing, the petitioner applied for permission to examine the witnesses to the will. The application was refused.—*French v. Copinger*, 6 I. C. R. 568; 3 I. Jur. 21. (C.)

8. A person had been named in the prayer of a cause petition as respondent, but had not been served with notice of the petition, and did not appear at the hearing, although aware

of the proceedings. His name did not appear in the docket for setting down the petition for hearing, and a decree having been made in the cause by consent, his name did not appear in the decree. Upon an application by him for a re-hearing of the cause—*Held*, that he was not entitled to have the cause re-heard, not being a party to the proceedings.—*Handcock v. Delacour*, 7 I. Jur. 252. (C.)

9. A petition was filed under the Ren. Lease. Conv. Act, in which the petitioner alleged that no demand had been made on him under the Tenantry Act. The respondent, though served with notice, neglected to appear on the hearing. An order for a f. f. grant was made. The Court allowed the petition to be re-heard, and varied its order, on an affidavit by the respondent, showing that the petitioner had suppressed a letter addressed to him by the respondent several years before, which might be held to be a demand under the Tenantry Act.

Waiver of a demand, if intended to be relied on by a petitioner, should be put in issue by the petition, and not by an affidavit in reply.—*Ex parte Bull*, 3 I. Jur. N. S. 332. (R.)

10. Cases decided in the Court of Appeal in Chancery are not to be re-heard.—*Falkiner v. Hornidge*, 9 I. C. R. 168. (C.A.)

11. A Judge of the L. E. Court disallowed E.'s claim on the schedule of incumbrances, and placed M.'s claim before W.'s. E. on appeal, abandoned all question of the validity of M.'s claim, and obtained a decree establishing his own claim on the schedule. W. withdrew his appeal. E., finding that the validity of M.'s claim would not be disputed, as he expected it would be in W.'s appeal, sought to have his original appeal re-heard, so far as it related to the validity of M.'s claim. *Held*, that the whole appeal must be re-heard.—*Eyre v. M'Dowell*, 5 I. Jur. N. S. 50. (C.A.)

12. The 98th G. O., 1843, limiting the time for applying to amend a decree to six days after the decree has been pronounced, will be construed strictly; the only remedy is by petition to re-hear.—*O'Neill v. Innes*, 5 I. Jur. N. S. 208. (C.)

13. A motion to re-hear an order or decision must be made within three months, and liberty must be obtained before notice of the re-hearing is served. The application for liberty to re-hear may be made *ex parte*.—*In re Johnstone's Estate*, 7 I. Jur. N. S. 36. (L.E.C.)

14. The Masters have jurisdiction to re-hear causes referred to them under the 15th sec. of the Ch. Reg. Act; but have only the same power and authority, and are bound in the same manner as the Court, in respect to the period within which causes may be re-heard. After the time limited by the 30th sec. of the Act, the Masters have jurisdiction to give leave to re-hear a cause, only upon being

satisfied that "substantial grounds probably exist for such re-hearing, and for the delay in bringing the same.

A decree was made in June 1855 in an administration suit. In July 1858 the petitioner was informed of the necessity of rectifying it. In 1859 he obtained leave to file a supplemental petition in the nature of a bill of review, which was dismissed without prejudice in Feb. 1860. In May 1860 he obtained leave to re-hear the original cause. *Held*, that the Master had not jurisdiction to make the order, having regard to the unaccounted for delay which had taken place.

Observations on the practice in the Master's office in administration suits.—*Nason v. Peard*, 12 I. C. R. 30. (R.)—[Overruled: *Sloan v. M'Callin*, 8 I. Jur. N. S. 201. (C.A.)]

1. The M. R. has jurisdiction to re-hear cause petitions heard before himself, within the limits and restrictions contained in the 30th sec. of the Ch. (Ir.) Reg. Act.

A petition was filed for an injunction and an account of the profits of a coal mine. On the 27th of May a decree granted the injunction, but not the account. On the 21st of June an action at law was brought for the profits, but stayed by injunction on the 4th of July. An order for a re-hearing was granted on a motion made early in Nov.—*Sloan v. M'Callin*, 13 I. C. R. 357. (R.)

2. *Semble*—When a cause has been sent by the Lord Chancellor to the Rolls Court, and has been heard before his Honor, no practice exists by which he can re-hear it.—*Sloan v. M'Callin*, 8 I. Jur. N. S. 201. (C.A.)

3. The Masters have not jurisdiction to re-hear causes referred to them under the 15th section.

*Nason v. Peard*, 12 I. C. R. 30 (R.), is overruled by *Sloan v. M'Callin*, 8 I. Jur. N. S. 201 (C.A.); *Cooke v. Franklin*, 16 I. C. R. 469. (R.)

#### LXXX. REJOINDER.

[See G. O. (1867), 83.]

4. In a suit to appoint new trustees, the Court permitted the replication and rejoinder to be withdrawn, and the bill amended, by making the infant child of the ptf.s, born after issue joined, a deft.—*Gavacan v. Brophy*, 2 Jo. 629. (E.E.)

5. A rejoinder falsely traversing matter of inducement, contained in a replication to a plea to a *sci. fa.* upon a receiver's recognizance, taken off the file, with costs.—*The Queen v. Foot*, 1 I. C. R. 9. (C.)

#### LXXX.\* REPLEVIN.

6. To warrant a party in issuing a writ of replevin, he should have been in clear and unequivocal possession of the thing replevied, when it was taken. A party, issuing the writ under improper circumstances, will be attached

for contempt; the writ will be quashed; and the goods ordered to be restored.—*Comerford v. Blake*, 2 I. E. R. 176. (C.)

#### LXXXI. REPLICATION.

[See 30 & 31 Vic., c. 44, ss. 68, 85: G. O. (1867), 82, 83, 123, 138, 256.]

7. After replication, a cause cannot be set down without giving deft. an opportunity to examine witnesses.—*O'Reilly v. Patterson*, Hay. & J. 210. (E.E.)

8. If the bill be amended, and notice given that the ptf. does not require an answer to the amendments, the deft., if he desires to answer them, must do so within the time allowed for answering when an answer is required. In such a case the ptf. acts irregularly in filing a replication before he has returned to the deft. his copy of the bill, amended. An answer filed after such a replication is irregular.—*Cathcart v. Hewson*, H. & J. 540. (E.E.)

9. There having been a decree to sell the whole lands, a reference to settle conditions of sale of a moiety was refused; because when a good title can be made to one moiety only, the Court cannot, on motion, direct that moiety only to be sold. The proper course is, to set down the cause for further directions.—*Piers v. P.*, S. & Sc. 414. (R.)

10. The name of a deft., a *femme covert*, having been omitted by mistake from a replication, the ptf.s. were permitted to amend it by inserting her name; but a motion for liberty to insert it *nunc pro tunc*, so as to speed the cause, was refused with costs.—*Moore v. Creed*, S. & Sc. 672. (R.)

11. All such notices and documents, as formerly should have been served through the Six Clerks, must now be served through the notice office. The copy of a replication served by ptf.'s solicitor on deft.'s solicitor is insufficient.—*Cremin v. Howroyd*, 1 I. E. R. 373. (R.)

12. An irregular replication, affecting to join issue with, amongst others, a deft. who had appeared, but had not answered, though he was only a formal party, is not a proceeding in the cause to save ptf.'s bill from being dismissed for want of prosecution.—*M'Loughlin v. Reilly*, 4 I. E. R. 175. (R.)

13. The replication should be filed against persons against whom process is prayed, only when they come within the jurisdiction.—*Stephens v. O'Shaughnessy*, 11 I. E. R. 279. (R.)

14. The Court will amend a replication, by altering the name, when issue has been joined with a person not a party to the record.—*Rowland v. M'Donnell*, 1 I. Jur. 195. (R.)

15. A rejoinder falsely traversing matter of inducement contained in a replication to a

plea to a *sci. fa.* upon a receiver's recognition, taken off the file, with costs.—*The Queen v. Foot*, 1 I. C. R. 9. (C.)

1. It is not an objection to a replication in *sci. fa.*, that it purports to be pleaded by the Queen, not by the Att.-Gen.—*Reg. v. Bowen*, 1 I. C. R. 241. (C.)

2. Whenever a plea alleges a will, the ptf. must file a replication.—*In re Martin*, 4 I. Jur. N. S. 214. (P.)

3. To a plea, denying that A. had died intestate, and propounding a will; the ptf., without serving notice, moved for leave to file special replications. *Held*, that the deft. should be served with two clear days' notice of the motion.—*Meek v. M.*, 5 I. Jur. N. S. 42. (P.)

4. When a plea alleged that the will propounded in the declaration had been revoked by a later will, the date of which was not known, the provisions of which were inconsistent with those in the will alleged, and which had been given by the deceased to the ptf., the Court required a replication to be filed by the ptf.—*Greer v. Waterson*, 9 I. Jur. N. S. 418. (P.)

REPORT. See PRACTICE, MASTER, REFERENCE TO.

RESTORING CAUSE. See PRACTICE, CAUSE, ADJOURNING, &c.

RETAINING CAUSE. See PRACTICE, CAUSE, ADJOURNING, &c.

LXXXI.\* REVIEW. See PRACTICE, BILL OF REVIEW—PRACTICE, COMMISSION OF REVIEW.

5. A commission of review is granted only in cases of a clear, distinct, and manifest error in law or fact.—*Kelly v. Thewles*, 2 I. C. R. 510. (C.)

REVIVOR. See PLEADING—BILL OF REVIVOR—PRACTICE, ABATEMENT AND REVIVOR—PRACTICE, SEQUESTRATION.

LXXXI.\*\* RIGHT AND AUTHORITY TO SUE.

6. Practice respecting issuing a *fi. fa.* upon a decree.—*Ould v. Griffin*, 3 I. E. R. 565. (E.E.)

LXXXII. SALES JUDICIAL. See LANDED ESTATES COURT, BANKRUPTCY, X—MORTGAGE, VII—PARTICULARS OF SALE—PRACTICE, COSTS.

[See 19 & 20 Vic., c. 77, s. 6; Settled Estates Act, 19 & 20 Vic., c. 120. As to Execution of Conveyance, see Trustee Act, 1850-1852.]

1. Sale; when Directed; on what Terms; where to take place.

a. By the Court of Chancery.

b. By the I. E. Court, or L. E. Court.

2. Who may Purchase at.

3. Vendor's Duties and Liabilities.

4. Purchaser's Rights, Liabilities, and Duties; respecting the Title.

5. Sale, when Completed; putting Purchaser into Possession.

6. Discharge of first Purchaser; substitution of another.

7. Opening Biddings.

a. Generally.

b. Deposit on.

c. Re-sale.

8. Of the Conveyance.

9. Setting aside Sale.

10. Other Cases.

LXXXII. 1. Sale Judicial; when Directed; on what Terms; where to take place.

a. By the Court of Chancery.

b. By the I. E. Court, or L. E. Court.

LXXXII. 1. Sale Judicial; when Directed; on what Terms; where to take place.

7. The Court will in proper cases refer it to the Remembrancer to settle conditions of sale.—*Bennett v. Beamish*, Jon. & Car. 178. (E.E.)

8. The Court will not set up land to be let, subject to the interests of the tenants resident thereon.—*Anon.*, 2 Jo. 630. (E.E.)

9. The Court will not set up a title, knowing it to be bad. When, therefore, the Court is apprised of a defect of such a nature, that, if it is of any importance, it must make the title not merely defective, but absolutely bad, the Court, though it may not deem the defect important, will not, by a condition of sale, preclude objection thereto.—*Bennett v. Wheeler*, 1 I. E. R. 18. (R.)

10. Though, in general, the Court will not give a decree to sell an equitable estate in lands, yet, if ptf. is not entitled to call for a conveyance of the legal estate, the Court will make such a decree.—*Tremble v. Simpson*, 6 I. E. R. 98. (E.E.)

11. Hearing for further directions; decree for a sale pronounced.—*Simpson v. O'Sullivan*, Dr. Rep. temp. Sug. 89. (C.)

12. A mortgagor having been convicted of felony, the mortgaged premises were set up for sale under the decree; but subject to the conditions that the purchaser should not require the deed to be executed by the Att.-Gen.; nor the record of the conviction to be made up.—*Anon.*, 4 I. E. R. 701. (E.E.)

13. The heir-at-law being an infant, the Court, in a suit by a simple contract creditor of the ancestor, in order to protect the infant's interests, abstained from giving the usual

directions for a sale, until the cause came back for further directions; but such is not the regular course.—*Lynch v. Joyce*, 3 Dr. & War. 849. (C.)

1. The decree declared ptf.'s demand a charge on the lands. Liberty was given to all parties to apply as occasion might require. Afterwards, on motion, the Court directed a sale.—*Watson v. Pin*, Dr. Rep. temp. Sug. 90. (C.)

2. The mortgagor having been convicted of felony, the mortgaged premises were set up to be sold under the decree, subject to the conditions that the purchaser should not require the deed to be executed by the Att.-Gen.; nor the record of conviction to be made up.—*Anon.*, 4 I. E. R. 700. (E.E.)

3. An estate was set up for sale in two lots. One was sold; but no bidder appearing for the other, its sale was adjourned. The Court approved of the following condition of sale for it:—That the purchaser should not require original searches for judgments against any person against whom such searches had been already made at the instance of the purchaser of the lot already sold, but should be satisfied with compared and certified copies of such searches.—*Fitzgerald v. Lane*, 2 I. E. R. 447. (R.)

4. By settlement of 1812, lands were limited to J. for life; remainder to T. for life; remainder to children of T., as he should appoint; in default of appointment, equally. The lands were subject to a rentcharge in fee, vested in H., the daughter of J., which was to commence on his decease. On the marriage of H. with W., J. charged his life estate with an annuity of £50. It, together with the perpetual rentcharge, was settled to the uses of W. and H., and their issue. J. and T. subsequently granted to D. a rentcharge, issuing out of the lands, for the term of twenty years; and demised the lands to a trustee for a like term, to secure its payment. J. died. After his decease W. filed a bill against T., his wife, and their children (who were minors), for an account of the sum due to him on foot of the annuities, and for a receiver; and obtained a decree declaring that the arrears of the annuity of £50 were a charge on the lands. D. also filed a bill against the proper parties, for an account of the sum due to him on foot of his annuity, and for a sale of the term. A decree having been pronounced in that suit to take an account of prior incumbrances, W. proved under it his demand in his own cause. In 1829 a decree was pronounced in D.'s cause, for a sale of the inheritance, and for payment thereof of the sum due to W., on foot of the annuity of £50; and a day to show cause was given to the minors. W. purchased the lands sold under that decree. Upon a bill of review by the children of T. charging that the decree of 1829 was erroneous, and that it, and the sale thereunder, had been concerted by fraud, which was not proved *Held*, that the decree was erroneous, as it directed the inheritance to be

sold for payment of a sum which only affected the life estate of J., and the sale was declared to be a sale of the life estate of T. only.

Costs of a bill of review and reversal given to the ptf., who succeeded in the suit.—*Talbot v. Minnett*, 6 I. E. R. 83. (E.E.)

5. A condition of sale—that the purchaser shall not be at liberty to investigate the right of the lessor in a lease for lives renewable for ever, which was decreed to be sold, to grant the same—will not be granted. But the Court will refer it to the Remembrancer to settle a condition of sale, that the purchaser shall not require the production by the vendors of the title of the lessor.—*Lahey v. Bell*, 6 I. E. R. 122. (E.E.)

6. When the agreement of the parties to a loan is, that the money shall be repaid by the creditor retaining the rents of certain lands of which he is tenant to the debtor, a sale of those lands will not be decreed.—*Maguire v. O'Reilly*, 9 I. E. R. 335; 3 Jon. & L. 224. (C.)

7. When a second incumbrancer's demand would exhaust the entire fund in a creditor's suit, the Court refused to allow him to pay off the first incumbrance and take a conveyance without the expense of a sale; but, all parties consenting, referred it to the Master to ascertain the value of the debt and estate, and if it would not be beneficial to have a sale, directed the conveyance to be made as asked.—*Lynch v. Kelly*, 9 I. E. R. 342; 3 Jon. & L. 628. (C.)

8. In proceeding under the 138th G. Rule of 1843, the practice is to require common, and not negative, searches to be taken out for the purpose of being laid before counsel, with the abstract of title, before it is laid before and approved of by the Master.

Costs of negative searches for that purpose will be disallowed in taxation.

The ptf.'s solicitor will not in the first instance, *i. e.*, prior to the sale, be allowed to charge for copies of deeds, &c., appearing in the abstract.—*Hutton v. Foster*, 2 I. C. R. 340. (R.)

9. A creditor who has obtained a receiver under the Judgment Act is a necessary answering party in a cause seeking a sale of the lands. The receiver cannot be extended from the matter to the cause, unless the creditor has filed his answer, and has had notice of the motion to extend.

But when it is sought to extend a receiver from one matter to another, or from a matter to a cause, in which a receiver only is prayed for, the debtor only, and not the creditor who has obtained the receiver, should be served with notice of the motion.—[*Walsh v. W.*, 11 I. E. R. 609, observed on.]—*Le Grand v. O'Neill*, 2 I. C. R. 569. (R.)

10. When the validity of an instrument under which the petitioners have obtained an order for sale is questioned, the Court will not consider that question; but will stay the pro-

ceedings, imposing terms upon the party to proceed elsewhere.—*In re Gerrard's Trusts*, 6 I. Jur. 19. (I.E.C.)

LXXXII. 1. a. *Sale Judicial, ordered by the Court of Chancery.*

1. When a ptf. obtains liberty to bid, the management of the sale will be taken from his solicitor.—*Drought v. Jones*, Fl. & K. 316. (R.)

2. The saving in the 3 & 4 Vic., c. 105, s. 22, of the rights of incumbrancers prior to the 1st of Nov. 1840, is solely for their protection. Therefore, in a suit by a judgment creditor to sell the conuzor's lands in his lifetime, he cannot rely on the existence of such incumbrances if the owners of them do not object to the sale.

*Semble*—This Court will sell an estate subject to incumbrances.—*Kieran v. Corr*, 11 I. E. R. 514. (C.)

3. A purchaser under the Bankrupt Court is bound by the abstract of title posted in the Court; by the particular or contract of sale; and by the advertisement thereof—all three combined; and will not be discharged because of unwritten or casual misrepresentations made out of Court. Notice of lease is notice of covenants. Purchases under bankruptcy materially differ from purchases under a decree in Ch., where there is no abstract of title posted.—*In re Kidd*; *ex parte Kirk*, 3 I. Jur. 354.

4. The Court will, on petition, grant an order for the sale of lands charged with poor-rates when civil-bill decrees for payment have been made against the respondent.—*The Guardians of Fermoy Union v. King*, 5 I. Jur. 74. (C.)

5. The Court of Ch. will not sell the arrears of rent due to the receiver by the tenants of lands in the possession of the Court, after those lands have been conveyed to a purchaser, if any of the parties object.

*Semble*—That the Court has full jurisdiction to make the sale, if such a course of proceeding be expedient, and all parties consent.—*Hoops v. The Earl of Kingston*, 5 I. Jur. 333. (C.)

6. Order made that the Master should let certain lands unless the parties in possession showed good cause to the contrary; and that on showing such cause they should state how they held the lands.—*Peile v. Bermingham*, 7 I. Jur. N. S. 274. (R.)

LXXXII. 1. b. *Sale Judicial ordered by the I. E. Court, or L. E. Court.*

7. Form of order for the sale of lands under the I. E. Act, at the petition of an owner, tenant for life, subject to incumbrances, remainder to his first and other sons in tail, remainder to himself in fee; there being no issue, and

notice having been served on the surviving trustee to preserve contingent remainders.—*Ex parte Lord Blayney*, 11 I. E. R. 183. (R.)

8. Cause was shown against a conditional order being made absolute; but in consequence of the deeds being in the possession of the petitioner, the party showing cause was not in a condition to prove his rights. The Commissioners would not order the deeds to be lodged in Court; but made the conditional order absolute in the first instance, upon which the petitioner would be compelled to lodge them.—*In re Orpen*, 3 I. Jur. 208. (I.E.C.)

9. The power given to the L. E. Court, under the 21 & 22 Vic., c. 72, s. 72, is discretionary, and exists both in the case of an incumbered and an unincumbered estate.

The consent of the landlord is not necessary; but the Court requires it to be clearly shown that his interest is not in any appreciable degree made less secure, less enjoyable, or less marketable than before. If there is any reason to believe that the petition has been presented, not for a *bona fide* sale, but to obtain an apportionment, the Court will make such an order as will apportion the rent only if the proceeding be duly prosecuted, and the sale duly had.—*In re Comyn's Estate*, 11 I. C. R. 330. (L.E.C.)

LXXXII. 2. *Who may Purchase at Sales Judicial.*

10. A receiver cannot, without special leave from the Court, buy the lands over which he is receiver.—*Alven v. Bond*, 3 I. E. R. 365; Fl. & K. 196. (R.)

11. It is irregular for a party in the cause to bid at the sale of lands set up under the decree, without having previously obtained the permission of the Court so to do. And the Court will not, in such case, on a certificate of his being the highest and best bidder, declare him the purchaser, unless special circumstances excuse his irregularity.—*Byrne v. Lafferty*, 8 I. E. R. 47. (R.)

12. An application that a party in the suit may bid at the sale must be on notice.—*Clarke v. Dobbin*, 8 I. E. R. 111. (R.)

13. It is contrary to the practice and policy of this Court to permit the receiver in the cause to bid at the sale of the lands over which he had been appointed.—*Anderson v. A.*, 9 I. E. R. 23. (R.)

14. *Quere*—Whether a debt., who has not the carriage of a decree, may bid at the sale in the Master's office without an order permitting him to do so?—*Munns v. Feris*, 11 I. E. R. 253. (R.)

15. Leave given to the ptf. to bid at the sale, without taking from him the carriage of the decree, when he was the first incumbrancer,

and the property clearly insufficient to pay his demand.—*Steele v. Devonport*, 11 I. E. R. 339. (R.)

1. The ptf. was allowed to bid, and at the same time to retain the carriage of the proceedings; the only other solicitor in the cause having, on a previous sale, raised objections to the title, and obtained the discharge of a purchaser.—*Bridge v. Egan*, 1 I. Jur. 43. (R.)

2. The Court will not permit a solicitor who has acted in a cause to bid, though he discharge himself.—*Keogh v. K.*, 1 I. Jur. 226. (R.)

3. The solicitor for X., ptf. in a suit to raise a charge on lands, purchased, in the name of a trustee, the lands, at a sale under the decree, which was conducted by him in a manner that showed either great negligence or a design to depreciate the property, and the proceeds of which were insufficient to discharge his demands for costs, without paying anything to X. The sale was declared void, on a bill filed by X. sixteen years afterwards, without any proof of its being at an under-value.

*Semble*—A solicitor having the conduct of a sale under a decree, is under an absolute incapacity to purchase at it.

Relief in such cases is given after a great lapse of time, and when there is a deception on the Court. *Semble*—There is no fixed period of limitation to bar relief.—*Atkins v. Delmege*, 12 I. E. R. 1. (C.)

4. Leave will be given to a creditor having carriage of the proceedings for sale of an estate, to bid at the sale; but he must first transfer the carriage of the proceedings to some other creditor, whom the Master shall direct.

On a motion by a creditor for leave to bid at a sale, if another creditor appear, and apply for the carriage of the proceedings, he will be entitled to his costs of appearing on such motion, if the Master afterwards give him the carriage of the proceedings.—*Molony v. Scollard*, 5 I. Jur. 204. (R.)

5. A., a solicitor, having a charge on real estate, caused a bill to be filed, in his partner's name, to raise the charge. A sale having been decreed, A., without the leave of the Court, purchased the lands in the name of B., to whom the conveyance was made.

The fact that A. was the real purchaser was never disclosed to the Master or the parties in the cause; and several orders were made on applications, in the name of B., calculated to lead the Court to believe that he was the real purchaser, though the whole of the purchase-money was paid by A. The Court, after the expiration of nineteen years, and after the death of A. and his partner, set aside the sale, although it was not proved to have been fraudulent or at an under-value.

It is a settled rule of the Court that the ptf. or his solicitor cannot bid at the sale under the decree without the leave of the

Court. Non-compliance with that rule will vitiate the sale.

If a solicitor or trustee secretly purchase in the name of another, at a sale under the Court, the sale is void.

When there has been concealment, a violation of the rule of the Court, or the sale was void, *laches* or lapse of time will not preclude relief.

Form of decree setting aside a purchase by a solicitor, and directing accounts, when no fraud or under-value was proved.—*Popham v. Exham*, 10 I. C. R. 440. (R.)

### LXXXII. 3. *Vendor's Duties and Liabilities.*

6. In sales under decrees, as in private sales, ptf. or vendor is not bound to furnish the purchaser with a fee for counsel, with the abstract of title, unless by special condition. The purchaser, if he requires the opinion of counsel, must take it at his own expense; but he will have only a qualified property in the opinion until the sale is complete.—*Alexander v. Crosbie*, 2 I. E. R. 141. (R.)

7. When a purchaser has been discharged on a report of bad title, it is the inheritor's right to have the estate again set up for sale. Therefore, the Court will not, against his desire, substitute, in place of the discharged purchaser a person who offers to take the estate at the same price, without objecting to the title.—*O'Connor v. Bernard*, 3 I. E. R. 496. (E.E.)

### LXXXII. 4. *Purchaser's Rights, Liabilities, and Duties; Respecting the Title.*

[See also LANDED ESTATES COURT.]

[G. O. of 1843-188, 139.]

8. A decree to sell lands did not direct that they should be sold subject to dower which one deft. had recovered at law; but the Remembrancer himself set them up subject thereto. *Held*, that the sale was not irregular; that the Remembrancer has a right to ascertain if a bidding be *bona fide*, and to refuse to accept a bidding which he considers not *bona fide*.—*Eyre v. Lynch, Hay & J.* 505. (E.E.)

9. A purchaser under a decree, who has gone into possession, cannot prevent the purchase-money being paid out, by alleging that the landlord claims title to the premises because of a forfeiture, and threatens to bring an ejectment for them; the Court having previously overruled an exception, taken by the purchaser to the report of good title, founded upon that defect in the title.—*Sparrow v. Cooper*, 1 Jo. 72. (E.E.)

10. A purchaser under a decree is entitled to the rents of lands purchased from the gale day next preceding the payment of the purchase-money into the bank; and to have all the outgoings of the estate cleared off up to that time.—*Montgomery v. Coslett*, 2 Jo. 174. (E.E.)

1. The Court does not insure to a purchaser of lands sold under its decree the rents which accrued due between the lodgment of the purchase-money in Court and the execution of the injunction to put him into possession, except when the lands are in the possession of a receiver of the Court. An application, to have the rents paid out of the purchase-money, refused with costs.—*Nunn v. Mahon*, 2 Jo. 181. (E.E.)

2. A purchaser under a decree will not be held to his purchase, unless all parties having judgments, &c., appearing on record against the vendor, whether prior or subsequent to the claim to raise which the bill was filed, are brought before the Court so as to bind their rights.—*Piers v. P.*, 1 Dr. & Wal. 265. (C.)—[Affg. S & Sc. 379. (R.)]

3. A purchaser under a decree, under colour of an injunction to put him into possession, dispossessed persons who claimed adversely to the title of the parties to the cause. The Court granted a writ of restitution to restore them to the possession; and a reference to the officer to ascertain the amount of damages sustained by them in consequence of the ouster. The purchaser was ordered to pay those damages, with full costs; the applicants undertaking not to bring an action.—*Anderson v. Barry*, 2 Jon. 631. (E.E.)

4. The decree in a suit, to raise charges created by will, directed the sale of lands, the legal estate in which was vested in an adult trustee in trust for minors. The trustee and *c. q. trusts* were parties to the suit. A day to show cause was given to the latter. A purchaser under the decree was compelled to take the title.—*Kirby v. O'Hea*, 2 Jon. 635. (E.E.)

5. The gale days being 1st May, and 1st Nov., and the purchaser having lodged one-fourth of the purchase-money on the 28th April, and the remaining three-fourths on the 1st May, though the sale was not confirmed until afterwards—*Held*, that he was entitled to the rents due on the 1st May.—*Scott v. Rothe*, 1 I. E. R. 105. (R.)

6. When a promissory note, payable with interest generally, has been lodged in Court, in part payment of the purchase-money, that will be regarded as a contract between the parties out of Court; and the word "interest" means legal interest, not the Court rate of interest, according to G. O. 204.—*Gibbons v. Berry*, S. & Sc. 158. (R.)

7. When a purchaser moves on consent to lodge a promissory note in part payment of his purchase-money, the consent and note should both specify the rate of interest payable on the note.—*O'Connor v. Richards*, S. & Sc. 160. (R.)

8. If lands be leased by the inheritor after a decree to account has been pronounced against him, they will be set up, in the first instance, subject to the lease; and if they do

not produce sufficient to pay the incumbrances decreed, with costs, they will then be set up discharged of the lease.—*Barrett v. Birmingham*, S. & Sc. 678. (R.)

9. A tenant under the Court for seven years pending a cause, whom the purchaser's injunction has dispossessed in the interval between two gale days, is bound to pay rent for the period during which he occupied after the last gale day.

It will be referred to the Remembrancer to ascertain the amount of such rent, having regard to the season of the year when the broken gale occurred; and to the nature of the demised premises.—*Jameson v. Farrer*, 2 I. E. R. 513. (E.E.)

10. A purchaser who, having lodged only one-fourth of his purchase-money, was discharged upon a report of bad title—*Held*, entitled to the costs incurred by him in investigating the title, but not to interest on the one-fourth.—*Feely v. Kilkenny*, Fl. & K. 456. (R.)

11. A purchaser, discharged upon a re-sale under an order opening the biddings, is not entitled, against ptf. or his solicitor, to the costs which he may have incurred in investigating the title, there not having been any reference to the Master to report touching good title.—*Sullivan v. Bayley*, Fl. & K. 460. (R.)

12. The omission from a rental, of a reservation of mines, minerals, and of a right of entry to search for them, is a valid objection to the title.—*Barton v. Lord Downes*, Fl. & K. 505. (R.)

13. When an estate for life was sold under a decree, and the tenant for life died after lodgment of one-fourth of the purchase-money and obtaining the rule *nisi*, but before the sale was confirmed—*Held*, that the purchaser was bound to complete his purchase.—*Vesey v. Elwood*, Fl. & K. 667. (R.)

14. When, in consequence of a defect in the title to lands sold under a decree, the purchaser is discharged, he is entitled to the full amount of his purchase-money, interest, and taxed costs, without deduction. Therefore, when the interest and costs are to be paid out of a fund consisting of rents of the lands, the discharged purchaser is entitled to an order, including the amount of the usher's poundage payable in respect of the sum which he is entitled to receive out of the fund.—*Johnson v. Reardon*, 3 I. E. R. 200. (R.)

15. If a good title cannot be given to the purchaser under the decree, without the aid of a supplemental suit, he will, if so desiring it, be discharged, as in case of a title absolutely bad.—*Plumptre v. O'Dell*, 4 I. E. R. 602. (R.)

16. *Semble*—That when the estate bargained for has been in its creation voidable, it lies

upon the purchaser, objecting to the title upon that ground, to show that it has been avoided.

When the validity of the title depends upon the operation of deeds and acts of the parties upon legal estates, the purchaser is entitled to have the opinion of a Court of Law. before the title can be forced upon him.—*Massey v. Batwell*, 2 Con. & L. 413; 4 Dr. & War. 56. (C.)

1. By deed of 1709, the lands of S., together with twelve other denominations, were conveyed to J., subject to a rent of £126, which was to cease upon payment of £1800. In the will of J., dated 1717, and in family settlements executed in 1756 and 1778, no notice was taken of the existence of this rent. In 1841, S. was sold under a decree in a foreclosure suit. In the rental and abstract the lands were described as fee-simple, and in a declaration made by the deft., under 4 & 5 W. 4, c. 62, he stated, that no part of the rent had ever been paid by him or any of his ancestors out of S. There was no evidence to show that the rent had not been paid out of the other denominations. *Held*, that there were not sufficient grounds to presume that the rent was either released or extinguished, and that it was a valid objection to the title.—*Warren v. Bateman*, Fl. & K. 448. (R.)

2. The omission in a rental, of a reservation of mines, minerals, and of a right of entry to search for them, is a valid objection to the title.—*Barton v. Lord Downes*, Fl. & K. 505. (R.)

3. When a party objects to a Master's report as to title, his proper course is to file exceptions, and to set them down in the cause list for hearing.

A ptf. cannot, after proceeding before the Master on a reference as to title, rely on previous acts of the purchaser, as binding him to his purchase, notwithstanding a report of bad title.

A purchaser is not bound to abide by the opinion of his counsel.—*Harewood v. Bland*, Fl. & K. 540. (R.)

4. A ptf.'s solicitor was held personally liable for the costs of a reference to the Master to enquire and report whether a purchaser was entitled to any and what compensation by reason of a misdescription in the rental, caused by his neglect in not examining the tenants' leases lodged in the Master's office.—*Taylor v. Gorman*, Fl. & K. 567. (R.)

5. By a lease dated in 1777, lands were demised for three lives therein named, "or the longest lives of them, or whatever life or lives shall for ever or hereafter be nominated or appointed, added or inserted, on the back of this indenture." There was no express covenant for perpetual renewal. The lessee's interest was sold to a purchaser under a decree, as one held under a lease renewable for ever. Upon exceptions to report of bad title—*Held*, that the title was not such a one as the Court would compel a purchaser to

take.—*Sheppard v. Doolan*, Fl. & K. 598. (R.); on appeal, 5 I. E. R. 6. (C.)

6. A purchaser, discharged by reason of bad title, is entitled to the costs of counsel's opinion upon the title, and of the preparation of the case for counsel.—*Barton v. Lord Downes*, Fl. & K. 633. (R.)

7. The ptf.'s attorney will be permitted to make copies of deeds lodged in the office, for the purpose of making out title, and will not be obliged to take out office copies thereof.

*Semble*—That an order of the Court is necessary for the purpose.—*Bradshaw v. Short*, 3 I. E. R. 198. (E.E.)

8. A purchaser under the decree of the Court took several objections to the title, in some of which he failed, and succeeded in others. *Held*, that he was entitled to the costs properly and necessarily incurred by him in investigating the title, after deducting thereout the costs occasioned by the objections in which he failed.—*Brown v. Lynch*, 4 I. E. R. 59. (E.E.)

9. A party quarrelling with the report of bad title, should move to set it aside, not to send it back to the officer to be reviewed; and the notice of motion ought to state the grounds upon which the party seeks to set aside the report.—*Vincent v. Thwaites*, 4 I. E. R. 689. (E.E.)

10. In the published rental of premises advertised to be sold under decree, one portion was described as subject to "a lease for sixty-eight years from the year 1778," at the yearly rent of £9. 13s. 10d., which was very inadequate. The sale took place in Nov. 1840, the purchaser went into possession in Nov. 1841. In Jan. 1842, he heard that the lease in question was misdescribed in the rental, but took no step. On the 12th of March 1842, the lease in question, with the title-deeds (which had been lodged in the Master's office for the purposes of the sale, &c.), were handed over to him, and the lease turned out to be for sixty-eight years from 1796, and a further term of seven years added by endorsement. He now (3rd May 1842) moved for a reference to the Master to enquire and report whether he was entitled to any and what compensation by reason of the misdescription? *Held*, that he was entitled to compensation, notwithstanding the lateness of his application; and that the ptf.'s solicitor should pay the costs of the reference, and of this motion.—*Taylor v. Gorman*, 4 I. E. R. 550. (R.)

11. In cases of specific performance, the Court will, for the future, add to the reference as to whether a good title can be made, a direction to the Master to enquire and report at what time a good title could have been shown; as interest on the purchase-money will be payable from that date.—*Enraght v. Fitzgerald*, 2 Dr. & War. 43; 1 Con. & L. 181. (C.)

12. Lands were let under the Court for seven years, pending a judgment creditor's petition.



Before the term expired, the lands were sold out of Court, with the petitioner's consent, to pay their demands. The tenant gave possession to the purchaser. *Held*, that the tenant was bound to pay rent for the interval during which he continued in possession, from the last gale day to that on which he gave possession to the purchaser.—*Jackson v. J.*, 5 I. E. R. 591. (E.E.)

1. A., tenant in tail, executed a settlement in 1809, on the marriage of his eldest son, B., with C., and thereby conveyed his estates to trustees for 100 years, to secure C.'s jointure, on a contingency then mentioned, and to secure an annuity for A.'s wife; subject thereto, the lands to A. for life, remainder to trustees for 200 years, to secure a sum of £3000 for A.'s two remaining children, T. and J.; subject thereto to B. for life, remainder to trustees for a term, to secure portions for his children; subject thereto to his first and other sons successively in tail. B. was a party to this settlement, and entered on A.'s death. In 1811, on the marriage of J., his share was, by a settlement to which A. and B. were parties, partly settled for her benefit, and partly assigned to her intended husband's father, who subsequently assigned his interest over; and in 1823, those assignees filed a bill to raise this charge. In 1834, a receiver was appointed, who continued in receipt of the rents from that time. In 1837, a decree on sequestration was obtained against B. and C. and their eldest son, D.; and in 1839 there was a decree for a sale of the 200 years' term, and all proper parties were directed to join in the conveyance. In 1839, D., without the concurrence of B., executed a disentailing deed. B. died in 1840, and D. conveyed the lands, subject to the term, to R. and his heirs, who conveyed the lands for value to the widow of B. *Held*, that a purchaser, under the decree, of the term, declining to take a case to a Court of Law, was bound to accept the title; the settlement of 1809 having been only voidable, but not void, and being binding on B., who derived benefits thereunder; and having been sufficiently confirmed by D.; and that judgments entered up against B. and D., since 1823, did not bind the term; and that B.'s widow, having purchased *pendente lite*, was bound by the decree of 1839.—*Massey v. Batwell*, 2 Con. & L. 413; 3 Dr. & War. 56. (C.)

2. When the purchaser of an interest sold under a decree of the Court, acquires by that means a knowledge of a defect in the title to that interest, and afterwards buys up the estate of the person interested in taking advantage of that defect, the Court will not allow him to rely on the doctrine that a purchaser is not obliged to take a doubtful title, in support of an objection to the title founded on that defect.

*Quære*—Whether, if the objection were valid, the Court will allow him to rely on it?—*Sheppard v. Doolan*, 5 I. E. R. 6; 3 Dr. & War. 1. (C.)—[See 4 I. E. R. 654; Fl. & K. 598. (R.)]

3. Lands held under a lease for lives renewable for ever, were, by marriage settlement, conveyed to trustees to the use of G., the husband, for life; remainder (subject to jointure and portions for younger children) to the first and other sons of the marriage in *quasi* tail. After the death of G., the younger children filed a bill to raise their portions. In 1838 there was a final decree for a sale, under which, in 1843, the lands were sold. In 1842, a re-renewal of the lease was executed to the deft., the *quasi* tenant in tail, against whom, pending the suit, several judgments had been obtained, of which no notice had been taken. The purchaser objected to the title because of those judgments. *Held*, on exception to the Master's report of good title, that the renewal of 1842 ought to have been to the trustees of the settlement; that its having been to the deft. made him a mere trustee of the legal estate upon the trusts of the settlement; and that the judgments in question did not constitute a valid objection to the title.—*Leake v. L.*, 5 I. E. R. 361. (R.)

4. Before a purchaser under decree was put into possession, rents to which he was entitled became due, and payments were made by the tenants to the receiver. *Held*, that the payments made after the rents to which the purchaser was entitled had become payable, should be applied in payment of those rents, and not of the arrears of rent previously due.—*Hargrave v. Holland*, 5 I. E. R. 169. (R.)—[Overruled: *Doorley v. Power*, 11 I. E. R. 577.]

5. A life estate was sold by the Court, and the life dropped before the sale could have been confirmed. *Held*, that the purchaser was bound by his bidding in the Master's office, and should complete his purchase.—*Vesey v. Elwood*, 5 I. E. R. 184. (C.)

6. In England the money is not required to be lodged until the title is approved of, and there are frequent applications made to the Court there for liberty to bring in the purchase-money, so that the purchaser may be entitled to the rents from the date of the lodgment. The question, whether the purchaser is entitled to interest on his purchase-money, is also frequently debated there.—*Vincent v. Thwaites*, 5 I. E. R. 528. (E.E.)

7. Lands were sold under a decree of the 30th of April 1840, one-fourth of the purchase-money deposited, a conditional order to confirm the sale, and subsequently the remaining three-fourths lodged in bank to the credit of the cause; all upon the following day. Order to confirm the sale made absolute on the 12th of May. *Held*, that the purchaser was not entitled to the rents from the 1st of Nov., the gale-day next preceding the day of sale.—*Vincent v. Thwaites*, 2 I. E. R. 426. (E.E.)

8. It appeared that the receiver had passed his final account in 1829, when there was a small sum due to him; that the purchaser under the decree in the cause was put into

possession the same year; and that the receiver had not received any of the rents since his last account. The Court granted an order to vacate the receiver's recognizance, although he had not been formally discharged. The injunction to put the purchaser into possession amounts to a discharge of the receiver.—*Anon.*, 2 I. E. R. 416. (E.E.)

1. A motion to invest the one-fourth of the purchase-money in  $\frac{1}{2}\%$  per cent. stock, must be upon notice.—*Lee v. Poole*, 2 I. E. R. 419. (E.E.)

2. The purchaser of lands sold under a decree is entitled to a map and survey of them, prepared during the progress, and for the purposes of the cause.—*Jephson v. Minton*, Flan. & K. 95. (R.)

3. When a purchaser, having lodged the one-fourth of his purchase-money, refused to lodge the three-fourths, unless the abstract of title were first delivered to him, and no report of good title had been obtained—*Held*, that the purchaser was not entitled to the abstract until the confirmation of the sale.

The deposit of one-fourth of the purchase-money made by the purchaser, who afterwards refuses to complete the purchase, can in no case be forfeited, until the Master has made his report of good title; and even then it will require a strong case to induce the Court to declare it forfeited. The more proper course is, for the ptf. to move for a re-sale, and that the deposit be retained to indemnify the estate the costs and consequences of such re-sale.—*Warren v. Bateman*, Fl. & K. 189. (R.)

4. A purchaser of an estate sold under a decree of the Court of Ch., who confirmed his sale on the 28th April, but whose purchase-deed was not executed until the Dec. following, is liable for the tithe composition which accrued due in Nov., the lands being in the occupation of tenants from year to year.

A person who has been declared the purchaser on a sale under the Court of Ch., has, in the contemplation of a Court of Equity, after the confirmation of the report, an estate in the lands.

A purchaser of an estate buys it subject to the outgoing incidents to it.—*Stewart v. Alexander*, 2 Jo. 530. (E.E.)

5. The purchaser of a reversionary interest under the decree of the Court, is bound to pay interest at the rate of  $\frac{1}{2}\%$  per cent. on the three-fourths of his purchase-money, from the date of the report of good title, he not having been guilty of any *laches* up to that period, to the date of the lodgment.

The rule is the same if the property be in its nature reversionary, though there be a small present profit arising from it.

Upon obtaining the report of good title it is the duty of the purchaser to bring in the remainder of his purchase-money; and if he is afterwards discharged on account of defect of title, he will be entitled to interest thereupon; he is therefore properly chargeable with in-

terest from that time.—*Hutchinson v. Cathcart*, 1 I. E. R. 452; Jon. & C. 260. (E.E.)

6. A purchaser of lands sold under the decree of the Court, pursuant to a rental which stated that they were demised for a term therein mentioned, is entitled to confirmation, if it should appear that they are demised for a longer term; but he may, by his acts, waive his title thereto.—*Horner v. Williams*, Jon. & Ca. 274. (E.E.)

7. When lands, let under the Court for seven years pending the cause, are sold under the decree, and the tenancy is determined before the expiration of the term, the purchaser having notice of the tenancy at the time of the sale, and going into possession, is not entitled to the crops sown by the late tenant, and growing on the lands. The late tenant is entitled to emblements, and is not affected by the custom of the country as to the outgoing tenant's right after the expiration of his lease.

*Semble*—In such a case, if the purchaser insist on retaining the crops, the Court will direct a reference, at his expense, as to the value of the crop, and the damage sustained by the late tenant in relation thereto.—*Creed v. C.*, 3 I. E. R. 207. (R.)

8. In a purchase of a life interest under the Court, when the life dropped after the rule *nisi* to confirm the report of the sale had been obtained, and before it could be made absolute—*Held*, that the purchaser was bound to pay the purchase-money.

In sales under the Court the title of the purchaser has relation back to the time of bidding, as in sales out of the Court it has to the date of the contract.—*Vesey v. Elwood*, 2 Con. & L. 47; 3 Dr. & War. 74. (C.)

9. A purchaser cannot be attached for not completing his purchase until after a report of good title has been obtained.

The purchaser of a life estate under a decree, having lodged one-fourth of the purchase-money, served the rule *nisi* to confirm the sale on the 22nd of Jan. The eight days limited by the rule expired on the 3rd of Feb., and no cause was shown. The tenant for life died on the 12th of Feb., and before the sale had been absolutely confirmed, or the remainder of the purchase-money had been paid in, the purchaser refused to proceed, the estate having determined. *Held*, that as the sale might have been confirmed, the purchaser, although, not guilty of any unreasonable delay, was bound and liable to the risks and losses of the estate, provided a good title could have been made. The Court, therefore, refused his application for the one-fourth of the purchase-money lodged by him; and ordered, on the ptf.'s motion, that it should be referred to the Master to enquire, &c., whether a good title could have been made at the time of the sale, or at any and what time previous to the death of the tenant for life.—*Vincent v. Going*, 3 I. E. R. 480. (R.)

This order was reversed by Lord Plunket, on appeal.—*Ibid*, 489, n.

1. When the purchaser has been discharged upon a report of bad title, it is the right of the inheritor to have the estate again set up to be sold. Therefore, the Court will not, against his desire, substitute in the place of the discharged purchaser a person who offers to take the estate at the same price, and not object to the title.—*O'Connor v. Bernard*, 3 I. E. R. 496. (E.E.)

2. A purchaser under the decree of the Court was discharged upon a report of bad title, and it was ordered that his deposit be paid back to him, without prejudice to his applying for the interest thereon, and his costs, when there should be a fund in Court. He died before either the costs were taxed, or a fund for their payment was realised. *Held*, that on a fund being afterwards realised, his personal representative was entitled to be paid thereout the interest and costs.

An order, awarding an attachment against the purchaser for not completing his purchase had been made. Thereupon he obtained an order of reference as to the title. *Held*, that he was not entitled to interest for the period intervening between the date of the lodgment of the deposit and the date of the order of reference, or to the costs incurred by him during that interval; and that the costs of the order for the attachment should be set off against the interest and costs due to him.—*Mackay v. Orr*, 3 I. E. R. 499. (E.E.)

3. When lands are sold under a decree, the purchaser is entitled to have all judgments paid out of the purchase-money satisfied upon record.

But when a judgment creditor filed a charge under the decree, to which the ptf. filed a discharge, relying on the Statute of Limitations, and nothing further having been done upon the charge, the Master's report did not find anything due on foot of the judgment.—*Held*, that notwithstanding the death of the judgment creditor, the purchaser under the decree was not entitled to have such judgment satisfied, nor the lands released from it by deed, as the filing of the charge made the creditor a *quasi* party, and bound him and his representatives by the decree.

When a judgment creditor comes in under a consent order after the final decree, and the Master finds against the judgment, as being barred by the Statute of Limitations, the Master's report must be made up and confirmed; otherwise the purchaser will have a right to have the judgment satisfied, or a release executed.—*Fitzgerald v. Lane*, 3 I. E. R. 339. (R.)

4. A purchaser under decree is not entitled to require, at the cost of the estate, a further opinion of counsel in favour of the title, besides that which he gets with the abstract under Lord Redesdale's rule. He may, if he pleases, take a further opinion; and, if afterwards discharged from the purchase by rea-

son of defects of title discovered by such further opinion, he will be entitled to be repaid the reasonable costs incurred in obtaining it.—*Barton v. Lord Downes*, 4 I. E. R. 607; Fl. & K. 633. (R.)

5. A purchaser under a decree of the Court took several objections to the title, in some of which he failed, and succeeded in others.—*Held*, that he was entitled to the costs properly and necessarily incurred by him in investigating the title, after deducting thereout the costs occasioned by the objections in which he failed.—*Brown v. Lynch*, 4 I. E. R. 59. (E.E.)

6. A purchaser of lands sold under a decree is not bound to see to the application of the purchase-money.—*Blake v. B.*, 5 I. E. R. 596. (E.E.)

7. If the ptf., or a person standing in the situation of a ptf., purchases under the decree, the transaction is to be examined with the utmost strictness, and if the decree be reversed for error, the sale cannot be upheld. *Talbott v. Minnett*, 6 I. E. R. 83. (E.E.)

8. A purchaser under the decree of a Court of Equity, obtaining a conveyance of the legal estate, is not entitled to have, at the expense of the funds in the cause, a release from equitable incumbrancers, who were parties to, and paid under the decree.

Upon the sale of an estate, if there be an outstanding trust term, the vendor must (if required) have such term surrendered at his own expense; or, if the term be so circumstanced that, although the trusts have been fulfilled, it has never been assigned to attend the inheritance, the vendor must, if required, have it so assigned at his own expense; but if the term have been already assigned to attend, and the purchaser requires it to be further assigned to a trustee nominated by himself, such further assignment must be at the purchaser's expense.

The lands of B. and D. being subject to a jointure secured thereon by a trust term, by condition of sale it was stipulated that, without prejudice to the rights of the jointress, B. should be sold as if exclusively liable to the jointure, and D. as if exonerated therefrom; and that, to this end, the purchaser of D. should have from the purchaser of B. a deed of indemnity. The costs of the preparation of such deed must be borne by the vendor, the condition being silent on the subject.—*Keatinge v. K.*, 6 I. E. R. 43. (R.)

9. Purchasers of an estate sold in several lots under decree, requiring to compare with the original deeds lodged in the Master's office, for the purposes of the sale, the copies furnished to them with the abstract of title, the Court ordered that the deeds should be handed over to the ptf.'s solicitor, he undertaking to re-lodge them after the comparison should be made; and that the ptf.'s solicitor should produce them in his office to the solicitors for the several purchasers, and permit

them to compare the deeds with the copies furnished, or to be furnished, to them.—*Reynolds v. R.*, 6 I. E. R. 75. (R.)

1. The tenants of the lands sold under the decree, refusing to give copies of the leases under which they claimed to hold the lands, the Court ordered them to produce their leases to the attorney for the ptf., to enable him to take compared copies thereof. Some of them having disobeyed that order, the Court, upon the parties in the cause and the purchaser undertaking to confirm the leases, ordered an attachment to issue against the tenants so refusing; same not to issue if the tenants produced their leases, and permitted copies thereof to be taken.—*Scott v. Miller*, 6 I. E. R. 120. (E.E.)

2. Form of order to the Master to deliver title deeds and documents to the ptf.'s solicitor to be deposited in the Bank of Ireland for the benefit of the several purchasers under the decree; and allowing the purchaser to compare copies with the original deeds.—*Cunningham v. Hume*, 6 I. E. R. 76, note. (R.)

3. Judgments entered pending a suit for the sale of an estate constitute no valid objection to the title.—*Massey v. Batwell*, 5 I. E. R. 382. (C.)

4. A., by will, after appointing lands to his eldest son, G., gave all the residue of his real estate among his six younger sons, subject to his debts and some charges. Shortly afterwards he obtained a conveyance of freehold property, and died without having altered or republished his will, leaving his eldest son of full age. Upon A.'s death in 1791, the six younger sons entered into possession of, *inter alia*, the after-acquired property, and so continued until the present time. G. died in 1819, leaving an infant heir. It did not appear that any claim was ever made on the part of G. during his life, or after his death by his heir-at-law, and the younger sons continued during the entire of such period in the undisturbed enjoyment of the property. In 1839 the premises were sold under a decree of the Court in a suit instituted by a judgment creditor of A., in which the infant heir was a deft. After this sale the heir died, and the suit was not revived against the next heir. The abstract of title stated all the above matters, and was verified by two affidavits, deposing as to the fact of the possession, and the receipt of rent by the younger sons. *Held*, upon objections to the title by the purchaser, that by the operation of 3 & 4 W. 4, c. 27, such a title had been created as the purchaser was bound to take.—*Scott v. Nixon*, 3 Dr. & War. 388; 6 I. E. R. 8. (C.)

5. A purchaser under a decree for a sale for the payment of equitable incumbrances, has not a right to have the estate released therefrom, the effect of the decree being to extinguish them as to the estate sold. He must have a conveyance of the legal estate

discharged of all incumbrances, legal, and equitable; but he is not entitled to any other evidence of the exoneration of the estate from equitable incumbrances extinguished, by the decree, than such as the decree itself, and the proceedings under it, afford him.—*Webber v. Jones*, 6 I. E. R. 142. (R.)

6. A purchaser under the decree of this Court is not entitled to have his objections to the title disposed of before he brings in the whole of the purchase-money, and has the sale absolutely confirmed. If, after lodging one-fourth of the purchase-money, he delays to complete his purchase, the party having the carriage of the decree may obtain an order that he bring in the remaining three-fourths within a limited time, or, in default of so doing, that his one-fourth be forfeited, and that there be a re-sale. It is no objection to the application for such order, that there has not been any report upon, or reference as to, the title.

The purchaser under a decree in a creditor's suit, objected to the title, on the ground that there were outstanding judgments confessed by the deft. before the filing of the bill, which afterwards, pending the cause, were revived and redocketed under Moore's Act, and that they were not bound by the decree. The Master overruled the objection, being of opinion that the judgments in *sci. fa.* were to be considered as new and original judgments; that the first were gone, and that the others, having been obtained *pendente lite*, did not affect the title to be conveyed to the purchaser. Upon exceptions to the report of good title—*Held*, that they should be allowed; that the judgments in *sci. fa.* were not to be considered as creating new rights, but merely as revivals of rights under the original judgments; and that the purchaser's objection to the title should therefore be allowed.—*Newman v. Fitzgerald*, 6 I. E. R. 258. (R.)—[See *Hawkes v. Swiney*, *ibid*, 259, note.]

7. J. conveyed his real estate to trustees, to whom he was indebted, in trust to sell and pay themselves; to pay the surplus arising from the sale to J.; and to convey to him the residue of the lands (if any remained unsold); the receipt of the trustees to be sufficient discharge to a purchaser. The deed contained covenants for repayment of the money by a certain day, for good title, and quiet enjoyment. On a sale of the estate, under a decree to execute the trusts of the deed—*Held*, that judgments confessed by J., after the execution of the deed, and still outstanding, were not objections to the title.—*Alexander v. Crosbie*, 6 I. E. R. 513. (R.)

8. Though the Court will not, in general, give a decree for a sale of an equitable estate in lands, yet, if the ptf. is not entitled to call for a conveyance of the legal estate, it will make such decree.—*Tremble v. Simpson*, 6 I. E. R. 98. (E.E.)

9. The purchaser under a decree having objected to the title for want of parties to the

suit, an application on behalf of the ptf., that the purchaser might be discharged from his purchase was refused.

Leave given to file an exception to the officer's report (of bad title). *nunc pro tunc*.—*Conyers v. Crosbie*, 7 I. E. R. 300. (E.E.)

1. Four tenants in common, being entitled to the first estate tail in X. under a deed, were before the Court in a suit instituted to establish a will devising Y., the validity of which depended on the deed. In a cross-cause impeaching the deed, only two of them were made parties. Both causes having been heard together, a decree was made on a compromise setting aside the deed as to X., and directing a reconveyance by all proper parties. A person who would have been entitled to a prior estate tail in X. under the deed was born. A conveyance was afterwards executed in pursuance of the decree, in which the four tenants in common joined. *Held*, that the inheritance having been imperfectly represented in the cross-cause, a good title could not be derived through the decree.—*Pasley v. Lord Clanmorris*, 7 I. E. R. 442. (C.)

2. Under a deed in the nature of a mortgage, containing a trust for sale, the trustees and mortgagee can make a good title to a purchaser without the concurrence of judgment creditors of the mortgagor, whose judgments are subsequent to the deed; and it makes no difference that the sale is bad in a suit founded on the deed.

Though a purchaser is not bound by the opinion of his counsel on the abstract of title waiving an objection, yet if the objection does not go to the root of the title (*ex. gr.*, if it be for the non-production of an old deed), if the purchaser continues to treat, and leads the seller to further expense for some time after the first waiver, he cannot afterwards rely on it.—*Alexander v. Crosbie*, 6 I. E. R. 513, affirmed on appeal.—*Alexander v. Crosbie*, 7 I. E. R. 445; 1 Jon. & L. 656. (C.)

3. When lands sold under a decree contain a quantity less than that stated in the rental, the ptf. cannot, the purchaser not having made any objection, set aside the sale, or insist that the purchaser shall not have compensation if he choose to hold his bargain.—*Magawley v. Brady*, 7 I. E. R. 557. (R.)

4. A purchaser who has been discharged from his purchase on report of bad title, is entitled to interest on his one-fourth of the purchase-money from the date of its lodgment, up to the lodgment of the residue.—*Linehan v. Cotter*, 8 I. E. R. 104. (R.)

5. The purchaser lodged his promissory note for £1500, the amount of the purchase-money, but was afterwards allowed £288. 2s. 4d., compensation for a rentcharge to which the estate was found to be liable. *Held*, he was chargeable for interest on his note for the difference only.—*Wilson v. Poe*, 8 I. E. R. 139. (R.)

6. Part of the lands sold under the decree was liable to quit-rent and tithe rentcharge, though not so stated in the rental. Another part was stated in the rental to be held from year to year, by C., at a rent payable on 1st May and 1st Nov.; but the purchaser found, after he lodged his one-fourth of the purchase-money, that it was held for a term, with power to the tenant to surrender on any 25th of March or 29th of Sept., giving six months' previous notice; and it was surrendered on the 25th of March then next. The tenure by which other parts were held was not stated in the rental; but the purchaser, on going into possession, found they were held for lives still subsisting. *Held*, that the purchaser was entitled to compensation for the quit-rent, but not for the tithe rentcharge. That C. was, at the time of sale, a tenant, not from year to year, but for a term to end on the 25th of March then next; and the purchaser was entitled to compensation therefor; and that he was not entitled to compensation in respect of the premises of which the tenure was not stated, as he should have ascertained how they were held.—*Martin v. Cotter*, 8 I. E. R. 147. (R.)

7. The Court will require that the promissory note lodged by the purchaser for his purchase-money shall bear interest at £6 per cent.—*Anon.*, 8 I. E. R. 158. (R.)

8. Lands were decreed to be sold subject to a charge. An application, on consent, to lodge the money in Court, refused. — *v.* —, 8 I. E. R. 514. (E.E.)

9. When a creditor to the estate is declared the purchaser, at a sum less than his demand, he must lodge his promissory note in lieu of the purchase-money, in order that the Side-bar Rule to confirm the sale may be entered.—*Edwards v. Backas*, 8 I. E. R. 585. (R.)

10. The lands of M., part of the manor of C., were conveyed in 1823 to A. and his heirs, "saving and excepting thereout the manorial rights belonging to the manor of C., and the tolls and duties of the fairs and markets thereof, and also any liberty of turbary or limestone heretofore granted therein or thereout by B. or his ancestors, to any of the tenants of the said manor, as expressed in their leases respectively." There was no limestone or turbary on M., nor had any manorial rights been exercised for more than twenty years, nor any fair or markets ever held. In 1845, M. was set up and sold as held by a clear indefeasible title in fee-simple. Upon objection to the title, the Master in Ch. reported the title bad. *Held*, upon exceptions to the report, that, under the circumstances, the saving in the deed did not form any ground for the report of bad title.

In the rental under which the lands were sold a part was thus described:—"Term for which demised; under an article of agreement for lease for four lives, bearing date 1804, and one year." The sale took place in Jan. 1845; and on the 9th of April the

purchaser's solicitor received a copy of the article, and then first discovered that the agreement was for a lease to commence after the expiration of a then subsisting lease which did not expire until 1843. On the 24th of Oct. he lodged objections to the title, and subsequently swore that he was misled by the statement in the rental. *Held*, affirming the report, that the mis-statement was ground for discharging the purchaser, not for compensation. That the delay in lodging the objection disentitled the purchaser to his costs.—*Martin v. Cotter*, 9 I. E. R. 44. (R.)

1. When lands decreed to be sold to pay the ptf.'s demand were of insufficient value, and no *bona fide* bidders could be procured, the Court permitted the ptf. to bid, without taking from him the carriage of the decree.—*Spaight v. Paterson*, 9 I. E. R. 149. (R.)

2. Lands were set up as held under a clear and indefeasible title in fee-simple, and in the rental it appeared that they had been conveyed forty years before, reserving a right to cut turf and quarry limestone to tenants of another estate, although the right had never been since exercised, and there were no turf bogs worked or quarries open on the estate; but it did not appear that there might not be turf; and there was no proof that there was not limestone. *Held*, a good objection to the title, and the purchaser discharged.

The rental at the sale contained an obscure statement, leaving it doubtful whether a tenant held for lives named in 1804 or 1843; it proved to be the latter; and the purchaser swore he had been misled. *Held*, a sufficient ground for discharging the purchaser.

A delay of seven months *held* no waiver of an objection to the title, which turned upon a question of fact.

Observations on clearing a title, by showing the non-existence of rights under a reservation or onerous covenant not stated; and on the duty of being careful and explicit in preparing for a sale.—*Martin v. Cotter*, 9 I. E. R. 351; 3 Jon. & L. 495. (C.)

3. By deed of 1809, between A. and B., Deputy Barrack-master General, reciting that part of A.'s estate had been fixed on for the site of barracks, and that it was necessary that a liberty or privilege for the troops for exercising should be granted on another part; A. conveyed nine acres for ever for the site of the barrack, and also granted, let, and demised unto B. 100 acres, to hold to him and his successors for ever, for the purpose only of exercising thereon, in trust for his Majesty, his heirs and successors, reserving a rent of £150. There was a covenant for the payment of the rent, and a power to the lessor to resume the 100 acres, upon giving another piece of ground in lieu of it. After the signatures, it was declared in the attestation clause that nothing in the deed should be construed to deprive A. or his heirs of the fee and inheritance of the full and free enjoyment and possession of the 100 acres, "the

liberty of exercising thereon being only intended to be granted." A., in 1818, demised the 100 acres to C., for lives renewable for ever, subject to the perpetual right of exercising thereon, &c. In 1823, C., being a trader, upon his marriage covenanted that whatever estate or property, real or personal, he died possessed of, should be charged with an annuity for his wife, in the event of her surviving. C. died in 1842, leaving his widow still surviving. C.'s interest in the lease was sold under the decree; and the rental stated "the lands were subject to a perpetual right to be used by the military as an exercise ground." *Held*, confirming the Master's report of bad title, that the deed of 1809 was not a mere grant of an easement in the 100 acres, but was an absolute conveyance of the land, the fee of which was, by the 7 G. 3, c. 6, vested in the Crown, without livery of seisin.

Though a conveyance to one and his successors gives but a life estate, and in conveyances operating under the Statute of Uses, the seisin must be commensurate with the use, yet *Semble*, this does not apply to a case of trust.

*Held also*, that it being doubtful whether, upon the true construction of the covenant in the deed of 1823, the lands were bound thereby, the Court would not compel the purchaser to take a title subject to so serious a question.—*White v. Baylor*, 10 I. E. R. 43. (R.)

4. Lands were sold as fee-simple, but the purchaser, after the sale, for the first time found that, though held in fee-simple, the owner was bound to raise and maintain the fences, and keep the drains and watercourses clear, &c. *Held*, that the purchaser could not be compelled to accept a title when the enjoyment of the estate was subject to such qualifications.—*Larkin v. Lord Rosse*, 10 I. E. R. 70. (R.)

5. The purchaser of lands sold under the decree of the Court is not entitled, before the title has been accepted by him, to see the opinion of counsel on the statement of title, given pursuant to the 138th G. O.—*Stack v. Baxter*, 10 I. E. R. 102. (R.)

6. The Court refused to allow a purchaser to lodge his promissory note in lieu of the three-fourths of his purchase-money, upon the allegation that there would be a large surplus, and the inheritor consenting, notice not having been given to all the creditors.—*Gardiner v. Blesinton*, 11 I. E. R. 357. (R.)

7. A sum not exceeding the interest of the purchase-money, or the rents of the estate, paid to the purchaser when the money had been lodged three years, but the title was not yet completed.—*Piers v. P.*, 11 I. E. R. 358. (R.)

8. When a property was set up for sale by an auctioneer in the country, first in lots, then part of it in batches of some lots together, then the whole together, the auctioneer having stated that he would receive biddings, and

that the Master would declare the purchaser, a person who was the highest bidder for a batch of some lots, and afterwards for the whole, was held to his bidding for the lots, though he was misled by the mode of selling, and intended to bid for the whole.

When a sale is had in the country, under the 139th Order, the bidders are not entitled to have notice of the confirmation of it by the Master.—*O'Grady v. Brady*, 11 I. E. R. 400. (C.)

1. Rents, received by the receiver after the gale day next succeeding the lodgment of three-fourths of the purchase-money by a purchaser of lands under a decree, are applicable:—first, to pay solvent arrears; then to pay rent due to the purchaser, whether he has or has not gone into possession, and whether the purchase-deed has or has not been executed.—*[Lee v. Moorhead*, 2 Moll. 509; *Hargrave v. Holland*, 5 I. E. R. 169, overruled.]—*Doorley v. Power*, 11 I. E. R. 577. (R.)

2. Lands were, by settlement, subject to £800 secured by a term of 100 years, and by a subsequent will to £4200, secured by another term of 99 years, as portions for younger children, of whom the ptf. and A. were two. By will the lands were devised, subject to the two terms, after prior limitations, to A. for life, remainder to his first and other sons in tail. A. being in possession, a bill was filed to raise the two sums, to which a minor tenant in tail, born afterwards, was made a party by supplemental bill. The Master reported interest accrued on the two charges during the possession of A. The final decree confirmed the report, and declared the sums reported charges on the terms; and in default of payment thereof, directed the Master to sell the several lands and premises comprised in the respective terms, to pay the respective demands decreed charges thereon. The lands were set up and sold for the residue of the two terms. *Held*, on exceptions to the Master's report of good title, that as the minor tenant in tail was a party in the cause, the decree was not erroneous, though it directed a sale for the payment of interest accrued during the possession of A.; nor because it omitted to set off the interest which ought to have been paid by A. against his share of the portion, and a sum which was reported to A. charged on other lands directed to be sold by the decree. But the Court directed the Master to allocate to the minor, out of the sum so reported to A., the amount of interest which he was liable to pay.

That although the two charges affected the terms separately, and were not distinguished in the report or decree, as it was clearly for the benefit of the minor that the terms should be sold together, the title was not objectionable on that ground.

That as the minor's estate was puiſne to the terms, the omission to give him a day to show cause would not affect the purchaser.—*Edgeworth v. E.*, 12 I. E. R. 81. (R.)

3. A purchaser relied on the memorial of a deed as creating an objection to the title, and

succeeded on an exception founded upon it. *Held*, that he could not afterwards object that the deed itself was not produced, although there was not a condition of sale dispensing with its production.—*Stewart v. Marquis of Conyngham*, 1 I. C. R. 534. (R.)

4. The petitioner's title was questioned. It was stated in an affidavit that he was abroad, and that his residence was not known. The Court settled interrogatories, and directed them to be left with his solicitor; and that they should be returned, answered, within fourteen days.—*In re Hamilton's Estate*, 3 I. Jur. 121. (I.E.C.)

5. An estate was so situated that its value would be considerably increased or deteriorated by the deaths of certain parties. The rental stated that twelve acres, part of the demesne, were not part of the property to be sold under this Court; but were held under a lease which terminated with the present sale. It afterwards appeared that these twelve acres included the front lodge, and principal, if not only practicable means of entry to the demesne. P. purchased in August last. On an application by him to be discharged from the sale—*Held*, that his delay in paying the purchase-money, and in making the present application, had disqualified him from the indulgence sought.

*Seemle*—A conditional order for an attachment against the purchaser, for non-payment of the purchase-money, having been obtained upon a former day, was now made absolute.—*In re Jessop*, 3 I. Jur. 223. (I.E.C.)—*Ibid*. 385. (C.)

6. Lands sold under the Court were purchased by M.K., who immediately sold them to A. for £50 more than he had paid; received his I. O. U. for the amount; and with his consent entered a declaration of trust in his favour in the Commissioner's books. A. refused to complete the purchase. *Held*, on an application to compel him to do so, that the Court could not recognise the sub-sale.

The practice of the Court is only to recognise the person who bids for the property, when he bids in his own name; when he bids with consent for another person, to hold both accountable, unless he shall have previously declared to the Court that he is only bidding as a trustee.

Where a sub-sale takes place, or for any other cause it is the desire of the purchaser on record that some other party should be placed in his stead, so as to release him from responsibility, his proper course is, to make an application to that effect to the Court.—*In re Stirling's Estate*, 3 I. Jur. 229. (I.E.C.)

7. Vendors contracted to give the purchaser a perpetuity of lands held on lease for lives renewable for ever. The purchaser paid his purchase-money the day after the sale, and called for the perpetuity, which had not been then (nor even at the date of this motion) procured. A few days after, the premises were accidentally destroyed by fire. On an

application by the purchaser to be discharged from his purchase—*Held*, that the vendors, not having given what they had professed to sell—a perpetuity—the contract was not fully completed; and, that the purchaser should be discharged.—*In re Carew*, 3 I. Jur. 233. (I.E. C.)

1. When the rental contains misdescriptions of facts, which do not interfere with the enjoyment of the estate, the Court will not release a purchaser; but will refer it to the Commissioner, in chamber, to enquire, and award adequate compensation.—*In re Clare's Estate*, 3 I. Jur. 367. (I.E.C.)

2. A discharged purchaser is *prima facie* entitled to all the costs incurred by him in investigating the title. The Court therefore refused to give a special direction to the Taxing-Master to disallow costs incurred in consequence of the purchaser not objecting earlier to the title.—*Weir v. Chamley*, 2 I. C. R. 566. (R.)

3. Premises having been sold, the ptf., the first incumbrancer, was declared the purchaser. The incumbrance being for a larger amount than the purchase-money, she was allowed to lodge her promissory note for one-fourth of the purchase-money; the sale to be thereupon confirmed, *nisi*, and when the time should expire, she should lodge her promissory note for the remainder of the purchase-money.—*Hammond v. Mitchell*, 6 I. Jur. 249. (R.)

4. The question, on a reference to enquire whether timber be essential to the possession and enjoyment of an estate, is one partly of fact and partly of opinion and taste; the end of the enquiry being, to ascertain whether, though in respect of its intrinsic value, it may admit of pecuniary compensation, its adventitious value as an ornament to the estate be not so material as that it may reasonably be supposed that, without it, the purchaser would not have entered into the contract.

When the timber, the subject of the enquiry, grew on a comparatively small portion of the estate, detached from the demesne, and not in view of the mansion-house, pleasure grounds, or avenues, and the Master reported that it was not essential to the possession and enjoyment of the estate, though there were conflicting affidavits as to whether it was ornamental or not, the Court (reversing the order of the M. R.) refused to send back the report to be reconsidered on further evidence.

A motion to vary a Master's report was directed to stand over for further affidavits. *Held*, that a party who had filed an affidavit could not, on appeal from the order made on the further affidavits, object to the admission of them as irregular and contrary to the practice of the Court.—*Stewart v. Conyngham*, 3 I. C. R. 104. (C.)

5. According to the practice of the I. E. Court, the purchaser is entitled to the rents from the last gale day before the purchase, as the Commissioners charge the purchaser

interest at £5 per cent. from the expiration of fourteen days from the day of purchase or confirmation of the sale. The sale took place on the 21st of July; the purchaser was declared entitled to the gale due on the 29th of Sept. following, although he did not lodge his purchase-money until the 21st of Oct.

After a receiver has been discharged, and the purchaser has gone into possession, the Court will not make an order that the tenants shall pay to the purchaser the rent which fell due prior to the discharge of the receiver; the receiver is to receive the arrear due prior to his being discharged, although the purchaser may be entitled to a portion of such arrear. The Court of Ch. does not order the tenant to pay such arrears to the purchaser.

The practice of the Court of Exchequer, as stated in *Jackson v. J.* (5 I. E. R. 591) and *Jameson v. Farrer* (3 I. E. R. 346) is not the practice of this Court.

Form of order in such case.

The Side-bar Rule, discharging a receiver, on the certificate of a sale in the I. E. Court, does not operate as an absolute discharge. Although he cannot proceed against the lands for arrears of rent, he may proceed against the tenant by attachment or sequestration, on the Master's certificate, or by action in the name of the Master, when the tenant holds by lease under the Court, for the arrears due when the receiver was discharged.—*Walcott v. Condon*, 3 I. C. R. 481; 6 I. Jur. 381. (R.)

6. The conditional order to confirm a sale must be served on the inheritor, even if he have not appeared in the cause.

Although, as a general rule, the time for showing cause against a conditional order does not run when the Rolls Court is not sitting, the Lord Chancellor will, under particular circumstances, direct the officer to issue the Side-bar Rule to lodge the remaining three-fourths of purchase-money, though the conditional order to confirm the sale had not been served until after the Rolls Court had risen for the Vacation.—*Copeland v. Conway*, 3 I. C. R. 486. (C.)

7. In the cause of *C. v. C.* lands were sold, and the ptf.'s demand paid out of the purchase-money. The purchaser obtained a conveyance, and went into possession of the lands. He was afterwards evicted by title paramount, from a very small portion of his purchase. *Held*, that he was not driven to seek a remedy under the covenants in his conveyance, but was entitled to compensation from any fund in Court which might be applicable to pay compensation to him.

The cause of *C. v. C.* was instituted by the holder of an incumbrance pulse to that of the ptf. in *C. v. C.*, and sought a sale of lands which had been subject to the charge of the ptf. in the first suit. The whole of the purchase-money in *C. v. C.* had been distributed, but a fund arising from lands subject to the demand of the ptf. in that suit had been transferred to *E. v. C.* *Held*, that this fund might be applied to compensate the purchaser for the loss sustained by his eviction.



A purchaser under the Court may, in some circumstances, insist on compensation, even after conveyance executed and possession taken.

A purchaser under the Court is not confined to his own purchase-money as security for any compensation to which he may be entitled, but may obtain it from a fund produced by other lands, which had been subject to a demand discharged out of his purchase-money.—*Cooper v. C.*, 4 L. C. R. 75; 7 L. Jur. 49. (C.)

1. A purchaser of lands by public auction agreed to pay the purchase-money in March 1852, and fulfil the conditions of sale, one of which was, that the purchaser should be entitled to the rents and profits from the 1st Nov. 1851; and if the completion of the purchase should be delayed "from any cause whatsoever" beyond March 1852, that he should pay interest on the purchase-money from Nov. 1851. The vendor agreed to furnish an abstract of title within four days, but it was not sent within the specified time, and the title was not completed until Jan. 1854. The purchaser had, before March 1852, drawn the amount of the purchase-money out of the funds, and lodged it in bank ready for payment, but received little or no interest upon it. In the beginning of the latter month, he sent an agent to the vendor, offering the money, and declining to pay interest upon it after that date. The vendor refused to receive the principal until the title should be completed. In the latter end of the same month the purchaser wrote to the vendor stating that, if the abstract of title should be furnished within one week, he was ready to complete the contract, provided that his right to the rents and profits should not be interfered with, and that he should not be asked for interest upon the purchase-money. No direct reply was given, but negotiations were continued. A petition having been filed by the vendor to compel the purchaser to complete the purchase, and pay interest upon the purchase-money—*Held*, that the purchaser was not liable for interest upon the purchase-money, the vendor having been in default.

That the purchaser was entitled to the rents and profits of the lands.—*Kellett v. Farrelly*, 7 L. Jur. 184. (C.)

3. A solicitor bidding at a sale in the I. E. Court, and signing his name in the book "in trust," without disclosing the name of his c. q. t. was held personally liable for the deficiency which arose on a re-sale of the lands.—*In re Scott's Estate*, 7 L. Jur. 329. (I.E.C.)

4. The rental of lands sold in the I. E. Court stated that the property was held under two leases, for three young lives, with a concurrent term, at a rent, and that the lease contained covenants by the lessee to expend £300 in building a dwelling-house and for planting and registering trees. One lease contained a covenant to expend £300 in building a house; but there were blanks for the names of the covenantor and covenantee, and for the years within which the covenant was to be performed. The other lease contained a covenant

merely to improve a dwelling-house; and each lease contained a covenant to plant timber trees every year. *Held*, that the observations in the rental were not so specific as to amount to misrepresentation, such as would entitle the purchaser to be discharged from his purchase.

That the purchaser had constructive notice of the covenants in the leases.

That the purchaser was entitled to compensation, by reason of the covenant to build being limited in point of time.—*In re Irwia*, 5 L. C. R. 290. (P.C.)

5. The L. E. Court, even in the absence of an express condition of sale to that effect, does not guarantee the particulars of tithe rentcharge, the amount and apportionment of which are settled by Act of Parliament.

The rental incorrectly stated the names of the parties liable to the tithe rentcharge, but the same amount was in fact paid by other parties. A motion by a purchaser, to be discharged was refused; but compensation was given, at the rate of the purchase, for any substantial error of detail.—*In re Moorhead's Estate*, 12 L. C. R. 371; 6 L. Jur. N. S. 319. (L.E.C.)

6. Upon a claim for compensation by a purchaser in the L. E. Court, upon the ground of discrepancy in the acreage of a lot—*Held*, that when, after the discovery of an error in the rental, the solicitor having the carriage of the sale took every possible means of publishing the true acreage, and the estate was sold from an amended rental, after an announcement by the Judge, of the mistake, the purchaser was not entitled to compensation; and that the Judge of the L. E. Court was a competent witness of the state of the facts.—*In re Browne's Estate*, 6 L. Jur. N. S. 328. (C.A.)—[Affirming decision: *ibid*, 142. (L.E.C.)]

7. In 1851, an order for the sale of the estate of O., a tenant for life, was, upon the petition of a mortgagee, made by the I. E. Court; of the estate, lot 14 was sold by private sale, and in 1855, conveyed by the Commissioners, to the purchaser. It was described in the rental as containing, amongst other denominations, "Coolacarra mountain, in common to tenants, 363a. 2r." A map, approved of by the Master of the Court, was annexed to the conveyance, which contained no reference to the rental. The denominations and quantities in both were the same.

A portion of O.'s estate, sufficient to pay all incumbrances thereon, having been sold by the I. E. Court, an order was made, on the application of the petitioner, dismissing the order for sale as to the unsold portions; O. undertaking to pay petitioner's post costs and a balance of interest due; and also to abide any further order to be made by the Commissioners in the matter.

The purchaser was put by the sheriff into possession of lot 14, including the 363 acres, called "Coolacarra" in the map and rental.

In 1859, H., having disputed the purchaser's title to a portion of Coolacarra, containing 270 acres, the purchaser brought an action of trespass against H., and obtained a verdict.

That verdict was set aside. On a second trial, the jury found that the 270 acres had never been known as Coolacarra, and were the property of H. The purchaser applied to a Judge of the L. E. Court, that the order dismissing the order for sale, as to the unsold portion of O.'s estate, should be varied, and further portions sold, sufficient to pay him compensation for the loss of the 270 acres, and also the costs incurred in the two trials. The Judge ruled that the purchaser was entitled to compensation for the value of the 270 acres, and that O. in accordance with his undertaking was bound to pay it; but refused to grant any compensation for the costs incurred in the trials. O. having appealed from the whole order, and the purchaser having appealed from the latter portion—*Held*, that the decisions as to compensation in cases of sales in the Court of Ch. do not apply to sales in the I. E. Court, in which the conveyance contains no covenants, and the purchaser had no opportunity of investigating the title.

That O. was not responsible for the compensation, by reason of the undertaking given by him, when the order for sale was dismissed as to the unsold portions of the estate; as the true construction of that undertaking was, that he would abide any further order which the Court might make in the matter as it then stood.

That there being no fund upon which the Court could act, and the Court having no jurisdiction to sell any further portion of the estate, the purchaser could not obtain any compensation whatever.—*In re Otway's Estate*, 13 I. C. R. 222; 7 I. Jur. N. S. 189. (C.A.)

1. A. and B., petitioners in the I. E. C., for sale of lands, purchase them. The map to the I. E. C. conveyance included a plot of land alleged to have belonged to X., an adjoining owner. On application to the Court, to compel A. and B. to re-convey to X., *Held*, that as the circumstances of the case negated the presumption of misconduct on the part of A. and B., or their solicitor, arising from the mistake, the Court had not jurisdiction to direct a re-conveyance.

*Semle*—That the principle which guides the Court is, that if, by any fraud, negligence or other misconduct of the party having the carriage of the sale, he procures the Court to sell and convey to him property which ought not to have been sold or conveyed, the Court has jurisdiction to compel him to re-convey, if the property remains in his hands, and to make good the loss, by pecuniary compensation, if it has passed from him into the hands of a purchaser for value.

From a clear mistake, the Court will presume misconduct, unless and until the contrary is proved. A substantial loss must have been suffered by the applicant.—*In re Collis's Estate*, 14 I. C. R. 511; 9 I. Jur. N. S. 177. (L.E.C.)

#### LXXXII. 5. Sale, when completed: putting Purchaser into Possession.

2. The receiver passed his final account in 1829, when a small sum was due to him. The

purchaser under the decree in the cause was put into possession in that year; and the receiver had not, since his last account, received any rents. The Court granted an order to vacate the receiver's recognizance, although he had not been formally discharged.

The injunction to put the purchaser into possession amounts to a discharge of the receiver.—*Anon.*, 2 I. E. R. 416. (E.E.)

3. In the Exchequer the three-fourths of the purchase-money cannot be paid in until the sale is confirmed. *Secus* in Ch.—*Vincent v. Thwaites*, 2 I. E. R. 427. (E.E.)

4. When a life estate was sold under a decree, and the tenant for life died after the lodgment of one-fourth of the purchase-money, and the obtaining of the rule *nisi*, but prior to the confirmation of the sale—*Held*, that the contract was not complete until the sale was confirmed by order of the Court; and that the purchaser was discharged from his contract. [Reversing the decision of the M. R., 1 Fl. & K. 250.]—*Vincent v. Going*, 3 Dr. & War. 75, note. (C.)

5. That the Master in the cause has executed the deed of conveyance for the principal debt, does not preclude his giving the usual certificate to enable the purchaser to obtain an injunction to be put into possession.—*Lawler v. Drew*, 7 I. E. R. 637. (R.)

6. When the conveyance to a purchaser states that a tenant is under terms to surrender to the landlord upon a particular day, the Court will not, if he fails to do so, issue an attachment against him.

[*Per* Longfield, C.:—The words "under terms" only express the terms of his tenancy.]

If such a tenant refuses to attorn as tenant at sufferance to the landlord, the Court will issue to the sheriff an injunction to put the landlord into possession.

The document, stamped with the stamp of the Notice-office, is *prima facie* evidence of all it contains; and an attachment will be issued against a solicitor who alters it.

*Quare*—Does every interest, saved by the Court, become a legal interest?—*In re Fitzpatrick*, 3 I. Jur. 54. (I.E.C.)

#### LXXXII. 6. Discharge of first Purchaser; Substitution of another.

7. A person who opens a sale under the decree of the Court, undertaking to pay the former purchaser his costs and interest, will not be released from his undertaking, though the estate be sold to another person at a great advance of price.—*O'Beirne v. Macmahon*, 2 Jones, 589. (E.E.)

8. A purchaser of two lots, as to one of which the biddings were opened, was released from his bidding for the other, upon undertaking to pay the costs of the re-sale.—*Gregg v. Glover*, 1 I. E. R. 211. (R.)

1. The Court will not set up for sale lands the title to which it knows is bad.

*Semble*—If the owners, and the creditors interested in the produce, do not object, the Court will allow a party to apply to stand in the place of a purchaser discharged because of bad title.—*Piers v. P.*, S. & Sc. 414. (R.)

2. A solvent person, who had directed his agent to bid £1 more than any other bidder at a letting under the Court, would not be discharged from his bidding, though it was much higher than the real value. He was given the option of having the lands set up again, without discharging him from his bidding, and subject to his making compensation for any difference between the two lettings.

*Semble*—If he could have shown that the opposing bidder was employed merely to raise the rent, or had any ill-will against him, or was in collusion with any of the parties, the application to be discharged might have been granted.

After enquiry by the inheritor's solicitor, the inheritor being a minor, the rent was reduced, by consent, from £261 to £200 per annum.—*Coote v. C.*, 2 I. E. R. 159; S. & Sc. 693. (R.)

3. A solvent person, who has been declared tenant to lands let under the Court, will not be discharged from his bidding, because he had bid beyond the real value, and his life had been threatened if he should take possession; but will be permitted to have the lands re-let, upon undertaking to abide the Court's order consequent upon such re-letting.

The lands having, upon the re-letting, produced a less rent, a reference was granted to ascertain the amount of compensation. The applicant was ordered to enter into a recognizance to pay it by half-yearly payments during the term of the original letting.—*Cox v. C.*, S. & Sc. 697. (R.)

4. Upon motion to substitute one purchaser for another, there must be an affidavit that no money has been paid for the substitution.—*Vincent v. Going*, Fl. & K. 428. (R.)

5. A purchaser, having lodged one-fourth only of his purchase-money, was discharged upon a report of bad title. *Held*, that he was entitled to the costs incurred by him in investigating the title, but not to interest on the one-fourth.—*Feely v. Kilkenny*, Fl. & K. 456. (R.)

6. If a good title cannot be given to the purchaser under a decree, without the aid of a supplemental suit, he will, if he desires it, be discharged as in case of a title absolutely bad.

When a necessary party is not before the Court, a report of good title, "the ptf. undertaking to file a supplemental bill, and obtain a decree against such party," is irregular.—*Plumtree v. O'Dell*, 4 I. E. R. 602, n. (R.)

7. The costs of a discharged purchaser will not be given against the ptf., but will be paid

out of the fund in Court. If there be no fund, or an insufficient one, a receiver will be appointed over the lands to pay them.—*Cuffe v. Young*, 10 I. E. R. 233. (R.)

8. The purchaser of a leasehold interest under a decree is bound by notice of all the covenants contained in the lease under which the property is held.

The omission to state, in the rental of a leasehold sold under a decree, a covenant in the lease against the exercise of particular trades, is not misdescription, although the value of the premises may be lessened by the covenant. But when the rental described the premises as held for the residue of a term at a yearly rent, though by the breach of a covenant the term had been forfeited, or an additional rent incurred, at the election of the lessor, the Court held it misdescription, and discharged the purchaser.

The rental described premises as let by one lease at one rent, whereas they were let by two leases at two separate rents, together equal to that stated in the rental. *Held*, that although there was misdescription, it was not such as affected the title.

A., having a term for 150 years, assigned it by mortgage in 1794, and in 1806 took a new lease for 130 years of the same premises, his interest in which was sold under a decree in 1846. No evidence was given to show that the mortgage was paid, or when interest had last been paid on it. *Held*, that the fact of the mortgage being dated in 1794 was not of itself evidence against a purchaser that the mortgage was paid off or barred by the Statute of Limitations.

The cases of *Pope v. Garland*, 4 Y. & Col.; *Jones v. Edney*, 3 Camp.; *Flight v. Booth*, 1 Bing. N. C.; *Barton v. Lord Downes*, Fl. & K.; *Flight v. Barton*, 3 M. & K., reviewed and considered.—*Spinner v. Walsh*, 10 I. E. R. 386. (R.)

9. A purchaser of a leasehold under a decree is affected with notice of all clauses in the lease; but he has a right to assume that the premises are lawfully in the condition in which they are sold. Therefore, when a lease contained a clause of forfeiture for the exercise of a trade, which was that carried on on a part of the premises of comparatively little value for any other business—*Held*, a ground for discharging the purchaser, though he had been some time in possession, and there was a waiver by the landlord for the time past.

A purchaser under a decree is not bound to make his objections to the title in any particular order.—*Spinner v. Walsh*, 11 I. E. R. 597. (C.)

10. The rental of lands sold under a decree stated the date, tenure, and rent of a tenant's lease, but not a clause in it giving the tenant power, under restrictions, to fell and dispose of the timber, which was very valuable. *Held*, that the purchaser, having notice of the lease, was bound by constructive notice of the clause relating to the timber.

The rental described lands as held by lease

for three lives and 31 years, the lease being for three lives and the life of the survivor; and if all the lives should die before the expiration of 31 years, for so much of such term of 31 years from that period as should be to come upon the decease of the survivor. *Held*, that the rental being substantially correct, there was no misrepresentation which would entitle the purchaser to be discharged from the purchase. — *Vignolles v. Bowen*, 12 I. E. R. 194. (R.)

1. Lands held under a bishop's lease for 21 years were sold under a decree. The rental stated the date of the lease, and that the lands were subject to a rentcharge which appeared to be a permanent charge on them. *Held*, that the purchaser was bound by constructive notice of a non-alienation clause and other unusual covenants in the lease.

That he was bound by notice of the deed granting the rentcharge, and all its contents, and could not therefore object to the purchase because the rentcharge was secured by a term short by six months of the twenty-one years, with a *t. g.* covenant for renewal. — *Vaughan v. Magill*, 12 I. E. R. 200. (R.)

2. A party purchased an estate, but (owing to fortuitous circumstances) was unable to lodge the purchase-money. He stated all the facts fairly to the Court within a reasonable time, and applied to be released from the purchase; or to assign the lots to the parties interested, which was refused. Subsequently, having agreed to assign the lands to a third party, the Court permitted him to declare a trust in favour of such party. — *In re Hemworth*, 3 I. Jur. 402. (I.E.C.)

3. After lands have been sold under a decree, the Court may direct a sole ptf. to be substituted as purchaser for another party who had bid at the sale, and had been declared the purchaser, he consenting thereto. — *Moorhead v. M.*, 7 I. Jur. 16. (R.)

4. A purchaser, discharged from his purchase on account of the title being bad, is entitled to be paid interest at £5 per cent. on his purchase-money, from the time of lodgment, and to be paid his costs thereby incurred. If there be no fund in Court, he is entitled to an order for payment thereof, and of his costs of the motion against the ptf. in the suit; with liberty to the ptf. to apply to be repaid out of any funds to be realised out of the estate.

The ptf.'s costs of the motion made costs in the cause. — *Murphy v. Lynde*, 7 I. Jur. 305. (R.)

#### LXXXII. 7. Opening Biddings.

- a. Generally.
- b. Deposit on.
- c. Re-sale.

#### LXXXII. 7. a. Opening Biddings generally.

5. An advance of £300 on £6700 is not sufficient to open biddings, though the fund is deficient.

*Semble*—When the applicant has been present at the former sale, a larger advance would be expected from him. — *Graham v. Gledstones*, 1 Jon. 436. (E.E.)

6. An estate having been sold under the Court for £5050, the sale was opened upon an advance of £300, though the applicant had bid at the sale. — *Biggs v. Rowe*, S. & Sc. 152. (R.)

7. Biddings opened on an advance of £250 on a sale of £8500, by one who was present, and bid at the former sale. — *Gorman v. Browne*, S. & Sc. 154, n. (R.)

8. Biddings opened on an advance of £400 on a sum of £6200, by one who had bid at the former sale. — *Langford v. Carroll*, S. & Sc. 155, n. (E.E.)

9. Biddings opened on an advance of £1000, on a sum of £35,000. — *McClintock v. Knox*, S. & Sc. 155, n. (R.)

10. Biddings opened on an advance of £300 upon a sum of £5500. — *Moloney v. Bernard*, S. & Sc. 156, n. (R.)

11. Biddings opened after confirmation of a sale under a decree, ptf. being the purchaser. It will always be a question, with reference to the circumstances of each particular case, whether the jurisdiction to open the sale should be exercised? — *O'Connor v. Richards*, S. & Sc. 246. (R.)

12. Biddings opened on an advance of £75 on £1050. In Ireland there is not a fixed rule regulating the *quantum* of advance. The Court will always open the biddings, when doing so will benefit the estate. — *Digby v. Browne*, 1 I. E. R. 377. (R.)

13. In opening biddings, this Court does not tie itself down to any precise rule as to the amount of the sum to be advanced, but looks substantially to that which is for the benefit of the parties, and to the circumstances of the particular case before it. — *Power v. P.*, 3 I. E. R. 511. (E.E.)

14. The biddings having been opened upon an advance of £150 on £2500, the Court refused the application of the first purchaser to open the second biddings upon an advance of £150, it appearing that he had been present at, and had bid at the second sale. — *Jackson v. Lord Granard*, 3 I. E. R. 513. (E.E.)

15. After confirmation of the sale, the biddings will not be opened upon a mere advance of price. — *Vincent v. Thwaites*, 5 I. E. R. 526. (E.E.)

16. Biddings opened under the circumstances of the case, on an advance of £20 on £165, upon the application of a person who had bid at the former sale. — Whether the biddings will be opened or not is a question to be

determined by the particular circumstances of each case.—*Mayne v. Macartney*, 2 I. E. R. 324. (E.E.)

1. An estate was sold in the country, subject to a life annuity equal to the rent. After sale, but before the purchaser was declared by the Master, the annuity determined. The Court opened the sale on an advance.—*O'Hara v. Chaine*, 8 I. E. R. 365. (R.)

2. A person who opened a sale with the assent of the parties, for the purpose of preventing a sacrifice of the property, but, being outbid, was not the purchaser, allowed the costs of opening the sale, on the ground of having benefited the estate.—*Cuffe v. Young*, 9 I. E. R. 475. (R.)

3. The Court refused to open the biddings on an advance of £20, the property having been sold for £430.—*Gardiner v. Blesinton*, 10 I. E. R. 220. (R.)

#### LXXXII. 7. b. *Deposit on.*

4. When, upon a re-sale, the former purchaser has been overbid, the Court will not pay him his one-fourth until after the new purchaser has paid in his deposit.—*Anon.*, H. & J. 719. (E.E.)

#### LXXXII. 7. c. *Opening Biddings: Re-sale.*

5. When, upon a re-sale, the former purchaser has been overbid, the Court will not pay him his one-fourth until after the new purchaser has paid in his deposit.—*Anon.*, H. & J. 719. (E.E.)

6. A purchaser, discharged upon a re-sale under an order opening the biddings, is not entitled, as against the ptf. or his solicitor, to the costs which he may have incurred in investigating the title; there not having been any reference to the Master to report as to title.—*Sullivan v. Bayley*, Fl. & K. 460. (R.)

7. A purchaser, having lodged one-fourth of his purchase-money, refused to lodge the remaining three-fourths, unless the abstract of title was first delivered to him. No report of good title had been obtained. The ptf. moved that the lands be re-sold, and the one-fourth forfeited. *Held*, that the purchaser was not entitled to the abstract; and that the one-fourth could not be forfeited, no report of good title having been obtained.

*Semble*—If that report had been obtained, the proper motion would have been, that the lands be re-sold, the one-fourth to remain as a security to indemnify the estate from all loss and costs attending the re-sale.—*Warren v. Bateman*, Fl. & K. 189. (R.)

8. When, upon a report of bad title, a purchaser has been discharged, the inheritor's right is, to have the estate again set up to be sold. Therefore the Court will not, against his desire, substitute, in the discharged purchaser's place, one who offers to take the

estate at the same price, but not to object to the title.—*O'Connor v. Bernard*, 8 I. E. R. 496. (E.E.)

9. The owner employed an improper person to bid for him, who failed, on being required by the Court, to lodge a sum of money as earnest; and another party was declared the purchaser. On application by the owner, and on his satisfying the Court that the agent had been *bona fide* instructed to bid, the Court directed the property to be re-sold, upon the terms that the owner should lodge £1000 within one week, and undertake to bid £9000, and to pay all the costs and expenses incurred by the present purchaser.—*In re Waller*, 4 I. Jur. 15. (I. E. C.)

#### LXXXII. 8. *Of the Conveyance.*

10. A motion, by one who, in consequence of a direction to his agent to bid one pound beyond any other bidder, had been declared tenant at a very high rent, to be discharged from his bidding, was refused with costs.—*Mahon v. Hammond*, S. & Sc. 689. (R.)

11. When a decree for a sale contains the usual direction that all proper and necessary parties shall join in conveying to the purchaser, if any of such parties, bound by the decree, and within the jurisdiction, refuses to execute the conveyance, he will be attached in the first instance. The Court will not order the Master to execute, in his name, under the statute, until it appears that an attachment cannot induce him to execute *propria manu*.—*Usher v. Scanlan*, 8 I. E. R. 474. (R.)

12. A deft. will not be compelled to convey an estate to the ptf. pursuant to a decree, when there is a *bona fide* intention to prosecute an appeal against that decree.—*Patten v. Wallace*, 5 I. E. R. 309. (E.E.)

13. In this Court, the decree for a sale does not direct the Remembrancer to settle the draft of the deed of conveyance to the purchaser; and a special application for that purpose is necessary.—*Hogg v. Waldron*, 6 I. E. R. 218. (E.E.)

14. Upon a sale of lands under a decree in a cause, when judgment creditors prior to the ptf. had not been made parties to the original suit, and a supplemental bill had been filed making them then parties, but no decree had been obtained in the supplemental suit, the Remembrancer was ordered to execute the deed of the sale, upon the consent of the parties in the supplemental suit.—*O'Kelly v. Bodkin*, 7 I. E. R. 338. (E.E.)

15. Statute 1 W. 4, c. 47, s. 12 (authorising the conveyance of estates devised in settlement by tenants for life, &c., under decrees), extends to a decree for a mortgage as well as for an absolute sale.—*Holmes v. H.*, 7 I. E. R. 390. (C.)

16. R. was entitled to a rentcharge for life, and to a legal estate for life in remainder in lands

decreed to be sold to pay paramount incumbrances. After decree he became lunatic, but no commission issued. A conveyance by him to a purchaser was ordered under the Trustee Act, s. 5.—*Blake v. B.*, 9 I. E. R. 592. (C.)

1. The heir-at-law of a mortgagee who had never been in possession, was out of the jurisdiction, and the produce of the sale of the mortgaged lands under a decree was insufficient to pay off the mortgage, by reason of prior incumbrances. *Held*, that the Court had not jurisdiction to make an order for the conveyance of the legal estate to the purchaser, either under 1 W. 4, c. 60, s. 8, or 1 Vic., c. 69, s. 1.—[*In re Thompson*, 12 Sim. 392, disapproved of.]—*Spunner v. Walsh*, 10 I. E. R. 214. (R.)

2. The Court has not power under the 28 G. 3, c. 35, to direct the Master to execute a conveyance in the name of an infant resident out of the jurisdiction.

An application to the Court for that purpose, under the 1 W. 4, c. 47, or 1 W. 4, c. 60, must be made by petition, unless the minor is ordered at the hearing of the cause to convey.—*McGeehan v. Rankin*, 12 I. E. R. 182. (R.)

3. The Court has not power under the 28 G. 3, c. 35, to order the Master to execute a conveyance in the name of a *femme coverte* who is out of the jurisdiction.—*Nugent v. Piers*, 12 I. E. R. 188. (R.)

4. When an order that the Master, or any other person appointed by the Court, should convey in the name of a deft., under the 1 W. 4, c. 60, s. 8, cannot be made contemporaneously with the decree at the hearing of the cause, in consequence of the party to whom the conveyance is to be made not being then ascertained (*e. g.*, where lands are by the decree directed to be sold), an application under that statute, that the Master should execute a conveyance in the name of such deft. must be made by petition.—*Newman v. Fitzgerald*, 13 I. E. R. 65. (R.)

5. Lands were sold in Ch. in the cause of *C. v. C.* They were purchased by A., to whom was executed a conveyance describing the lands by reference to a map on the margin. A. was evicted by title paramount from a portion of the lands as marked out on the map. A bill was filed by E. against the deft. C., to recover the amount of claims for which she was liable as a trustee, praying that she might have the benefit of the proceedings in the cause of *C. v. C.*; and by an order, the funds in *C. v. C.* were transferred to the cause of *E. v. C.* *Held*, that the map on the conveyance was conclusive evidence that everything so marked out on it was intended to be conveyed to the purchaser; that he was entitled to compensation for the portion of the lands from which he was evicted; and that if any of the purchase-money so transferred to the cause of *E. v. C.* remained in Court, such compensation should be paid thereout; but that a motion

seeking compensation out of the funds generally in Court to the credit of the cause of *E. v. C.* should be refused with costs, whatever the rights of the parties might be in a plenary suit.

*Semble*—That the purchaser when he was served with the ejectment should have served notice on the parties in the cause of *C. v. C.*, that he, if evicted, would seek compensation; and they would then have been bound by the proceedings.—*Cooper v. C.*, 6 I. Jur. 404. (R.)

6. The lands sold in this matter comprised a field held by the principal officers of her Majesty's Ordnance from G., under an instrument dated 24th Dec. 1844, for one year, at the rent of £31. 10s. By the same instrument the said G. agreed that the principal officers of Ordnance should be at liberty to hold the field after the expiration of said year, if they should have occasion for it, for such further time as they should so require it, paying the like rent for so long as they should so hold it. The principal officers of Ordnance had held the field at the same rent as exercise ground for the troops at P. Barracks, and still hold it for that purpose; and they were stated in the rental, under which the sale was made as tenants from year to year, determinable on the 24th Dec. in each year. Under the head "Observations" in the rental it was stated that this tenancy was created under an agreement dated the 24th Dec. 1844, by which G. agreed, &c. It set out in terms the agreement. After the sale the purchaser discovered a document dated 9th Dec. 1854, by which one D., who was a receiver over the lands under the Court of Ch., offered to let the field for exercise ground for one year ending the 22nd Dec. 1855, at the rent of £31. 10s.; and the officers in command at P. Barracks, and the Commander of the Forces, recommended that it should be taken for that purpose. The purchaser informed the solicitor, who had the carriage of the sale, of this document, and demanded to have the conveyance made to him discharged of any title of the Ordnance department after the 22nd Dec. 1855, and then went before the Commissioner who had to settle the deed, and showed him the proposal. The draft deed omitted the observations in the rental, and did not contain any allusion to the article of 24th of Dec. 1844; and the Commissioner altered the deed by stating that the tenancy of the Ordnance department was for one year, which would determine on the 22nd Dec. 1855. On motion on behalf of the Sec. at War, in whom the Ordnance property is vested, that the purchaser should bring in his deed to have it amended, by stating the agreement under which the Ordnance department held the lands, as set out in the rental—*Held*, that this Court had full power to recal the deed for the purpose of correcting any error in it occasioned by mistake or fraud on the Court; but that the principal officers of Ordnance not having, at the expiration of the year ending 24th Dec., 1844, or at any time since, required any further lease or term, but having occupied under the proposal made by D. for one year, and paid rent therefor, that

department had no right to any further term in the field.—*Ex parte Truell*, 1 I. Jur. N. S. 66. (I.E.C.)

1. By two conveyances of equal date, executed by Commissioners of the I. E. C., premises were granted in severalty to A. and B.; and mountain lands were thereby granted to A. and B. in undivided shares proportioned to the rights of commonage thereon previously enjoyed by A. and B. respectively under leases. The premises granted in severalty were described as being in the occupation of the grantees, as containing a certain number of acres, and as being represented in maps annexed to the several conveyances. They were to be held subject to the leases. Those leases, also of equal date, described the premises as containing a certain number of acres, and as being in the possession of the respective lessees. The acreage in the conveyances and in the leases was substantially the same. A reclaimed piece of the mountain land was in the possession and occupation of A. at the dates of the leases and of the conveyances; but it would, if included in the lands demised, and granted to him in severalty, render the acreage inaccurate. Moreover, the maps annexed to the conveyances represented it as a portion of the mountain lands. *Held*, that as to the leases, it should be considered as a portion of the lands demised; but that, as to the conveyances, it should be considered as a portion of the mountain lands.

*Quære*—As to the principle upon which the partition of the mountain lands should be carried out.—*In re Clements's Estate*, 14 I. C. R. 505. (L.E.C.)

#### LXXXII. 9. *Setting aside the Sale.*

2. A purchaser was discharged from his purchase, on the ground of misrepresentation, lands having been set up to be sold as held under written agreements for leases from 1827, which, upon enquiry after the sale, appeared to be mere parol agreements.

A purchaser, seeking to be discharged from his purchase under the Court on the ground of misrepresentation, must swear distinctly to his having been deceived by the representations made to him; but, the case not being perfectly clear, and some time having elapsed before the application was made, the purchaser was refused his costs.—*Bessonnet v. Robins*, S. & Sc. 142. (R.)

3. The Court has, in every case, the jurisdiction of setting aside the sale, although confirmed, upon a proper case being made.

When the purchase has been made in trust for the receiver (without the special leave of the Court first had), the sale will be set aside.—*Alven v. Bond*, FL & K. 210. (R.)

4. A sale under a decree set aside after confirmation, on the ground that the purchase was made, in trust, as to one-third for the receiver in the cause, and as to another one-third for the father of the receiver. The pur-

chaser was disallowed interest on the purchase-money lodged by him, and all costs incurred by him in investigating the title, and in relation to the sale.—*Alven v. Bond*, 3 I. E. R. 365; FL & K. 196. (R.)

5. An irregular and fraudulent sale was had in 1808, and the purchaser went into possession. A bill was filed to set it aside in 1822, and no further proceedings were had until 1839, when a bill of revivor and supplement was filed. *Held*, that the lapse of time was not a bar to the relief sought.

When a purchaser has fraudulently procured an improper conveyance to be made under a decree for sale; *Semble*—His title to the lands thereby conveyed is not protected by the decree.—*Thornhill v. Glover*, 3 Dr. & War. 195. (C.)

6. Several estates, among them K. and B., were devised to trustees to the use of H. for life; remainder to his first and other sons in tail; remainder to R. for life; remainder to his first and other sons in tail; with a power to the trustees to raise, by sale or mortgage of the lands, or a competent part thereof, sums sufficient to pay the testator's debts and legacies, which were thereby charged on his real estate. The testator died in 1788, and immediately after, H., the tenant for life, advertised the lands, and agreed to sell the estate of K. to G. for what was then sufficient value. No regular contract was entered into; but G. treated himself as the purchaser, and from time to time paid off incumbrances to an amount exceeding the purchase-money, taking assignments of the securities to himself or to a trustee for him. The trustees of the will having declined to act, a bill was filed in the Exchequer in 1789, by a judgment creditor, for a sale, and the appointment of new trustees. In this suit, which was amicable, there were irregularities; answers were put in for parties whose names were affixed to them, but who did not sign them; the brother of the ptf.'s attorney was concerned for the debts; the ptf. died after the final decree, and the suit was not revived, but an order was made in it entitled in the executor's name, and tenants in tail, coming in *esse* during the suit, were not brought before the Court. There were also alleged miscarriages in the report under the decree to account. The final decree was in 1794. At the sale under it K. was bought for G. by the attorney for the ptf., at the price agreed on in 1788, there being only two other bidders, for form's sake. In 1802 the personal representative of the ptf. assigned his rights to a trustee for G., who afterwards was declared the purchaser of B. In 1810 an arrangement, to which some unpaid creditors were parties, was made, by which the payments made by G. were so appropriated as to cover the purchase of K., leaving an unsettled account respecting B. An order of Court was obtained, and a regular conveyance of K. executed. The tenant for life had been allowed to remain in receipt of the rents, and all interest on the incumbrances paid off by G. was permitted to remain in arrear with his

consent, G. being allowed compound interest; and the entire amount of interest was allowed in the purchase-money. The tenant for life died in 1837; and the bill was filed by the remainderman in 1843, to set aside the sale. *Held*, that although the sale was the result of a pre-arrangement, and the suit was irregular in the above respects, yet as, in the opinion of the Court, it was not fraudulent, and the purchaser intended no fraud, and the purchase was made at full value, the sale could not be set aside, especially after so long a time.

That as the purchaser had lent himself to the transaction, whereby the arrear of interest was thrown on the inheritance, he should be made responsible for that amount; and an account accordingly was directed.

The sale of the lands of B. took place in a suit behind the back of the Court, but no conveyance of them was ever executed, and no final settlement of the accounts on foot of this purchase was ever made. *Held*, that the sale of B., being still *in fieri*, should be set aside; and an account directed on foot of the sums paid towards the purchase, and of the rents received.

On the 15th of Dec. 1795, G. (the purchaser), on the marriage of his brother, granted a rentcharge of £300 a-year, for 1000 years, out of K., which was settled on the issue of the marriage. The Court dismissed the bill with costs against the parties claiming under this settlement, but refused to give them any relief.

Principles upon which the Court acts as to what shall, and what shall not, impeach a sale under a decree.—*Bowen v. Evans*, 6 I. E. R. 569; 1 Jon. & L. 171. (C).—[See 2 H. L. Cas. 257.]

1. An estate having been sold under a decree to pay incumbrances, part of the purchase-money was applied in payment of interest accrued due during the possession of a tenant for life. There had been an agreement respecting the sale, with the tenant for life, and he also obtained a lease of part of the property. On a bill filed by the next remainderman in tail, the Court refused to set aside the sale, but referred it to the Master to enquire if the sale was at an under-value; and if so, that the purchaser's representatives should pay the difference into Court; and that the tenant for life should pay into Court so much of the produce of the sale as the Master should find had been applied in discharge of interest accrued during the possession of the tenant for life.—*Townsend v. Warren*, 6 I. E. R. 620; 1 Jon. & L. 221, n. (C.)

2. Under articles of 1760, estates were covenanted to be settled on A. for life; remainder to B. for life; remainder to the heirs of his body. The estates were subject to prior incumbrances. A. executed a trust deed to pay creditors; and a bill was filed by one of the creditors, by judgment against A., pursuant to the articles of 1760, and under the direction of A. By an arrangement made in the course of the suit, but in pursuance of a pri-

vate agreement, and without the sanction of the Court, the lands were conveyed in f.-f. by A. and B. to X., who had notice of the articles, the rent being reserved to B., the purchase-money being applied partly to discharge incumbrances prior to 1760. In a sale in the suit, X. afterwards purchased the f.-f. rent. The proceeds of the sale were paid to B., and otherwise, without regard to the rights of his children; all parties apparently acting under a mistake as to the effect of the articles. A bill afterwards filed by A. and B. against X., and impeaching the sale for fraud, was dismissed. *Held*, on a bill by the son of B. claiming as remainderman in tail under the articles, that the f.-f. grant should be treated as a private sale and set aside, but that the purchase under the decree should be upheld.—*Fitzmaurice v. Sadleir*, 9 I. E. R. 595. (C.)

3. A receiver purchased a younger child's portion during the life of the child's father, and not payable till his death, but charged on the lands over which the receiver had been appointed. There was no evidence of under-value. On bill filed by the inheritor after thirteen years, and who had been during the interval out of the jurisdiction, against the personal representative of the receiver, the Court set aside the purchase.—*Kelly v. Bonynge*, 1 I. Jur. 3. (E.E.)

4. When the true circumstances of the case can be collected from the description in the rental, or when they are sufficient to provoke enquiry, the purchase will not be set aside for misdescription of the premises.—*In re Kirwan, assignee of Browne*, 3 I. Jur. 66. (I.E.C.)

5. A petitioner, knowing that a large fine had been paid upon the execution of an existing lease, suppressed that fact from the Court. On application by a puisne incumbrancer, the sale was set aside, and he was permitted to serve a notice under the 13th G. O. to impeach the lease. The carriage of those proceedings was given to him.—*In re the Assignee of Roberts*, 3 I. Jur. 142. (I.E.C.)

6. Errors in framing the petition and schedules are not sufficient causes for setting aside a sale on the application of an incumbrancer.

The proper time to apply to rectify an incorrect statement of the amount or priority of an incumbrance is, upon the settling of the schedule of incumbrances.—*In re Hayes's Estate*, 3 I. Jur. 192. (I.E.C.)

7. The owner of an estate, advertised to be sold in the I. E. Court, signed an agreement out of Court, that M. should be declared the purchaser for the amount of the incumbrances, provided they did not exceed £37,000; if they were under that sum, the purchaser was to pay the balance to the owner; and if they exceeded that sum, the purchaser was to be paid the excess by the owner, who was to get a lease of a portion of the lands, and the arrears of rent. The Commissioners, on the day of sale, refused to adopt the agreement. There-



upon this agreement (which the owner impeached as obtained by force and fraud) was signed; that the owner should have no claim against M., save for the sum mentioned in the first agreement, and that M. should not be bound to lodge in Court any sum save such as would cover the charges and costs to which the estate was liable; and that if he was obliged to lodge more than the £37,000 the surplus should be drawn out by him. The estate was immediately afterwards set up to auction, and sold to M. for £41,775. *Held*, reversing the decision below, that the Court could not recognise the agreement as it was a fraud on *bona fide* bidders, and therefore M. was bound to bring in the surplus, without prejudice to his establishing his right to it by an independent proceeding.—*In re Ashe*, 4 L. C. R. 594. (P.C.)

1. The L. E. Court will set aside the sale of a charge at an under-value, made to the party having the carriage, on the application of the party making the assignment, who has even a better equity to set aside the sale than the owner or puisne creditors have to have it declared a trust for them.—*In re Ronayne's Estate*, 18 I. C. R. 444. (L.E.C.)

2. An estate, to which equities were attached, having been sold discharged therefrom in the I. E. Court, Judge Dobbs refused, with costs, an application to set aside the sale, though no conveyance had been made. *Held*, that the application should have been granted.—*In re Devereux's Estate*, 10 I. Jur. N. S. 101. (C.A.)

#### LXXXII. 10. *In other cases.*

3. The Court will not make it a condition of sale of an interest under a lease, that the purchaser shall not be at liberty to object to the lessor's title to make the lease, but will direct that a purchaser shall not require the ptf. to show that the lessor had such power, leaving the purchaser free to object *alunde*.—*Willis v. Latham*, S. & Sc. 441. (R.)

4. If lands be leased by the inheritor after a decree to account has been pronounced against him, they will be set up in the first instance subject to the lease. If they do not produce sufficient to pay, with costs, the incumbrances decreed, they will then be set up discharged of the lease.—*Barrett v. Birmingham*, S. & Sc. 678. (R.)

5. A purchaser, having lodged the one-fourth of his purchase-money, refused to lodge the rest unless the abstract of title was first delivered to him. No report of good title had been obtained. Ptf. moved that the lands should be re-sold, and the one-fourth forfeited. *Held*, that the purchaser was not entitled to the abstract; that, no report of good title having been obtained, the one-fourth could not be forfeited.

*Semle*—If a report of good title had been obtained, the proper motion would have been that the lands be re-sold; the one-fourth to

remain as a security to indemnify the estate against all loss and costs attending the re-sale.—*Warren v. Bateman*, Fl. & K. 189. (R.)

6. When a ptf. obtains liberty to bid, the management of the sale will be taken from his solicitor.—*Drought v. Jones*, Fl. & K. 316. (R.) *Ennis v. Casey*, *ibid*, 319, n.

7. In a question as to the carriage of a decree for sale, in two suits, when the solicitor in the first had taken an assignment of a charge, prior to the ptf., and it was in that cause reported at £1800, but in the second cause at £900 (explained by a difference in the accounts decreed)—*Held*, that the solicitor in the first cause having, by the assignment, an interest different from the ptf., the carriage of the decree should be given to the ptf. in the second suit.—*Keons v. Magawly*, 7 L. E. R. 603. (C.)

8. After lands had been sold and the purchase deed approved, though not signed, by the Master's counsel, the purchaser was put into possession by injunction, in consequence of the deft. having entered on the lands and committed waste.—*Gray v. Stanford*, 8 I. E. R. 678. (R.)

9. When a property has been sold, the Master, at the instance of the inheritor and incumbrancers (no person being under disability), has jurisdiction to, and will sell arrears of rent.—*Carroll v. D'Arcy*, 3 I. Jur. 322. (C.)

SCANDAL. *See* PLEADING, ANSWER—PLEADING, BILL—PRACTICE, ANSWER—PRACTICE, MASTER, REFERENCE TO.

LXXXIII. SEAL AND SEAL DAY. *See* BANKRUPTCY, VI.

SECURITY. *See* SECURITY, *infra*.

LXXXIV. SEQUESTRATION.

1. *Issuing, Serving, Reviving against Heir, &c.*
2. *Execution and Effect of: what may be sequestrated.*
3. *Abatement and Discharge of.*
4. *Sequestrator.*

LXXXIV. 1. *Issuing, Serving, Reviving against Heir, &c.*

[*See* G. O. (1867), 117, 120, 129.]

10. Permission, to execute a sequestration for non-payment of costs in a cause, will be given only when it appears that the party cannot be arrested.—*Mellifont v. Whitney*, Hay. & J. 219. (E.E.)

11. There cannot be separate sequestrations for debt and costs. Ptf. was, therefore, permitted to execute a sequestration for the costs only, on the terms of his waiving any further

proceeding against deft. for the sum reported and decreed due.—*Graves v. Fennell*, 1 I. E. R. 28. (E.E.)

1. If the deft. have not appeared in the cause, it is not necessary to give him notice of a motion for liberty to execute a sequestration on the decree against the real estate of the deft. The motion will not be granted if the annual value of the real estate be not stated in the affidavit.—*Edwards v. Plunkett*, 3 I. E. R. 502. (E.E.)

2. It is a common exercise of the undoubted jurisdiction of this Court to appoint sequestrators and receivers of personal estate, although such personal estate may consist of debts founded upon contract; and there may be a dispute as to the person entitled to them.—*Acheson v. Hodges*, 3 I. E. R. 522. (R.)

3. Notice of a motion for liberty to execute a sequestration upon a decree is necessary, where it is sought to execute it against lands.—*Welsh v. W.*, 2 I. E. R. 360. (E.E.)

4. Upon an application for liberty to issue a sequestration for the costs of dismissing a bill, if the party be going against personal property, notice of the motion must not be given. *Secus* where the party is going against real property.—*O'Brien v. Foley*, 2 I. E. R. 418. (E.E.)

5. A motion on behalf of sequestrators, to lodge money, must be upon notice.—*Byrne v. Langmore*, 2 I. E. R. 411. (E.E.)

6. Practice, under G. O. 105, in issuing a sequestration; when there has not been an attachment.—*In re Powell*, 7 I. E. R. 452. (C.)

7. Sequestration may be awarded against the separate estate of a married woman for costs given against her.—*Keogh v. Cathcart*, 11 I. E. R. 280. (R.)—[Reversed: 12 I. E. R. 215. (C.)]

8. *Quære*—If a sequestration not issued until the *levari* on which it is founded is out of return, be not void, although the benefice was in the bishop's hands under a prior sequestration?—*Hogg v. Garrett*, 12 I. E. R. 559. (C.)

#### LXXXIV. 2. Execution and Effect of: what may be Sequestered.

9. The decree declared that the estate therein mentioned was divisible into three parts, and that the younger children of A., B., and O., were severally entitled to a third. O. was largely indebted to the estate, and a sequestration issued, and continued against him until his death; by means of which sums were brought in from time to time, and allocated according to the rights of the parties. Two of O.'s younger children died before any of the funds were allocated, and the Master's report found that sums (being their shares of the fund then in bank) were payable to their personal representatives. O. became entitled as executor and sole legatee of one of his

deceased children, and as administrator and sole next-of-kin of the other, to both their shares, but made no claim, there being a sequestration against him. He died, owing a large balance to the fund, and the proportion of that balance to which his younger children should have been entitled exceeded the amount of the shares. T., another of O.'s younger children, having become legal personal representative of his deceased father and brothers, now applied for the aforesaid shares, after payment of the costs due to their solicitor. *Held*, that when O. became entitled to this money it was attached for the purposes of the decree by the sequestration against him, and should not now be paid to his representative.—*Crone v. O'Dell*, 3 I. E. R. 12. (R.)

10. The case of *Waite v. Bishop* (1 Cr. M. & R. 507) decides expressly that a sequestration is not retrospective, and that it attaches the future accruing profits only.—*Egan v. Heenan*, 3 I. E. R. 53. (R.)

11. A judgment is not *per se* a lien upon a benefice, but is attached thereon by a sequestration, which, however, will not give the judgment creditor priority over an annuitant who became such after the judgment was entered, but before the sequestration issued.—*Wise v. Beresford*, 5 I. E. R. 407; 3 Dr. & War. 276; 2 Con. & L. 282. (C.)

12. A sequestration having issued against the deft. for non-performance of a decree to pay money to the ptf., the sequestrators seized the rents and profits of his lands. The ptf. and a prior incumbrancer both applied for the funds in the sequestrator's hands. *Held*, that the prior incumbrancer was entitled to them.

Sequestration is neither in form or substance an execution. It is founded on default of performance of the decree of the Court, and gives no right in the funds levied, to the party at whose instance it is sued out.—*Burns v. Robinson*, 7 I. E. R. 188. (R.)

13. When an attachment, issued against a tenant under the Court, cannot be executed by reason of his being out of the jurisdiction, the Court will grant a sequestration against the tenant having other lands in this country.—*Withington v. Blake*, 8 I. E. R. 32. (R.)

14. When a sequestration for contempt in not answering has been issued against a deft., and the sequestrators are in possession, the Court will not permit the bill to be taken *pro confesso* if the ptf. elect to continue the sequestrators.—*Cormick v. C.*, 9 I. E. R. 474. (R.)

15. A decree in sequestration is only a conditional decree, and will not prevent the operation of the Statute of Limitations, or of the 81st G. O.—*Young v. Wilton*, 10 I. E. R. 265. (C.)—[Affg. 10 I. E. R. 10. (R.)]

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6. On an application under the 4 & 5 W. 4, c. 82, the Court will not substitute service of a subpoena to answer, upon a person who has been appointed receiver upon the deft.'s lands, in a cause in Ch., unless it can be sworn that he remits the rents to the deft.—*Butler v. Gould*, Long. & T. 270. (E.E.)

7. Service of process under the 4 & 5 W. 4, c. 82, allowed, and appearance entered, when the affidavit of service was sworn before a Justice of Peace, of the county of M., in America, and the deft. was not personally known to the person who served the process.—*Atkinson v. Watson*, Long. & T. 108. (E.E.)

8. The 4 & 5 W. 4, c. 82, does not authorise the Court to substitute the service of a subpoena to appear and answer upon the agent of a party made a deft. in respect of a charge he has on the lands, the subject of the suit; the manifest intention of the Act being, to autho-

rise the service to be substituted upon the agent or receiver of the owner of the estate.—*Maclean v. The Marquis of Donegal*, 3 I. E. R. 383. (E.E.)

9. On a bill against the directors of an English Insurance Company for payment of the amount of a policy of insurance, service of the subpoena to appear and answer was substituted on the Irish agent of the directors; it appearing that the contract, the subject-matter of the suit, was made in Ireland.—*Ahearn v. Harney*, 3 I. E. R. 479. (R.)

10. A receiver, appointed by the Court of Ch. in an adverse suit, is not the receiver of the inheritor within the meaning of the 4 & 5 W. 4, c. 82.

The 4 & 5 W. 4, c. 82, does not authorise the Court to substitute service of the subpoena to appear on the law agent of the deft.—*Anon.*, 3 I. E. R. 501. (E.E.)

11. Ordered, that service of a conditional order to appoint a receiver in a matter, by delivering true copies, and showing the original to the respondent's servant, residing in his dwelling-house in Ireland, and to his land and law agents, be deemed good service of the respondent; it appearing that for upwards of the last twelve months he had been resident in France.—*Lynskey v. Hancock*, 5 I. E. R. 403. (R.)

12. In proceeding under the Judgment Creditors Acts, to substitute service upon the agents of the respondent, out of the jurisdiction, the proper course is, to effect the service in the first instance, and then apply to have it deemed good.—*Murphy v. Moore*, 6 I. E. R. 263. (R.)

13. In a petition under the 1 & 2 Vic., c. 109, s. 16, service of a conditional order on ratepayers was allowed, when the tithe rent-charge-payers could not be discovered.—*Knox v. Marley*, Long. & T. 159. (E.E.)

14. The affidavit to ground a motion for liberty to substitute service of the subpoena to appear and answer, because the deft. cannot, by reasonable diligence, be personally served, must state specifically the diligence used to effect personal service, in order that the Court may judge whether it is reasonable.—*Hearne v. Nagle*, 5 I. E. R. 158. (E.E.)

15. When a parliamentary appearance has been entered for a deft., upon service effected in the country, he may afterwards, without any order obtained for that purpose, be served out of the jurisdiction with the monthly notice to press for an answer.

*Semble*—It is not necessary to obtain an order to serve any conditional decree out of the jurisdiction.—*Curtis v. C.*, Fl. & K. 208. (R.)

16. When a deft., who is merely a formal party to a suit, resides out of the jurisdiction,



*Semble*—The bill ought merely to pray the usual process of subpoena against him.—*Wallace v. Mitchell*, 6 I. E. R. 656. (E.E.)

1. Service of subpoena to appear and answer, on deft. resident in America, U. S., authenticated by affidavit sworn before the Vice-Chancellor of the Northern Circuit of the State in which the deft. resided, the Vice-Chancellor's signature and office being certified by the British Consul.—*Reynolds v. M'Gawley*, 6 I. E. R. 78. (R.)

2. When it appeared that no British Consul, or military officer acting under the authority of the Queen of England, was resident within 900 miles of a deft. in an equity suit, who resided in the U. S. of America, so that service of the subpoena to appear and answer on such deft. might be authenticated before such person; the Court ordered that such service be authenticated by an affidavit made before any magistrate in the State in which the deft. resided, and that such affidavit should be authenticated by a public notary of such state.—*Eyre v. Dwyer*, 6 I. E. R. 79, *note*. (R.)

3. When a judgment creditor out of the jurisdiction has been served with subpoena and notice under the 22nd and 15th G. O., and the memorandum entered under the 16th G. O., it is not necessary to enter a parliamentary appearance, and take the bill *pro confesso* against the party, in order to bind him by the proceedings.—*Burroughs v. Molloy*, 7 I. E. R. 6. (R.)

4. When a receiver, against whom an order for an attachment has been made, conceals himself so that his residence is unknown, service of an order to put his recognizance in suit will be substituted on his solicitor, with whom he is in communication.—*O'Farrell v. M'Can*, 7 I. E. R. 63. (R.)

5. When defts. out of the jurisdiction have given authority to a solicitor to file a charge for them in a suit, the Court will, in another suit, conversant about the property the subject of that charge, order that service of the subpoena to appear and answer the bill in the latter suit be substituted on the solicitor who filed and verified the charge.—*Luckie v. Forsyth*, 7 I. E. R. 181. (K.)

6. The Court will substitute service of subpoena, against defts. out of the jurisdiction, upon the solicitor who acted for them in a proceeding still pending in relation to the same rights in which they are defts. in the cause.—*M'Loughlin v. M'L.*, 8 I. E. R. 157. (R.)

7. The Court will substitute service of subpoena against defts. out of the jurisdiction, upon the solicitor who acted for them in a proceeding still pending in relation to the same rights in which they are defts. in the cause.—*M'Loughlin v. M'L.*, 8 I. E. R. 157. (R.)

8. When judgment creditors out of the jurisdiction are Peers, it is not necessary that they should be served with a copy of the bill, along with the letters missive; the 15th G. O. is applicable to the case of all parties who should otherwise have answered.—*Coleman v. Gregg*, 8 I. E. R. 591. (R.)

9. When a deft. has not taken out a copy of the original bill, or answered it, and the ptf. amends by filing a new engrossment, it is not necessary, in order to entitle him to have the amended bill taken as confessed, that he should have served the deft.'s solicitor with a copy of the new engrossment, or of the amendments.

*Quare*—Whether the practice is the same, though the deft. has taken out a copy of the original bill, if he has not answered it?—*Blake v. Peyton*, 10 I. E. R. 231. (R.)

10. The deft. residing out of the jurisdiction, an order was made on the 12th of Dec. to substitute service of subpoena and notice on W., solicitor for the deft. in the transactions to which the suit related. The order did not state when the deft. was to appear, as required by the 31st G. O. when the subpoena is served out of Ireland. The subpoena required the deft. to appear in eight days, and to answer in two months. A side-bar rule having been entered by the ptf., a parliamentary appearance was entered on the 8th of Jan. On the 12th of March the deft. entered a common appearance. *Held*, that if the order of the 12th Dec. was irregular in not stating where the deft. was to appear, the irregularity was waived by the common appearance.

*Semble*—The proceedings were regular; for when an order is made under the general authority of the Court, to substitute service on the solicitor of a deft. residing out of the jurisdiction, the service is to be considered a service within the jurisdiction, and the deft. must appear and answer within the time limited by the 31st G. O., as mentioned in the notice.—*Johnston v. Tottenham*, 11 I. E. R. 271. (R.)

11. One of three conuzors of a recognizance, while out of the jurisdiction, filed a bill against one of the others, and obtained a receiver. Service, of the writ of *sci. fa.* upon the recognizance, on the attorney of the ptf. in the suit, was deemed good service upon the ptf., a copy being sent through the Post-office.—*Reg. v. Brown*, 1 I. Jur. 162. (C.)

12. Some of the defts. had been served out of the jurisdiction with subpoenas, but did not appear; none of them had answered the bill, although the time allowed for that purpose had expired as to all. *Held*, that the case came within the meaning of the 25th G. O., that parliamentary appearances should be entered for the defts. who had been served out of the jurisdiction; and that the cause be set down for hearing *pro confesso*.—*FitzGerald v. Quinlan*, 12 I. E. R. 393. (E.E.)

1. When a deft., having an interest in the lands and premises in the bill mentioned, had sailed for Australia, and was on the high seas, the Court refused to grant an absolute order to substitute service of a subpoena to appear and answer against him, upon parties in this country; and only granted a conditional order to substitute service upon them on terms of the subpoena being personally served on the parties in this country, and being made returnable in twelve months, so as to enable the deft. to appear and answer.—*M'Gusty v. Frazer*, 12 I. E. R. 395. (E.E.)

2. Service of a conditional order for sale substituted, by leave of the Court, on the attorney of the principal owner, who had left the country.

There being minor owners, also out of the country, the Court appointed a guardian, in the same interest with them, on whom service for them might be substituted.—*In re Purcell*, 2 I. Jur. 14. (I.E.C.)

3. A suit by a simple contract creditor, to attach a rentcharge on the separate estate of a married woman, is within the 4 & 5 W. 4, c. 82 (Service of Process Act).—*Copperthwaite v. Twite*, 18 I. E. R. 68. (R.)

4. Substitution of notice of a cause petition under the Ch. Reg. Act 1850.—*Power v. Shanahan*, 3 I. Jur. 4. (C.)

5. Service of a notice of a petition on "a man-servant at the porter's lodge" is not sufficient.—*Power v. Lord Mountcashel*, 3 I. Jur. 76. (C.)

6. The Court has no power to order service of a notice of a petition under the Trustee Relief Act, out of the jurisdiction. When the parties interested resided abroad, the Court ordered the petition to stand over until a cause petition should be filed.—*Ex parte Crawford*, 2 I. C. R. 573. (R.)

7. A cause petition was filed for recovery of rent on foot of a lease. The tenant had died, and appointed A., B., and C. executors. A., one of the respondents, alone proved the will, and then assigned to X., who assigned to a pauper; the petition sought to make the assets of the testator liable for the rent. A. resided abroad. B., the co-executor, was his father, and a solicitor residing within the jurisdiction of the Court, and a legatee under the will. W., another son of B., was also a solicitor, lived in the same house with him, and prepared the assignment to X. Agency to A. was denied both by B. and W., the latter saying that in preparing the assignment he acted only for the assignee, X., and not for A. Held, that the circumstances implied agency to A. in B. and W.; and service of notice of the cause petition on B. and W. was directed to be deemed good service on A.—*Westby v. Ford*, 6 I. Jur. 165. (R.)

8. Notice of filing a cause petition was directed to be served on a respondent who was

of unsound mind, and out of the jurisdiction, by serving the keeper of the lunatic asylum, and the friend of the lunatic in London. And liberty was given to the petitioner to appoint a guardian *ad litem*, if the respondent's friends should neglect to do so.—*Bell v. Johnston*, 7 I. Jur. 89. (R.)

9. An order to substitute service of a cause petition having been made, it abated by the sole petitioner's death. His executor was permitted to file a petition in the nature of a petition of revivor, and to substitute service of notice thereof in the same manner as the previous order had directed the original petition to be served.—*Synge v. S.*, 7 I. Jur. 101. (R.)

10. The fact that assets consist partly of stock, will not give jurisdiction to the Court to order service out of the jurisdiction in an administration suit.—*Freeman v. F.*, 4 I. C. R. 39. (R.)

11. When a cause petition is filed against a respondent of unsound mind, but not found so by commission, who has no wife, child, or servant on whom service can be effected, but resides in a lunatic asylum, the Court will direct service to be substituted upon the keeper of the asylum and the immediate relations of the lunatic; and in the event of their not appointing a guardian *ad litem*, the petitioner will be allowed to do so.—*Cooper v. C.*, 1 I. Jur. N. S. 227. (R.)

12. The Masters have jurisdiction, in cases referred to them under the Ch. Reg. Act, s. 15, to make orders to substitute service.—*Splaine v. S.*, 10 I. C. R. 49. (R.)

13. The Masters have jurisdiction to make orders for substitution of service, in cases referred to them under the Ch. Reg. Act, s. 15.

The M. R. will not make such orders in those cases.—*Splaine v. S.*, 3 I. Jur. N. S. 816. (R.)

14. The recognizance of a tenant under the Court was put in suit against G., one of the tenant's sureties, who resided out of the jurisdiction, and whose solicitor in this country acknowledged in writing, on his behalf, service of notice of the proceedings. A writ of *sci. fa.* having been issued; *Semle*—that the Court had jurisdiction to direct substitution of service of the writ on G.'s solicitor.—*The Queen v. Gibbins*, 8 I. Jur. N. S. 44. (C.)

15. A recognizance having been put in suit against one of the conuzors, resident out of the jurisdiction, service of a writ of *sci. fa.*, by transmitting a copy of it through the post, by a registered letter addressed to him, and by serving the writ on his solicitor, in an independent suit, was deemed good service.

*Semle*—Motions on the Petty-bag side of the Court must be made in Term.—*The Queen v. Swan*, 16 I. C. R. 21. (C.)

16. T., living in Rio de Janeiro, instructed his London solicitors to appear for him in administration suits pending in Ireland. They

employed an Irish solicitor to appear therein, who corresponded with them, but never with T., whose exact address they were and are ignorant of.

Another cause petition relating to claims of T. in those suits was filed. *Held* (reversing the Rolls decision), that a motion for leave to substitute service for T. on the Irish solicitor should be granted.

A., residing in London, appeared as respondent in the administration suits by another Irish solicitor, K., but did not instruct him to appear for her in the latter suit. *Held*, that service should be substituted for A. on K.—*Barry v. M'Carthy*, 111. Jur. N. S. 361. (C.A.)

The mode of service under the Ch. Reg. (Ir.) Act 1850, was regulated by the G. Orders 1851-2, 3, 4, 32.

**LXXXV. 1. b. Under the Chancery Ireland Act 1867.**

By sec. 54, the old practice of service of Writ of Subpoena is abolished:—And by secs. 55, 56, 57, 58, 59, the printed copy of the bill is to be served instead.

The mode of service is regulated by G. O. 1867—21, 22, 25, 26, 30, 33, and 35 to 40.

**SETTING DOWN CAUSE.** See PRACTICE DEMURRER—PRACTICE, HEARING AND SETTING DOWN CAUSE.

[See 30 & 31 Vic., c. 44, ss. 67, 121, 122, 123: G. O. (1867), 84-90, 114, 118, 138, 256.]

**SHOWING CAUSE.** See PRACTICE, ORDERS.

**LXXXVI. SIGNATURE OF COUNSEL, &c. See BARRISTER.**

**SIX CLERKS.** See PRACTICE, OFFICERS OF COURT.

**LXXXVI.\* SPECIAL CASE.**

[See 30 & 31 Vic., c. 44, ss. 111-128.]

**SPEEDING CAUSE.** See PRACTICE, CAUSE, ADJOURNING, &c.

**LXXXVII. STATE OF FACTS. See PRACTICE, MASTER, PROCEEDINGS BEFORE.**

**LXXXVII. STAYING PROCEEDINGS. See PRACTICE; CAUSE, ADJOURNING, &c.—INJUNCTION.**

[See G. O. of 1843—81, 82, 83: 30 & 31 Vic., c. 44, ss. 126, 145.]

1. It appearing to be for the benefit of the inheritor, a lunatic, the Court, on ptf.'s application after decree, stayed the proceedings of another creditor in Chancery, and directed him to file a charge under the decree; the Exchequer creditor consenting that the Chancery costs should be included in the report, if

any sum was found due to the creditor in the Chancery suit, but not otherwise.—*Lynch v. Skerrett*, 2 Jon. 508. (E.E.)

2. Ptf. resided out of the jurisdiction. His bill was reported prolix. The Court restrained him from proceeding in the cause until he paid the costs of the reference and report of prolixity, though deft. had not compelled ptf. to give security for costs.—*La Touche v. Laxtor*, 2 Jon. 629. (E.E.)

3. The amount claimed in a suit for title composition was £6. is. 5d. No difficulty in recovering it at law existed. Proceedings were, therefore, stayed on payment without costs of that amount.

The Court will more freely exercise this control over the conduct of its suitors when a solicitor is the real ptf.—*Disney v. Taaffe*, S. & Sc. 105. (R.)—[Affirmed: 1 Dr. & Wal. 94. (C.)]

4. A motion, to stay ptf.'s proceedings until he shall give security for costs, should be made as early as possible; but circumstances may exist under which such a motion would not ever be too late.

The proceedings of a ptf., who had misdescribed his residence in the bill, were stayed until, &c.—*Home v. Thompson*, S. & Sc. 622. (R.)

5. It is not necessary to apply to ptf.'s solicitor before serving notice of a motion to stay ptf.'s proceedings until he shall give security for costs.—*Shaw v. Dempsey*, S. & Sc. 628. (R.)

6. A motion, to stay ptf.'s proceedings until, &c., was refused with costs, because deft.'s affidavit to support the motion misrepresented some material facts, and suppressed others.

*Quare*—Can such a motion be sustained, after a decree to account has been pronounced?—*Murphy v. Archall*, S. & Sc. 630. (R.)

7. A London stockbroker, whose name was still used in the firm there, was appointed executor of one who had contracted to grant a lease of mines in Ireland, for a large sum. He filed his bill for specific performance; and, in his affidavit to oppose a motion to stay his proceedings until, &c., stated that he had given up his residence in England, and had at some expense removed his family to Ireland, where he had taken a permanent residence. In one passage he stated that he intended to reside in Ireland altogether, but the other passages were qualified by a statement, that he intended to reside in Ireland until this suit, and all other affairs of the testator in Ireland, should have been finally settled and arranged. The motion was refused, without costs.—*Pike v. Vigors*, S. & Sc. 635. (R.)

8. When a party desires to restrain proceedings at law upon a judgment after an execution has been issued, the amount marked

on the writ, and the costs at law, must generally be lodged in Court, or satisfactorily secured.—*Rogan v. Weir*, S. & Sc. 677. (R.)

1. A lease under the Court having expired, the tenant removed his property from the premises, owing upwards of a year's rent. The receiver had obtained a conditional order for liberty to put in suit the sureties' recognizance. By previous arrangement, W., one of the sureties, was the real tenant, who enjoyed the premises to his sole use, and always paid the rent, the nominal tenant having merely lent his name, and being insolvent. The other surety, C., had consented to join in the recognizance, because W. promised him an indemnity. The Court refused to stay proceedings against C., until it should appear that a proceeding against W. would be fruitless.—*Meehan v. Cusack*, 1 I. E. R. 370. (R.)

2. Ptf. resided abroad. Motion, to stay proceedings until, &c., refused with costs, deft. being aware of the residence abroad, but delaying his application until a negotiation opened by him for an amicable settlement, terminated unsuccessfully; until several months had elapsed after the notice pressing for his answer; and until the further time given him by ptf. to file his answer had nearly expired. *Held*, that deft. had waived his objection, since, if he meant to rely on it, he should have come immediately, or at least when served with notice, to press.

A ptf., residing abroad, but having a residence and estate at C., in the county of T., was described as of "C., in the county of T.," without further addition. *Held*, not a misdescription.—*Watson v. Pim*, 2 I. E. R. 26; S. & Sc. 642. (R.)

3. When it appears by the bill that the ptf. reside out of the jurisdiction, deft.'s motion, to stay proceedings until, &c., is a motion of course.—*Lord Yarborough v. Brazier*, 2 I. E. R. 463. (R.)

4. When a bill is filed for relief, which ptf. might obtain under the decree in another cause.—*Semble* a demurrer for want of equity on that ground cannot be supported.

The proper course is, to obtain a restraining order.—*D'Arcy v. Beytagh*, Fl. & K. 481. (R.)

5. A *femme covert* and infants, as co-plaintiffs, by one next friend, filed a bill in Vacation. Deft. filed a demurrer within the month allowed by the rules of the Court; and, when filing it, served ptf. with notice that he would apply, on the sitting of the Court, to have the proceedings stayed until security for costs was given, or the next friend was changed. *Held*, that deft. had not taken any step that prevented his making that application; that, though poverty is not a sufficient objection to the next friend of an infant, yet the *femme covert* and the infants having the same next friend, the proceedings might be stayed; and that they must be stayed as to all the parties, or not at all.

In such a case, the form of the order is, that the proceedings be stayed until the next friend of the *femme covert* be changed, or security for costs be given.—*Drinan v. Mannix*, 5 I. E. R. 162, 190; 3 Dr. & War. 154; 2 Con. & L. 87. (C.)

6. Proceedings stayed against one of several defts. in a tithe suit, upon payment of the sums decreed against him, and the costs of the cause and motion, save so far as the costs of the cause related exclusively to the other defts.—*Ould v. Griffin*, 8 I. E. R. 512. (E.E.)

7. Until the deft. in the original cause has answered, he is not entitled to call on the ptf. to answer the cross-bill. Before the deft. in the original cause has answered, he cannot stay the proceedings in that cause till the deft. in the cross-cause (the ptf. in the original), though out of the jurisdiction, shall answer the cross-bill. After answering the original bill, the ptf. in the cross-cause can stay publication in the original cause till the cross-bill be answered.—*Raikes v. Cherry*, 9 I. E. R. 140. (R.)

8. When the bill required, by the note at foot, one deft. only to answer, though subpoenas to answer were prayed against others, and the interrogating part was not divided or numbered.—*Held*, not irregular, within the meaning of the 12th G. O.

If a bill be irregular, in consequence of the interrogating part not being divided or numbered, the proper course is, to stay the proceedings; not to move to take it off the file.—*Burne v. B.*, 9 I. E. R. 205. (R.)

9. When the ptf.'s bill has been dismissed with costs, for want of prosecution, the deft. is entitled to stay him in another suit for the same object, until the costs of the first suit are paid.

The merits of the case cannot be discussed on the motion.—*Montgomery v. Johnson*, 9 I. E. R. 221. (R.)

10. When there are several suits, and a decree having been obtained in one, proceedings in the others are stayed, the ptf. in the stayed suits are personally liable, in the first instance, to pay the costs, of the several defts.—*O'Keeffe v. Holmes*, 1 I. Jur. 78. (R.)—[*Affd.*: *ibid*, 125. (C.)]

11. When a tenant under the Court, relying upon a legal technicality, has replevied goods distrained by a receiver, the Court will restrain the replevin suit, though the receiver has voluntarily taken steps in it; and will direct an account of the rent due to be taken by its own officer.—*Whitelaw v. Sandys*, 1 I. Jur. 150; 12 I. E. R. 396. (E.E.)

12. When two suits have been instituted to raise charge upon an estate, and a decree has been pronounced in the first, if important questions be raised in the second, the Court will not, by staying proceedings, deprive the ptf. of

the benefit of those questions at the hearing.—*Hamilton v. Synge*, 1 I. Jur. 201. (R.)

1. When the tenants admitted that some rent was due, and paid money on account, the Court made an order restraining them from proceeding with a replevin suit.

*Semble*—If the tenant plead *non tenuit*, the Court will not interfere.—*Morrissey v. Fitzpatrick*, 1 I. Jur. 225. (R.)

2. The Court will not stay proceedings in a replevin suit by a tenant, unless there has been some irregularity, and the receiver is liable to be defeated on technical grounds.—*O'Brien v. Bernard*, 1 I. Jur. 266. (R.)

3. When an order for a sale of lands has been made by the Commissioners for the Sale of Incumbered Estates, and a certificate thereof has been transmitted to the Court of Ch., the latter Court is bound by the 12 & 13 Vic., c. 77, s. 42, to stay all suits or proceedings in which a decree for sale of the same lands has been pronounced. When no such decree has been made, that sec. leaves it at the discretion of the Court whether or not to stay any other suits and proceedings, even although their object should be to procure a decree for a sale of the same lands.

Subsequently to the institution of a foreclosure suit, and to the filing of the answer of debts. in that suit, who were incumbrancers prior to the ptf., a petition was presented by a near relative of those debts., in the I. E. Court, and an order was made thereon for a sale of the mortgaged premises. Afterwards a motion was made under the 82nd G. O. of 1843, on behalf of those debts., to dismiss the bill for want of prosecution: this Court refused that motion with costs; but *proprio motu*, stayed the suit.—*Bernard v. Bond*, 1 I. C. R. 198; 2 I. Jur. 811. (C.)

4. A creditor's suit to administer the real and personal estate of a deceased testator was in the list for hearing at the time of the institution of a suit by a legatee, who could have obtained substantial relief in the creditor's suit, in which, shortly after, a decree to account was pronounced. Subsequently, on the petition of a creditor, the greater part of the real estate of the testator was ordered by the I. E. Court to be sold. This Court, being of opinion that the legatee's suit was oppressively and wantonly instituted, refused, with costs, a motion under the 12 & 13 Vic., c. 77, s. 42, on behalf of the legatee, to stay his own suit; and ordered that, if he did not file a replication within a short specified period, his bill should stand dismissed, as against one of the principal debts., with costs, including the costs of a contemporaneous motion made on her behalf, for its dismissal for want of prosecution.

The construction of the 12 & 13 Vic., c. 77, s. 42, adhered to, as laid down in *Bernard v. Bond*, in reference to staying proceedings in this Court, when lands, the subject of litigation here, have been ordered by the I. E. Court to be sold.—*Moneypenny v. Gibbings*, 1 I. C. R. 201. (C.)

5. A distress was made by a receiver. The notice of distress did not contain all the particulars required by the statute. The tenants brought actions of replevin. The Court stayed the proceedings in replevin, on payment to the tenants of all their costs. The receiver was allowed credit for this amount out of the estate, but had to abide his own costs of the motion.—*Graves v. G.*, 5 I. Jur. 309. (R.)

6. When the validity of an instrument under which the petitioners have obtained an order for a sale is impeached, the Court will not consider that question, but will stay the proceedings, imposing terms upon the party to proceed elsewhere.—*In re Gerrard's Trusts*, 6 I. Jur. 19. (I.E.C.)

7. A cause petition under the Ch. Reg. Act, s. 15, was filed to raise the amount of a charge on lands. The order of reference was made, and a receiver appointed. No party but the petitioner proved a charge in the matter. The respondent paid the petitioner's charge and costs, and now moved to have a consent, to dismiss the petition and discharge the receiver, made a rule of Court. An order was made to stay the proceedings on the petition, and to make the consent a rule of Court.—*Dwyer v. Baker*, 6 I. Jur. 341. (R.)

8. An order was made on a solicitor to lodge a list of the credits he admitted against his bill of costs; but, through mistake, not limiting any time within which to lodge it. An attachment was issued against him for not complying with the order. An action at law was then brought against the petitioner, but not against his solicitor, for issuing the attachment. *Held*, that the Court had not jurisdiction to stay the proceedings at law, they not being against a solicitor or officer of the Court; but that the original order for lodging the list of credits might be amended, by inserting the time within which the list of credits should be lodged, reciting in the order that the omission was through mistake.—*Bolton v. Carmichael*, 1 I. Jur. N. S. 116. (R.)

9. The Court will not upon motion stay proceedings for foreclosure and sale, upon the grounds that a compromise had been entered into before the filing of the petition, but will leave the respondent either to proceed by cross petition for specific performance, or to file in the Master's office a discharge to the original petition.—*Hall v. Woodcock*, 1 I. Jur. N. S. 227. (R.)

10. Pending an action against an administratrix, a cause petition was filed to administer the assets. The Court, under the Ch. Reg. Act, sec. 22, stayed the proceedings, and refused to allow the ptf. the costs of the motion to stay, although, after the order of reference, the deft. had obtained an extension of time to plead.—*Ellis v. Fawcett*, 6 I. Jur. N. S. 27. (R.)

STRANGER. See PRACTICE, PARTY, &C.

LXXXIX. SUBPŒNA. See PRACTICE, EVIDENCE.

1. *Its Form and Nature: Amendment of.*
2. *Issuing, Serving, and Return of.*
3. *To hear Judgment.*
4. *For other Purposes.*

LXXXIX. 2. *Issuing, Serving, and Return of.*

[See 30 & 31 Vic., c. 44, ss. 54-57, 122: G. O. (1867), 26, 83, 84.]

1. Service of a subpœna to elect will not be substituted upon the solicitor of a deft. who has gone abroad; but will be substituted upon another deft., who is a co-trustee, if it appears that he acts for, or communicates with, his co-deft.—*Waller v. Fowler*, S. & Sc. 702. (R.)

2. Service of subpœna to appear and answer, on deft. residing in U. S. America, authenticated by affidavit sworn before the V. Ch. of the Northern Circuit of the State in which deft. resided, the V. Ch.'s signature and office being certified by the British Consul—*Held*, good.—*Reynolds v. McGawley*, 6 I. E. R. 78. (R.)

3. When a minor is out of the jurisdiction, the Court will not substitute service of the subpœna out of the jurisdiction: the provisions of the 4 & 5 W. 4, c. 82, must be complied with.—*Tighe v. Walsh*, 1 I. Jur. 36. (E.E.)

4. In a foreclosure suit, service of the subpœna to appear upon A. who had a power of attorney to sell from one of the trustees of a settlement, was deemed good service.—*Steele v. Frazer*, 1 I. Jur. 139. (R.)

5. The practice of a ptf. himself serving a subpœna on parties out of the jurisdiction disapproved of.—*Helsham v. Burton*, 1 I. Jur. 164. (R.)

LXXXIX. 3. *To hear Judgment.*

[See 30 & 31 Vic., c. 44, s. 122.]

6. If the solicitor, upon whom the subpœna to hear judgment is served, refuses to endorse on the original an admission of the service thereof, he will be ordered to pay the costs rendered necessary by his refusal.—*Ross v. Wood*, 2 Dr. & Wal. 490. (C.)

LXXXIX. 4. *For other purposes.*

[See 30 & 31 Vic., c. 44, ss. 90, 91, 93, 139.]

7. A formal amendment of the bill is not a proceeding which will keep alive a cause, which is out of Court, until service of a subpœna to elect.—*Townshend v. Newenham*, S. & Sc. 700. (R.)

LXXXIX.\* *Suitors' Fee Fund.*

[See 30 & 31 Vic., c. 44, ss. 180, 192, 193.]

8. The salary of the second Commissioner in Bankruptcy is not charged on the Suitors' Fee Fund in aid of the Bankruptcy and Compensation fund, but on the latter fund only. On a deficiency, the Court has not power to marshal the funds so as to provide for payment of the salaries of both Commissioners.—*In re Commissioner of Bankrupt*, 8 I. E. R. 257. (C.)

9. The Court of Chancery has not jurisdiction, under the 3 & 4 Vic., c. 105, ss. 23, 24, to make a charging order against cash standing to the credit of the Suitors' Fee Fund, and ordered to be paid to a judgment debtor on account of his pension as a retired Registrar of the Court.

*Semble*—Such a pension, though paid out of the Consolidated Fund, if the Suitors' Fee Fund proves insufficient, is not a government annuity within the Act.—*Quin v. O'Keeffe*, 9 I. C. R. 331; 4 I. Jur. N. S. 167. (R.)

10. A retired Registrar of the Court of Ch. was entitled to a pension, charged upon the Suitors' Fee Fund, under the Ch. Reg. Act (Ir.) 1850, s. 135. A quarterly instalment having become due, a judgment creditor obtained a charging order (10 I. C. L. R. 363, Q. B.), against it. *Held*, that the Court of Ch. had not jurisdiction to enforce that order.

*Semble*—The instalment was not liable to such attachment, not being money in Court in a suit or matter under the ordinary jurisdiction of the Court.—*Quin v. O'Keeffe*, 10 I. C. R. 151; 5 I. Jur. 65. (C.)—[On appeal, the case was compromised. 10 I. C. R. 262. (C.A.)]

XC. TAKING PLEADINGS OFF THE FILE.

11. When it is alleged that perjury has been committed in a material part of the answer, the Court will not, upon a motion to take the answer off the file in order that the deft. may be prosecuted, enquire into the prosecutor's motives for making the application.—*Anon.*, H. & J. 600. (E.E.)

12. It is the right of the Att.-Gen., on the part of the Crown, to have an affidavit taken off the file of the Court, in order that the deponent may be prosecuted for perjury. Therefore, though the case be such that the application would not, if made by a private prosecutor, be granted, it will be granted on the Att.-Gen.'s application.—*Greene v. Hogan*, 2 Jones, 573. (E.E.)

13. An answer will not be permitted to be taken off the file for the purpose of prosecuting the deft. who has sworn it, for perjury, *ex debito justitiæ*. Such a case must be made for it as will justify the Court, exercising its discretion, in complying with the application.—*Daly v. Toole*, 2 Dr. & Wal. 599; 1 I. E. R. 344; *Napier v. N.*, 2 Dr. & Wal. 604; 1 I. E. R. 414; 2 I. E. R. 17. (C.)

1. The answer was sworn in Dec. 1838; publication passed in May 1840. In H. Term 1841, the ptf. applied to take the answer off the file, in order to prosecute the deft. for perjury in it. *Held*, that the application was not too late.—*Reeves v. Clarke*, 3 I. E. R. 190. (E.E.)

2. A ptf. served notice to continue an injunction on equity confessed, without reserving the right to except. He afterwards filed exceptions to deft.'s answer. *Held*, that they were irregular, and must be taken off the file.—*Crofts v. Lord Egmont*, 3 I. E. R. 277; Fl. & K. 82. (R.)

3. The solicitor of a deceased tenant for life, under J.'s will, was restrained, on the remainderman's motion, from acting for an annuitant by title paramount, in whose name he had filed a bill against the sole trustee and executor of the will, and his son, the remainderman, alleging that the will had been prepared by that trustee (the testator's law agent), not according to testator's instructions; and, further, that the trustee had, as such law agent, by gross misrepresentation and fraud, and without testator's authority, procured from ptf. a release of the annuity; praying that the release might be set aside, and the arrears of the annuity raised out of testator's estate: it appearing that several statements in the bill were founded on information confidentially acquired by the solicitor, as solicitor and agent for the deceased tenant for life; but the Court declined to grant that part of the motion that sought to have the bill taken off the file.—*McKiernan v. Kernan*, 4 I. E. R. 255. (R.)

4. One of several co-ptfs. was imbecile when the bill was filed, and his name was used without authority. The Court refused to order the bill to be taken off the file.

*Secus*—If he had been sole ptf.

*Quere*—Under such circumstances, could the Court order the the imbecile ptf.'s name to be struck out of the bill?—*Brangan v. Gorges*, 7 I. E. R. 225. (R.)

5. An application to take an affidavit off the file, in order to prosecute the deponent for perjury, will not be granted *ex debito justitiæ*. Before granting it, the Court will use circumspection. The applicant must, therefore, make a case sufficient to induce the Court to exercise its discretion in his favour.—*Davis v. Nolan*, 7 I. E. R. 559. (R.)

6. An application to take an affidavit off the file, in order to prosecute the deponent for perjury, though it will not be granted *ex debito justitiæ*, approaches very closely thereto. The Court will not scrutinise the grounds or merits of the prosecution, or the truth of the allegations on either side, but will give every facility to the applicant, provided he satisfies the Court that his application is not made for vindictive or unjust purposes.—*Madden v. Woods*, 8 I. E. R. 48. (R.)

7. In *sci. fa.*, on a receiver's recognizance, the replication assigned as breaches, that the

Master's certificate found a balance in his hands; and that, by two orders of Dec. 1843, that balance was directed to be lodged and invested in two several parts, which orders had not been obeyed. The rejoinder stated that the certificate directed part of the balance to be applied pursuant to an order of 1841 (different from the orders mentioned in the replication), and the rest to be invested; and that the Master had power to make, and the receiver was bound to obey that certificate. The facts were, that the directions in the certificate and order of 1841 had not been obeyed. Side-bar rules were entered to enforce them, in which rules the time only was different, and which were the orders mentioned in the replication. The rejoinder was taken off the file as being frivolous and filed for delay.—*The Queen v. Beatty*, 8 I. E. R. 132. (C.)

8. When, subsequently to the statute 13 & 14 Vic., c. 51, a *sci. fa.*, at the Petty-bag side of the Court of Chancery, upon a recognizance entered into by a surety for a tenant of lands, which were the subject of a suit at the Equity side of the Court of Exchequer, after reciting the recognizance, proceeded thus:—"As by the said recognizance, which was on, &c., in, &c., duly enrolled in her Majesty's said Court of Exchequer, and now remaining as of record in our said Court of Chancery, by virtue of the statute in that case made and provided, might appear;" to which *sci. fa.* the deft. pleaded that the Court of Chancery ought not to have or take further cognizance of the action, because the recognizance was on, &c., duly enrolled in the Court of Exchequer, whereby that Court then and there acquired, and still retained and possessed, full jurisdiction and authority to award execution against him for the said sum of, &c., according to the tenor and effect of the recognizance, and which plea concluded with the following averment—viz., "that there is not any such record of the said supposed recognizance now remaining in her Majesty's said Court of Chancery as in said writ of *sci. fa.* is above alleged; and this the said deft. is ready to verify; wherefore he prays judgment whether this Court can or will take further cognizance of the action aforesaid." Upon a motion at the Petty-bag side to take this plea off the file as irregular, as not having been verified by affidavit, and as being false and frivolous, this Court refused to make any rule.

Under the concluding part of the 13th sec. of the statute, such recognizances may, upon agreement between the Lord Chancellor and Lord Chief Baron, be delivered over to such persons as may be appointed by the Master of the Rolls. *Sed quare*, whether recognizances so transferred, become records of, and capable of being sued upon in, the Court of Chancery, unless perhaps by the Crown under its special privilege to select its Court?—*The Queen v. Jones*, 1 I. C. R. 524. (C.)

9. An application was made to the Court for liberty to take a document, verified by affidavit, off the file of the Court, for the pur-

pose of instituting a prosecution for perjury; it being alleged that the document contained false statements. *Held*, reversing the order of the M. R., that the application is not so much one to be granted *ex deb. jus.* but that the Court will enquire into the motives which have led to the prosecution; and will not lend its aid when the object is plainly the gratification of malicious feelings, and when it is equally clear that the admitted false statement was neither wilful nor corrupt.—*M'Gee v. M'Donnell*, 4 I. Jur. 153. (C.)

#### XCI. TIME.

1. *Generally: its Computation.*
2. *Term Time.*

##### XCI. 1. *Time generally: its Computation.*

[See G. O. (1867), 251-258.]

[As to time for filing affidavits under the Ct. of Ch. Reg. (Ir.) Act 1850, see PRACTICE, XXXVIII, 11. b. AFFIDAVITS, FILING.]

2. The time for filing a bill of review is regulated by analogy to the time limited by the 6 G. 1, c. 6, for bringing a writ of error; i. e., twenty years after the judgment, and five years after the disability, if any, of the ptf. in error has been removed.—*Kelly v. Lennon*, 7 I. E. R. 98; 1 Jon. & L. 305. (C.)

3. Under the 86th G. O., the ten days' notice to be given of examining witnesses is exclusive both of the day of serving the notice and of the day named for commencing the examination.

The Court is not bound to suppress depositions in every case of irregularity; and when, from a misconception of the 86th Order, only nine days' notice of examining witnesses was given, but the examination was not commenced until after ten days, and no party was prejudiced thereby, and publication passed without objection, the Court refused to suppress the depositions.—*Attorney-General v. Ball*, 9 I. E. R. 463. (R.)

#### XCI.\* TRAVERSING NOTE.

[See G. O. (1867), 63, 65, 79-81, 136.]

UNDER-CLERKS. See PRACTICE, OFFICERS OF COURT.

USHER. See PRACTICE, OFFICERS OF COURT.

#### XCII. VACATION.

[See G. O. (1867), 256, 258.]

VARYING MINUTES. See PRACTICE, DECREE.

VEAXATION. See PRACTICE, COSTS—VEAXATION, *infra*.

WAITING CLERK. See PRACTICE, OFFICERS OF COURT.

WARDEN OF THE FLEET PRISON. See MARSHAL OF THE KING'S BENCH.

WITNESS. See PRACTICE, COSTS—PRACTICE, EVIDENCE—BANKRUPTCY, XII.

WRIT OF PROCEDENDO. See BANKRUPTCY, VI—PRACTICE, WRIT.

XCIII. WRIT. See LUNACY—OUTLAWRY—PRACTICE, CERTIORARI—PRACTICE, HABEAS CORPUS.

1. *De Coronatore Eligendo.*
2. *Of Error.*
3. *De Excommunicato Capiendo—De Contumace Capiendo.*
4. *Ne Exeat Regno.*
  - a. *When granted.*
  - b. *Discharge from.*
  - c. *Bond and Surety.*
5. *Of Supplicavit.*
6. *De Ventre Inspiciendo.*
7. *Of Assistance.*
8. *Generally: Writs of other kinds.*

##### XCIII. 2. *Writ of Error.*

4. On a petition to quash a writ of error on a judgment of a Court of inferior jurisdiction, made returnable into the Court of C. P., the Lord Chancellor declined to adjudicate upon the petition, and directed the parties to proceed upon the writ in the C. P., and take the opinion of that Court.

*Quære*—Whether a writ of error lies from an inferior Court to the Court of C. P.—*Toole v. Duffy*, 2 Dr. & War. 380. (C.)

5. A *quo warranto* being brought to try the right to an office in the Court of Ch., the relator succeeded below. A writ of error was brought to the Exchequer Chamber, pending which the Court of Ch. refused to appoint the relator to the office.—*Ex parte Kelly*, 1 I. Jur. 1. (C.)

XCIII. 3. *De Excommunicato Capiendo—De Contumace Capiendo.*

XCIII. 4. a. *Writ of Ne Exeat Regno, when granted.*

[See 30 & 31 Vic., c. 44, s. 58: G. O. (1867) 185.]

6. A writ of *ne exeat regno* was granted against deft., on facts alone, which evidenced an intention in him to leave the kingdom, and thereby endanger the recovery of ptf.'s claim under a decree; and although deft., by affidavit, denied that he had any such intention, the Court refused to discharge him until he gave security for the amount of the writ.

It is not necessary that the going abroad should be with intent to avoid process, if the effect will be to endanger the recovery of the debt.—*M'Gauran v. Furnell*, S. & Sc. 263. (R.)



1. £4000 were vested in trustees for F. and his wife, for their lives, and, after their deaths, to pay the principal to their children, in such shares as they should appoint. £1200 were lost by improper investments. The tenants for life and their children filed a bill against the trustees, one of whom absconded. The other, C., arrested under a writ of *ne exeat*, marked for £1200, applied to be discharged, because there was not any present debt actually "due and payable" to any of the ptfs. *Held*, that, though from the nature of the trusts none of the *c. q. t.* had a present right to any part of the principal, yet the sum unaccounted for was a debt due in equity, demandable from deft. as a defaulting trustee, and sufficient to sustain the writ; that the writ, though not applied for until after a lapse of six months from the time when C. had made the declarations relied on, that he would leave the kingdom, yet the persons chiefly interested being infants, the Court was bound to attend to their interests, on the facts being stated.

An affidavit from which the Court can, without difficulty, ascertain the exact sum due, sets forth the amount of the debt with a certainty sufficient to ground a writ of *ne exeat*.—*Waller v. Fowler*, S. & Sc. 274. (R.)

2. After bill filed, praying an account, &c., a judgment creditor moved for a writ of *ne exeat*, to prevent deft., the conuzor's administrator, who threatened to leave the kingdom, from doing so. *Held*, that the motion should be refused, because the debt was a legal one; and ptf.'s affidavit was not positive that the assets had been received by deft.—*Hill v. O'Hanlon*, 2 I. E. R. 463. (R.)

3. The Court requires specific evidence of a party's intention to leave the country before the writ of *ne exeat* will be issued; a presumed intention is not sufficient.—*Darley v. Nicholson*, 1 Dr. & War. 66; 1 Con. & L. 207. (C.)

4. The applicant for a writ of *ne exeat* is bound to show that the person against whom it is sought is indebted to him in a sum certain and recoverable in equity.—*Alder v. Ward*, 5 I. E. R. 367. (R.)

5. On motion (after bill filed praying an account, &c.) by judgment creditor, for a writ of *ne exeat regno*, to prevent the deft., who was administrator of the conuzor, and threatened to leave the kingdom, from so doing, the Court refused the writ, inasmuch as the debt was a legal debt; and the ptf.'s affidavit was not positive that the assets had been received by the deft.—*Hill v. O'Hanlon*, 2 I. E. R. 463. (R.)

6. Upon a bill filed by a landlord against an enant, assignee of a lease for lives renewable for ever, the lessee having covenanted that he, or his heirs or assigns, would, within three months after the fall of each life, nominate another, and pay £11. 10s. renewal fine, praying that the deft. might be compelled to take out a renewal (one of the *c. q. v.* having dropped more than forty, and another more

than ten years, and there being but one of them subsisting), and pay the arrear of rent and the renewal fines, and also the septennial fines and interest, calculated as in the case of a tenant's bill for a renewal; and that, as the deft. threatened to leave the country, a writ of *ne exeat* might issue, marked for the amount of the rent and fines, &c., so calculated;—the ptf. having moved for the *ne exeat*, *Held*, as to the arrear of rent, that it was properly recoverable at law, and therefore a *ne exeat* could not issue for it.

As to the renewal-fines, that they also being legal specific debts, were not properly the subject of a *ne exeat*; and that their being at all recoverable in equity, must depend on the question, as yet undecided, whether equity will enforce the specific performance of such a covenant, especially in this case, having regard to the *laches* of the landlord, and the apparently mutual abandonment of the covenant by both parties, for a great length of time.

As to the septennial fines and interest, even assuming that the ptf. must have a decree obliging the deft. to accept a renewal, and pay the fines, it did not follow that such a decree must give septennial fines and interest; these being the compensation given by the Court to a landlord when the tenant, as ptf., comes for a renewal, notwithstanding the forfeiture at law, and deprives the landlord of his legal right. If recoverable as damages for breach of covenant, they should therefore be recoverable by suit in equity; besides, their being damages, and unliquidated, would of itself form a distinct objection to issuing a *ne exeat* for them.

J., lessee for lives, by deed (in form of a lease for same lives, reserving larger rent), assigned the whole estate at law to O., who assigned all his estate and interest under the deed to W. After the assignment to W., the rent having fallen into arrear, J. brought an action against her to recover it, and was defeated by a plea that he had no reversion. He then filed a bill against her, and prayed that a *ne exeat*, marked for the amount of the arrear, might issue. Motion for the *ne exeat* refused, as it was not clear that J., should have a decree.—*Alder v. Ward*, 5 I. E. R. 367. (R.)

7. A writ of *ne exeat regno* granted against an executrix.—*Winning v. English*, 2 I. C. R. 572. (R.)

8. When the intention of a deft. to go abroad is only discovered during the progress of a suit, the writ will be granted, though not prayed by the bill.—*Murdock v. M.*, 1 I. Jur. 284. (R.)

#### XCIH. 4. b. Discharge from Writ of Ne Exeat Regno.

9. On a motion for a writ of *ne exeat*, ptf. omitted to state that an appeal was pending. *Held*, not such a suppression of facts as formed a ground for discharging deft.—*M'Gowan v. Furnell*, S. & Sc. 263. (R.)

1. B., having been arrested under a writ of *ne exeat*, which was discharged afterwards for irregularity, commenced an action for false imprisonment against D., at whose instance the writ had issued. The Court, at D.'s instance, restrained the action, and refused to give B. any compensation; but gave him the costs of the motion, since this restraining order should have been made part of the original order setting aside the writ.—*Darley v. Nicholson*, 2 Dr. & War. 86; 1 Con. & L. 207. (C.)

2. A respondent is not entitled to his discharge from custody under a *ne exeat regno*, upon the ground that he was made amenable to that writ by an arrest under a warrant issued on informations sworn by the petitioner, in respect of the very matters which were in question in the suit; even though the prosecution instituted in pursuance of those informations be eventually abandoned, if the petitioner appear to have had a *bona fide* intention of prosecuting the criminal proceedings at the time of procuring the arrest on the warrant.—*Kelly v. Birch*, 3 I. C. R. 466; 7 I. Jur. 73. (C.)

XCIII. 4. c. *Bond and Surety.*

XCIII. 5. *Of Supplicavit.*

XCIII. 6. *De Ventre Inspiciendo.*

XCIII. 7. *Writ of Assistance.*

3. Service of the subpoena to appear and answer a tithe bill, substituted, by posting it, with a copy of the order, on the doors of the church, and of the R. C. chapel in the parish, and also on the place for posting notices for road sessions. Ptf.'s attorney was directed to apprise defts. of the order by post-paid letters.

A writ of assistance, to effect the posting, was granted.—*Fitzgerald v. Dea*, 1 Jon. 249. (E.E.)

4. A writ of assistance will not be granted to aid a receiver in distraining for rent.—*White v. Phibbs*, S. & Sc. 88. (R.)

5. A writ of assistance will only be granted to aid service of a writ, or in execution of process of the Court; but not to aid a receiver in levying a distress for rent, though the distress had previously been rescued.—*Robinson v. Wynne*, S. & Sc. 88. (R.)

6. A writ of assistance will not be granted to the sheriff, in executing an attachment directed to him which issued against a tenant under the Court, for non-payment of rent.—*Meagher v. M.*, 1 Jon. & L. 31. (C.)

XCIII. 8. *Generally: Writs of other kinds.*

7. A purchaser under a decree, under colour of an injunction to put him into possession,

dispossessed persons who claimed adversely to the title of the parties to the cause. The Court granted a writ of restitution to restore them to possession; and a reference to the officer to ascertain the amount of damages sustained by them in consequence of the ouster. The purchaser was ordered to pay those damages, with full costs: the applicants undertaking not to bring an action.—*Anderson v. Barry*, 2 Jon. 631. (E.E.)

8. The Court will permit the amendment of a *sci. fa.*, by stating the recognizance, on which it issued, to be a joint, not a several one, after deft. has pleaded.—*Reg. v. Fennell*, 1 Dr. & Wal. 511. (C.)

9. A sheriff seized under a writ of *fi. fa.*, issued out of this Court, under 3 & 4 Vic., c. 105, at the suit of the ptf., who refused to indemnify him against claims to the goods made by the parties. The Court enlarged the time for making the return.—*Bouyer v. Blair*, Fl. & K. 385, 586. (R.)

10. For the practice as to issuing a *fi. fa.* upon a decree against the goods of a deft., pursuant to 3 & 4 Vic., c. 105, ss. 27, 29, vide *Ould v. Griffin*, 3 I. E. R. 565. (E.E.)

#### PRAYER OF BILL.

See PLEADING, BILL.

#### PRÆMIUM PUDICITIÆ.

See CONSIDERATION, III.

#### PRECEDENT CONDITION.

See CONDITION, II.

#### PRECEDENTS.

See FORMS.

#### PRE-EMPTION.

11. Lands were demised for three lives, renewable for ever, subject to a condition of pre-emption by the lessor, his heirs, or assigns, if the tenant, his heirs, or assigns, should dispose thereof: if such preference should not be given, then the lease to determine. The lessor assigned his interest. The assignee purchased part of the tenant's interest. *Held*, that the assignee of the reversion could not take advantage of the condition; and that, the lands having been sold under a decree without such preference having been given, an exception to the title, on that ground, should be overruled.—*Sparrow v. Cooper*, Hay. & J. 404. (E.E.)

#### PRELIMINARY OBJECTIONS.

See PRACTICE, HEARING—PRACTICE IN COURT—BANKRUPTCY, XVII.

## PREROGATIVE.

See CROWN.

## PRESCRIPTION DE NON DECIMANDO.

See TITHES, IX, GENERALLY.

## PRESCRIPTION.

1. Rights to pews, annexed by prescription to messuages, cannot be severed from the occupancy of the messuages.—*In re Pews of Derry Cathedral*, 8 I. Jur. N. S. 115. (Consist.)

## PRESENTATION TO BENEFICE.

See ECCLESIASTICAL PERSONS, III.

## PRESUMPTION.

- *Of Settlement.* See SETTLEMENT, X.
  - *Of Surrender.* See COPYHOLD, IX.
  - *Of Payment or Satisfaction.* See BOND, VI.
  - *Of Trust.* See TRUST, V.
  - *Of Evidence of Title.* See TITLE, VI.
- [See ACCESS—DEATH—MORTGAGE, IX.]

## I. OF TITLE.

## II. OF PAYMENT, RELEASE, AND SATISFACTION.

## III. OF DEEDS AND OTHER MATTERS — GENERALLY.

## I. PRESUMPTION OF TITLE.

2. By deed, in 1769, A. granted a perpetual yearly rentcharge of £134, payable out of lands held by him for three lives, perpetually renewable. The deed was lost. It appeared from a memorial thereof that A. had granted to B. and C., for the uses mentioned in the deed, a yearly rentcharge of £134, for ever, issuing out of the lands. The rentcharge was paid by the owner of the lands, from 1769 down to 1860, when a petition was presented to the L. E. Court to sell the rent-charge. *Held* (overruling a decision of a Judge of the L. E. Court), that the memorial, coupled with evidence of the payment of the rentcharge down to 1860, was sufficient evidence of a perpetual subsisting rentcharge, so as to enable the Court to sell.—*In re Harding*, 11 I. C. R. 29. (C.A.)

## II. PRESUMPTION OF PAYMENT, RELEASE, AND SATISFACTION.

3. Rent, which was to cease upon payment of a sum of money, was charged upon and payable out of several denominations of land. There was evidence to show that it had not been paid by, or demanded from the owners of one denomination for upwards of a century; but there was nothing to show that it had not been regularly paid out of the other denominations. *Held*, that the Court would not presume that the redemption money was paid, or that that portion of the land had been released. — *Warren v. Bateman*, Fl. & K. 448. (R.)

4. Lands, liable to a jointure of £2000 a-year payable to V.'s wife, were devised by V. to A.

for life, remainder to trustees for 1000 years, upon trust to raise money to pay V.'s debts and legacies; remainder to B. for life, remainder to C. for life, remainder over. V. died in 1804. The jointress, in 1805, advanced £8500 in payment of V.'s debts, and took from the trustees a mortgage to secure that sum. In 1806 she married B. On that occasion the jointure was settled to her separate use, and the £8500 mortgage was settled on B. for life; and, if he survived her, upon him absolutely. On V.'s death A. entered into possession of the lands, and died in 1807. B. then entered into possession of the lands. His wife, the jointress, died in 1827. He died in 1828. C. then entered into possession; and, being entitled to the personal estate of the jointress, filed a bill in 1843 praying a foreclosure of the mortgage. That bill stated that, during the life of the jointress, the rents of the lands had been insufficient to pay the jointure. There was not any evidence of payment of interest upon the mortgage up to the filing of the bill. *Held*, on the principle laid down in *Burrell v. Lord Egremont* (7 Beav. 295), that the mortgage debt was not barred by the Statute of Limitations, 3 & 4 W. 4, c. 27.

That, although upon the death of the jointress in 1828, more than twenty years had elapsed without any payment in respect of the mortgage, yet the Court would presume that, from that period, B., and, after his death, C., had kept down the interest.—*Lord Carbery v. Preston*, 13 I. E. R. 455. (C.)

5. A lease for 500 years, dated 14th Dec. 1669, contained a covenant by the lessee, his executors, &c., with the landlord, his executors, &c., not to sell before the first proffer be made to the landlord, his executors, &c., to the end that they might have the first refusal thereof, and pay as much as any other person should *bona fide* offer. *Held*, a covenant running with the land, but not a perpetual one.

An assignment of the tenant's interest was made 140 years ago. *Held*, that it must be presumed that he declined the offer, or waived his right, and the tenant now holds discharged from the covenant.—*In re Houghton*, 11 I. C. R. 236; 6 I. Jur. N. S. 112. (L.E.C.)

6. In 1703 lands were demised for 500 years. The representatives of the lessee dealt with them from 1725 until 1840, as if they had been freehold. The devolution of the title between 1726 and 1770 was not proved. *Held*, that, as between claimants under a deed of 1770, the lands were to be treated as if a release of the reversion on the 500 years' term were to be presumed.—*Lysaght v. Royse*, 12 I. C. R. 444. (C.)

7. A married woman obtained over her husband's estate a receiver, for arrears of an annuity settled to her separate use. By an order, made with her consent, the receiver was discharged, without prejudice to her proceeding, as she might be advised, for the arrear then declared to be due, or the accruing gales. The husband went into possession. After the making of the consent order, a creditor

obtained an order for a receiver. The wife re-appointed the receiver in her cause. *Held*, that the presumption of release, or payment of arrears of pin-money, did not arise; and that she was entitled to the arrear due at the date of the consent order, and to the subsequent sales.

Principles touching arrears of pin-money.—*Edgeworth v. E.*; *O'Sullivan v. Edgeworth*, 16 I. C. R. 348. (R.)

### III. PRESUMPTION OF DEEDS AND OTHER MATTERS, GENERALLY.

1. Rent, which was to cease on payment of a sum of money, was charged upon and payable out of several denominations of land. There was evidence to show that it had not been paid by, or demanded from the owners of one denomination for upwards of a century, but there was nothing to show that it had not been regularly paid out of the other denominations. *Held*, that the Court would not presume that the redemption money was paid, or that that portion of the lands was released.—*Warren v. Bateman*, Fl. & K. 448. (R.)

2. A Court cannot, without proof, presume an agreement on the ground that, if there was not an agreement, there was fraud.

The Court will not act upon fraud or other misconduct, unless that fraud or misconduct has been put in issue by the pleadings.—*Siree v. Kirwan*, 9 Cl. & F. 716.

3. An agreement to reduce rent was presumed from the receipt of the reduced rent, which was consistent with the recital in a settlement, though during the greater part of the period a tenant for life received the rent. The reduction was *held* to extend to the entire interest, which was an estate for lives and a term of years in remainder; and not to be confined to the estate for lives.—*Enraght v. Haughton*, 8 I. E. R. 274. (C.)

4. A lease for lives by way of renewal, made while the former lease is subsisting, and not surrendered, being outstanding in other parties, though intended to operate in possession, passes a good legal estate.

Five-sixths of the legal estate being outstanding in other persons, two of whom owned a moiety beneficially; B., on behalf of his son, who was entitled to the other sixth and moiety, took a renewal, and lived nearly twenty years. His estate descended to the son. On a question as to the line of descent from the son—*Held*, it could not be presumed either that there had been a conveyance of the five-sixths to B., or a surrender of them.

*Semble*—The doctrine of *Thomas v. Cook*, 2 B. & Ald. 119 (surrender by acquiescence), does not apply to estates of freehold: *Lynch v. L.*, 6 I. L. R. 131, on this point questioned.

An estate *pur autre vie* will not merge in an estate for the same life in remainder, whether created by the same or different instruments.

*Lewis Bowles' case*, 11 Rep. 81 a., and *Williams v. W.*, Fr. in Ch. 319, explained and observed upon.—*Creagh v. Blood*, 8 I. E. R. 688; 3 Jon. & L. 138. (C.)

5. The rule, that every presumption is to be made in favour of a marriage proved *de facto*, does not authorise the presuming as true a circumstance necessary to the validity of the marriage (according to the *lex loci* where it was celebrated) which, on the evidence, is not to be believed.—*Piers v. P.*, 10 I. E. R. 341. (C.)

6. In 1805, C., entitled to a charge upon lands, died after (as was alleged) making a will, under which the petitioner claimed a portion of the charge. No evidence of the existence or probate of that will was given; but for upwards of thirty years the parties interested in the charge, and in the lands on which it was charged, had acted on the belief of the existence and probate of such will. During a considerable portion of that time, the owner of the lands was a lunatic, under the protection of the Court of Ch., which also had acted on the supposition of there being a will. Some of the respondents, who subsequently became owners of the lands, had in a former suit made verified statements, mentioning and relying on the execution of C.'s will. *Held*, in a suit to raise the amount due on foot of the charge, that the existence and probate of the will, and the assent of the executor might be presumed.—*Toker v. Lanesborough*, 7 I. C. R. 241; 3 I. Jur. N. S. 125. (C.)

7. V., possessed of a term for years, with a *t. q.* covenant for renewal, devised all his landed property, houses, and tenements, goods and chattels of every description, ready money and outstanding debts, to his sons, A., B., and C., to be equally divided between them; and appointed his wife executrix.

V. died in 1833. On his death, his widow, who proved the will, and B., went into possession of the lands until her death in 1847, when B. took out administration *de bonis non*, and continued in possession, applying all the rents to his own use. In 1850 a perpetuity grant of the lands under the Church Temporalities Act, reciting V.'s will, and that B. was administrator *de bonis non*, was made to him expressly in that character. In an administration suit—*Held*, that the perpetuity grant rebutted the presumption of an assent by the executor to the bequests, arising from lapse of time.

That the lands should be sold, and divided into three shares, for the benefit of V.'s sons, or their representatives.

That the claim of A.'s representative should, by reason of the surplus rents received by B., be paid out of B.'s share in priority to judgments registered as mortgages against B.—*McConnell v. Crothers*, 9 I. C. R. 217. (R.)

8. The Commissioners of Public Works, by drainage operations, diminished the water-power of portion of a river, separating two properties. On one property was a mill. The arbitrator awarded one sum as compensation for the water-power. *Held*, that the compensation must be deemed to have been awarded respecting the mill, not respecting the unem-

ployed water-power, available to, but not used by the proprietor of the other estate.—*St. George v. Redington*, 10 I. C. R. 176. (C.A.)

1. A document, more than thirty years old, purporting to be a copy of a lost instrument, and coming out of the proper custody, is not made evidence by an endorsement in the handwriting of the deceased family solicitor of the claimant under the lost instrument, that he has compared the copy with the instrument, and knows the handwriting of the witnesses to the original, and of one of the parties, to be genuine.—*Keria v. Davoren*, 12 I. C. R. 352. (C.)

2. The entry in a corporation minute-book, of a resolution accepting a proposal for a lease of part of the corporate property was partly erased. *Held*, that in the absence of evidence to the contrary, the erasure must be presumed to have been made before the book was signed by the chairman of the meeting at which the resolution was passed.

If a corporation has partly performed a contract for a lease, the Court will decree its specific performance, though the contract was not under the corporation's seal.

A statute empowered a corporation to make leases of the corporate property under their common seal, for a certain term in possession, and at the highest rent, and provided that all leases made in any other manner should be null and void. *Held*, that the statute did not preclude them from entering into an agreement for a lease, provided it was without delay carried into effect by the execution of leases in compliance with the statute.—*Stevens's Hospital v. Dyas*, 15 I. C. R. 405. (R.)

#### PRINCIPAL: WHEN INTEREST BEYOND IS GIVEN.

See INTEREST PECUNIARY, III.

#### PRINCIPAL AND INTEREST.

See INTEREST PECUNIARY.

#### PRINCIPAL AND AGENT—OF FACTORS.

See FRAUD, VII—HUSBAND AND WIFE, IV—INTEREST PECUNIARY, I—SOLICITOR AND CLIENT—NOTICE, I.

I. APPOINTMENT AND AUTHORITY OF AGENT: WHAT ENGAGEMENTS BY AGENT BIND HIS PRINCIPAL.

II. AGENT'S DUTIES AND LIABILITIES.

III. AGENT'S POWERS AND INCAPACITIES.

IV. ACCOUNTS BETWEEN PRINCIPAL AND AGENT: ALLOWANCES TO AGENT.

V. EFFECT OF BANKRUPTCY OR INSOLVENCY OF THE PRINCIPAL, OR OF THE AGENT, OR OF A FACTOR; ON THEIR RESPECTIVE LIENS OR CONSIGNMENTS.

VI. NOTICE TO AGENT: WHEN IT BINDS THE PRINCIPAL.

#### I. AGENT'S APPOINTMENT AND AUTHORITY: WHAT ENGAGEMENTS OF HIS BIND HIS PRINCIPAL.

3. Payment by an under-tenant, C., to the head landlord, A., with the assent of B., the intermediate landlord, of the head rent, does not *per se* make C. such an agent of B. as to induce the Court to decree a reversionary lease of the premises, obtained by C. from A., a trust for B.—*Mauvell v. O'Brien*, 1 Jones, 176. (E.E.)

4. An agent's authority to contract for a lease of lands need not be in writing. *Semble*—A written proposal for a lease, made to an agent, who has not power to enter into a contract for such a lease, may be acknowledged by parol by the principal, so as to bind him.—*Callaghan v. Pepper*, 2 I. E. R. 399. (E.E.)

5. A person appointed agent to pay the head rent on the part of a lessee for lives, with covenant for perpetual renewal, is the lessee's agent, so that a demand and notice upon him will bind the lessee, who resides abroad, and is, admittedly, unaware of the facts.

The presumption is, that the tenant is acquainted with the title under which he claims, and with the circumstances connected therewith. This presumption holds until the contrary is proved.—*Butler v. Earl of Portarlington*, 4 I. E. R. 1; 1 Dr. & War. 20; 1 Con. & L. 1. (C.)

6. A., agent over a property held by four sisters as tenants in common, had a power of attorney from three of them to make leases. When about to leave the country, under suspicious circumstances, he executed, as by a power of attorney from the four sisters, a lease of the property to B., his under-agent. The lease was, at the suit of the four sisters, decreed to be set aside.—*Rossiter v. Walsh*, 2 Con. & L. 562; 2 Dr. & War. 485. (C.)

7. Though the general rule is, that notice to an agent, in order to affect the principal, must be in the same transaction, yet if, from all the surrounding circumstances, from the one transaction being so recent, or so closely connected with the other, that the party must be presumed to have remembered the previous one, the notice, though not in the same transaction, will bind.—*Marjoribanks v. Hovenden*, 6 I. E. R. 238; Dr. Rep. temp. Sug. 11. (C.)

8. In order to set aside a conveyance from a principal to his agent, it need not be proved that the property was sold at an under-value. Though an agent may buy from his principal, he must fully disclose all the knowledge which he possesses respecting the property. If there be any underhand dealing—*e. g.*, a purchase in another's name—however good the price, or fair the transaction in other respects, it is not valid in a Court of Equity.—*Murphy v. O'Shea*, 8 I. E. R. 329; 2 Jon. & L. 422. (C.)

1. An agent, with authority to receive rents, wrote to his principal immediately before the expiration of a lease, stating the acreable rent which he thought would be obtained for the estate; and desiring the principal to send him a power of attorney to let it. The principal, in his answer, did not object to the agent's letting, and stated that he would "send the power of attorney to follow this," as soon as he could get it. There were subsequent acts of recognition, though they were afterwards retracted. *Held*, a sufficient authority to let the estate.—*Dyas v. Cruise*, 8 I. E. R. 408; 2 Jon. & L. 460. (C.)

2. A cause petition was filed to recover rent under a lease. The tenant had died, and appointed A., B., and C. executors. A., one of the respondents, alone proved the will, and then assigned to X., who assigned to a pauper. The petition sought to make the assets of the testator liable for the rent. A. resided abroad; B. was his father, a solicitor, residing within the jurisdiction of the Court, and a legatee under the will. W., another son of B., was also a solicitor, lived in the same house with him, and prepared that assignment. Agency to A. was denied both by B. and W., the latter saying that in preparing the assignment he acted only for X., and not for A. *Held*, that the circumstances implied agency to A. in B. and W.; and service of notice of the cause petition on B. and W. was directed to be deemed good service on A.—*Westby v. Ford*, 6 I. Jur. 165. (R.)

3. *Semble*—The rule, that directors are not a company's agents to commit a fraud, cannot apply to a case in which the fraud relates to a matter which is of the essence of the contract, and a part of it.—*Ex parte Ginger*, 2 I. Jur. N. S. 221. (C.)

4. H., solicitor and land agent of S., died in 1851. In 1854, E., solicitor for the administratrix of H., furnished S. with a bill of costs for work done by H. for S., who died in 1855. In 1862, B., solicitor for the petitioners, executors of S., wrote that the executors had handed him the costs and account on foot of rents which had been furnished; that the amount, save a small sum of costs, was already barred by the Statute of Limitations at the time when the bill was furnished to S.; but—continued B.—"the instructions I have received were to look at the matter fairly, and if anything appeared due, to settle it, notwithstanding Mrs. H. not being legally entitled to recover. I have accordingly done so; and, without entering into any particulars of the costs, but merely looking at the matter of the rents, it seems to me that Mrs. H. is indebted to Mr. S.'s executors." The writer then made a claim respecting the rents of another property alleged to have been lost by default of H., and concluded:—"Therefore, the executors are not in any way called on to pay, unless you can within a week show me, in any reasonable way, that Mr. H. did not act as Mr. S.'s agent over these properties, or that he used due diligence to collect the rents."

In a suit to administer the assets, the Master found that H. had not been agent over the latter property. *Held*, that the letter contained a sufficient acknowledgment to save the bar of the Statute of Limitations.

An agent's written acknowledgment, made after the passing of the Mercantile Law Amendment Act, 19 & 20 Vic., c. 97, suffices to save from the bar of the Statute of Limitations a debt contracted before the Act passed.—*Leland v. Murphy*, 16 I. C. R. 500. (R.)

## II. AGENT'S DUTIES AND LIABILITIES.

5. A principal, V., agreed to sell part of his estate to his agent, X.; but, when he made the agreement, was unaware that that part included the only turf bog on the estate. There was not any concealment, nor apparently any knowledge by X. of this circumstance. V., by will, named X. a trustee for sale. X. accordingly assisted his co-trustees, and did not insist on performance of the agreement until after the lapse of nearly a year from V.'s death, nor until after the estate had been advertised for sale. *Held*, that V.'s ignorance touching the turf bog afforded sufficient ground for refusing to enforce specific performance; and that X.'s conduct after V.'s death amounted to a virtual abandonment of the agreement.—*Chambers v. Betty*, Beat. Rep. 488. (C.)

6. A landlord's agent procured from a tenant a conveyance of his farm under suspicious circumstances. The Court, not being satisfied with the evidence, after a lapse of five years, directed an issue to enquire whether the deed had been obtained by fraud, duress, or undue influence?—*Smith v. Ward*, H. & J. 705. (E.E.)

7. The decrees in *De Montmorency v. Deveureux*, 1 Dr. & Wal. 119, affirmed, without costs, by the House of Lords, on appeal.

Where dealings between a solicitor and client, or principal and agent, are, in their inception, voidable in a Court of Equity, but have been saved from impeachment by reason of the client or principal having done acts confirmatory of them, the solicitor or agent will not be entitled to the costs of a suit instituted by the client or principal to impeach those dealings, but in which the bill has been dismissed.—*De Montmorency v. Deveureux*, 2 Dr. & Wal. 410.—[See 7 Cl. & Fin. 188.]

8. A lease obtained by an agent from his principal, who was strict tenant for life, with a limited power of leasing, at an under-value, and for a term longer than the power of the tenant for life authorised him to grant.—*Held*, fraudulent and void as against the successor of the grantor.—*Ker v. Lord Dungannon*, 1 Dr. & War. 541; 1 Con. & L. 335; 4 I. E. R. 344. (C.)

9. An agent may take a lease from his principal; but must be always prepared to

prove that full information had been imparted to the principal, and that the contract had been entered into in perfect good faith.—*Molony v. Kernan*, 2 Dr. & War. 31. (C.)

### III. AGENT'S POWERS AND INCAPACITIES.

1. The appellant had for a long time acted as the counsel and legal adviser of A., and, during that employment, acquired an intimate knowledge of A.'s property and liabilities, and had acted for him in compromising securities. *Held*, that a purchase by the appellant of those securities, after the relation of client and counsel had ceased to subsist, made without notice to A., and at a price less than their nominal amount, whilst the compromise was pending and feasible, was a trust for A.; and that the appellant was entitled only to the sum actually paid by him, with customary interest.—*Carter v. Palmer*, 8 Cl. & F. 657.—[See 1 I. E. R. 289; 1 Dr. & Wal. 22. (C.)]

2. If it appears that, in a transaction between principal and agent, there has been underhand dealing by the agent—*e. g.*, that he has bought the principal's estate, in the name of another person, for himself, however fair the transaction may be otherwise—and no matter how good the price was, the purchase is invalid in equity.

To set aside a sale from a principal to his agent, it need not be proved that it was made at an under-value. An agent may buy from his principal, provided that the agent deals with him at arm's length, and after a full disclosure of all his knowledge respecting the property.—*Murphy v. O'Shea*, 8 I. E. R. 329; 2 Jon. & L. 422. (C.)

3. A Joint-stock Banking Company held bound by a deed for the benefit of creditors, from the conduct of their public officer and others in assenting to it, though neither the company nor directors had given any authority to execute it, and the arrangement was an improvident one for them.

*Semble*—The rule requiring an authority under seal from a partner to execute deeds does not apply to such a case.

A creditor's deed provided that if the assignment made thereby should for any reason become inoperative, or any of the property thereby conveyed, or intended so to be, should not have been effectually assigned thereby, the parties might abandon it. The deed was an act of bankruptcy, under the 6 W. 4, c. 14, s. 20. No notice was given, as required by that section; and an attempted sale in execution of the trusts failed, from inability of the trustees to make out title. *Held*, that it could not be avoided under the proviso, which contemplated an act by some stranger thereafter, and not a defect inherent in the deed itself.—*Dudgeon v. O'Connell*, 12 I. E. R. 566. (C.)

4. A land-agent has not authority to enter into contracts for leases. Entering into possession under a contract for a lease is a part

performance; but the Court will not decree a specific performance, unless the terms of the contract are clearly proved. A tenant paid a fine, and entered into possession, but did not for thirteen years claim a performance of the contract for a lease, nor until after the death of the agent with whom the contract was said to have been made. During part of the time he paid an increased rent. There was evidence that the contract was for a tenancy from year to year. The Court refused a specific performance.—*Mortal v. Lyons*, 8 I. C. R. 112. (R.)

### IV. ACCOUNTS BETWEEN PRINCIPAL AND AGENT: ALLOWANCES TO AGENT.

5. An account against a land agent, for 27 years preceding the filing of the bill, decreed; but refused respecting gratuities which he had, with his principal's knowledge, received from the tenants, though the gratuities were charged to have been extortionate; the principal not having lost by their exorbitant nature, except so far as they had been taken as fines.—*Palmer v. Browne*, Beat. Rep. 540. (C.)

6. An agent had for several years stated accounts with his principals. In them he was not charged with interest on the balances in his hands, but in the last account settled previous to his discharge was debited with interest on several half-yearly balances. On his discharge he furnished an account not charging himself with interest; but on a bill filed to enforce payment of the balance then due, interest was given on it.—*Bateman v. M'Elligott*, 7 I. E. R. 471. (C.)

7. In a suit by a principal against his agent, for an account, a sum admitted by answer to be due will be ordered to be paid into Court.—*Blake v. Comins*, 1 I. Jur. 330. (R.)

8. A., entitled to a life estate in lands, remainder to his wife B. for life; C., entitled to an annuity; and D., having a judgment against A., and a policy of insurance; A., B., C., and D., in consideration of £350, advanced to A., conveyed to E. the lands, annuity, and policy of insurance respectively, subject to redemption. It was provided that A. should become tenant to E. of these lands, at a yearly rent, in case of non-payment of the interest and premiums on the policy; and A., B., and C. appointed F. irrevocably their attorney, to receive the rents of the mortgaged premises and the annuity, to pay (after receiver's fees and outgoings) the interest and premiums on the policy; and to invest, out of the annuity, a sum to form a fund to pay the principal, and to pay the balance of the annuity to C. and of the rents to A. The sums secured by the judgment and policy of insurance, when they should be paid, after deducting the £350 and interest, were to be applied by E. to pay D. any demand due to her by A., and the balance to A. It was provided that F. should not act as receiver until the interest or premium on the policy should be in arrear. F. entered into receipt of the

rents (as he alleged, under a subsequent power of attorney from A.) and of the annuity, no portion of which he invested to form the fund for payment of the annuity; and applied the rents for the purposes of A., and in paying the interest of a mortgage due to himself, F., by the directions of A.; and the annuity in payment of the interest on the £350, with the consent of C., who had, before such consent, taken the benefit of the Insolvent Act. *Held*, that F. was not agent or trustee for C. as to the lands, and therefore was not bound to account to her assignee for bygone rents.

*Semle*—B., being only a surety, her life estate is not liable, after the death of A., to repay the sums paid out of the annuity of C., for interest and premiums on the policy.

*Quere*—Whether F. should have credit for payments out of the annuity, contrary to the directions of the mortgage deed, made with the consent of C., after her discharge as an insolvent?—*M'Dowell v. Reede and others*, 14 I. C. R. 192. (R.)

[*Held*, that F. was not bound to pay the assignees the sums recovered by him after the insolvency.—*M'Dowell v. Reede*, 16 I. C. R. 430. (R.)]

1. A petition for an account against a land agent, referred to accounts A., B., and C., furnished by him; stated that C. omitted to bring forward a large portion of arrears of rent, shown by B. to be due; charged that they were lost by the agent's wilful default; that C. showed a large amount of arrears of rent to have been allowed to accumulate during the period comprised in that account; that the accumulation was owing to the wilful default and neglect of the agent, as the lands were set at reasonable rents; that he was bound to account for the rents which he had received, or which, without wilful default, he might have received, while he was agent. *Held*, having regard to the reference to the accounts, that the pleading warranted a decree eliciting a reference whether any part of the arrears had been lost by the wilful default of the agent.

A principal wrote to his agent—"I pity poor J. R.; I will leave the matter in your hands, to do what you think fit and fair, knowing, as you do, the state of both of us, and of our unfortunate country. If possible, accede to this request, for he has been a good tenant hitherto." *Held*, that the letter did not authorise the remission of an arrear of rent due by the tenant.—*Pennefather v. Bolton*, 14 I. C. R. 234; 8 I. Jur. N. S. 45. (R.)—[Varied: 14 I. C. R. 335; 8 I. Jur. N. S. 221. (C.A.)]

#### V. EFFECT OF BANKRUPTCY OR INSOLVENCY OF THE PRINCIPAL, OR OF THE AGENT, OR OF A FACTOR: OF THEIR RESPECTIVE LIENS OF CONSIGNMENTS.

2. A. and B., partners, being indebted to C. and D., the ptf's., A. by letter, proposed to assign a claim which A. and B. had upon P.'s estate, then the subject of a Chancery suit. Properties of P., sold under a decree, were

bought by A. in his own name; but, as he alleged in letters to C., really in trust for C. and D. Shortly afterwards, A., having committed an act of bankruptcy, executed deeds declaring that he held in trust for C. and D. His assignee having obtained a judgment in ejectment against part of the premises, a bill was filed praying that he should be restrained from executing his *habere*; that he should be declared a trustee for ptf's. respecting all the premises; and that he should be directed to convey to them. *Held*, that, though there was not express proof of B.'s concurrence, A. was authorised in all that he had done; that the trust was clearly established; and that ptf's. were entitled to the conveyance sought.—*Johnson v. Perrin, Hayes*, 322. (E.E.)

#### VI. NOTICE TO AGENT: WHEN IT BINDS THE PRINCIPAL.

3. Notice of a prior unregistered deed of annuity to the solicitor of a mortgagee, whose mortgage is registered, is notice to the mortgagee so as to preclude him from relying upon the provisions of the Registry Acts as against the prior unregistered annuitant.—*Nixon v. Hamilton*, 1 I. E. R. 46; 2 Dr. & Wal. 364. (C.)

### PRINCIPAL AND SURETY.

[See BANKRUPTCY, XIII—FRAUDS, STATUTE OF, IV—INDEMNITY.

- I. GENERALLY, AND OF CONTRIBUTION BETWEEN CO-SURETIES.
- II. LIABILITIES OF SURETY.
- III. SURETY'S RIGHTS IN BANKRUPTCY, AND GENERALLY, AGAINST HIS PRINCIPAL AND HIS PRINCIPAL'S ESTATE.
- IV. SURETY, HOW DISCHARGED.

#### I. PRINCIPAL AND SURETY GENERALLY: CONTRIBUTION BETWEEN CO-SURETIES.

4. A surety by recognizance, who pays the whole amount into Court, when pressed with Crown process, is entitled to use the Crown securities, in order to levy a moiety from his co-surety, provided that he shares with his co-surety the benefit of any counter security which he may have taken from the principal. *Latouche v. Pallas, Hayes*, 450. (E.E.)

5. A motion by sureties of a tenant under the Court to reduce the rent was granted under the circumstances, with the receiver's consent, and the consent of the interested parties, upon the terms of all arrears due being paid.—*M'Evoy v. M'E., S. & Sc.* 699. (R.)

6. An application, on behalf of the sureties of a tenant under the Court, for liberty to surrender the lands because the tenant was in insolvent circumstances, and the lands had fallen in value, was refused, with costs.—*Hone v. Lord Langford*, Dr. Rep. temp. Sugden, 328. (C.)

7. Joint judgment against A., B., and C. A. was the principal, B. and C. were sureties. A. dies; judgment revived against B. and C. C. was heir-at-law of A., but the revival was



against him as one of the surviving conuzors and not as heir. The Court appointed a receiver, on petition, over the lands which had come to C. by *quasi* descent from A., the principal debtor.

*Semble*—As a general rule, when there is a joint judgment, and, all the conuzors being principal debtors, one of them dies, the Court will not appoint a receiver over the lands of the surviving conuzors alone. The judgment ought to be revived against the surviving conuzors, and the heir and terre-tenants of the deceased conuzor; and the Court should appoint a receiver over the lands of the heir and terre-tenants of the deceased conuzor as well as over the lands of the survivors, in order to enforce contribution.

An arrest under a *ca. sa.*, and a discharge under the Insolvent Act, is not cause against the appointment of a receiver on the judgment.—*Mercer v. M'Kee*, 11 I. E. R. 322. (R.)

1. A. and B. became sureties for C., and were sued for his default. A. procured the amount sued for, on the security of a mortgage from A., and a judgment against B. The mortgage was paid by A., who obtained an assignment of the judgment; registered it as a mortgage against lands of B.; and filed a petition for foreclosure and sale. B., by his discharge, set up a defence that he became surety on the promise and undertaking of A., that he would indemnify him from all loss. *Held*, that parol evidence was admissible to prove the contract to indemnify, as it was to rebut the equity on which the petition was founded.

*Semble*—Such a contract of indemnity is not within the Statute of Frauds, and need not be in writing. *Held*, that the defence might be relied on without filing a cross petition.—*Rue v. R.*, 6 I. C. R. 490. (R.)

2. A. became surety for B., to secure his due performance of his duty as a county cess collector. B. and C., by deed, covenanted to indemnify A. against any loss he might sustain, as such surety. B. was suspended by the Grand Jury for a deficiency in his account. A. handed him the sum required to make up his deficiency; and so prevented him from being declared a public defaulter. *Held*, that this was not a payment constructively equivalent to a payment in the character of a surety, so as to affect C., who got no notice of the transaction, there being an arrangement between A. and B. that the money so paid was to bear interest at £6 per cent.—*Carolin v. Stuart*, 4 I. Jur. N. S. 165. (C.)

## II. LIABILITIES OF SURETY.

3. The Court, after dismissal of the bill, has jurisdiction to order that a recognizance, given by the ptf. and his sureties, to abide such order as the Court might make touching the mesne rates of the lands, shall be put in suit against the sureties.—*Costello v. Hunt*, 2 Jon. 784. (E.E.)

4. A petition by a solvent surety of an insolvent tenant, to surrender, or reduce the rents of premises of which the value had greatly diminished since the lease was made, was dismissed, with costs.

*Semble*—The general principle, by which a surety is supposed to be regarded more favourably than his principal by Courts of Equity, is erroneous.—*In re O'Neills Minors*, S. & Sc. 686. (R.)

5. A receiver's sureties are liable under their recognizance for the costs of an attachment against the receiver for not passing his account, and for all costs incurred in discharging him, and appointing a new receiver.—*Mauvell v. Egan*, 9 I. E. R. 283; 3 Jon. & L. 251. (C.)

6. A. was seized in fee of the S. estate; the D. estate was settled to such uses as A. and B. should jointly appoint; in default of appointment, to A. for life, remainder to B. in fee. A. subsequently charged his life estate in D. with an annuity of £1000 in favour of B. There were incumbrancers upon S. A. borrowed £20,000 upon a mortgage of D. and S., to which B. and the incumbrancers on S. were parties. By that deed, A. and B. conveyed all the lands to the mortgagee. The proviso for redemption was to the effect that, upon re-payment, the lands should be re-conveyed to A. in fee. *Testatum*, that B. and the incumbrancers on S., gave priority to the mortgage over their respective charges. A. subsequently borrowed £17,000; upon which occasion, by a mortgage of all the lands for £37,000, to which B. and the incumbrancers on S. were parties, A. and B. conveyed all the lands to the mortgagee, subject to a proviso for redemption, to the effect that, upon re-payment, the lands should be re-conveyed to A. and B. in fee. *Testatum*, that A. and the other incumbrancers agreed to give priority to the mortgage over their respective charges.

Both estates having been sold in the I. E. Court, the mortgage was paid out of the joint produce. B. made an affidavit, stating that he had been induced by A., and joined in the mortgage, upon the representation that the money would be applied to pay A.'s (his father's) debts; that his (B.'s) interest in D. would only stand as a collateral security; and that he had received only a nominal consideration, and was in no way privy to any arrangement with the mortgagees. The price having proved insufficient to pay all the incumbrances, the I. E. Court decided that the mortgage should be deemed to have been paid out of the price of D., before recourse was had to the proceeds of S. *Held*, reversing that decision, that B. was a surety only, as between himself and A., and that the incumbrancers on S. were not entitled to indemnity out of B.'s interest in D.—*In re Kelly*, 6 I. C. R. 394; 2 I. Jur. N. S. 453. (C.A.)

7. A. was trustee of a settlement, part of the trust fund being secured by a bond. B., executor of the obligor, with the assent of A.,

lent the sum secured by the bond, and all the assets of his testator, on mortgage of an estate, which, in consequence of the depreciation of property at the time, was sold in the I. E. Court for a sum insufficient to reach the mortgage. In a suit by the *c. q. t.* of the settlement and the legatees of the testator, A. and B. were ordered to bring into Court the amount secured by the bond, in equal shares; and B. was ordered to bring in the remainder of the assets, without prejudice to any proceeding by A. against B. on foot of the bond. *Held*, that A. could not in equity recover from B. the moiety of the sum secured by the bond, which he had paid into Court under the decree.—*Montgomery v. Waring*, 6 I. C. R. 588. (R.)

### III. SURETY'S RIGHTS IN BANKRUPTCY AND GENERALLY, AGAINST HIS PRINCIPAL, AND HIS PRINCIPAL'S ESTATE.

1. A surety by recognizance, having paid the debt, though after a *levari* issued against him, but never returned, is entitled to the benefit of the recognizance, and to stand as a creditor by matter of record against his co-surety for contribution.—*Salkeld v. Abbot*, Hayes, 576. (E.E.)

2. A surety pays a debt secured by separate judgments against himself and the principal upon their joint and several bond. He may, by bill in equity, compel the creditor to assign to him the judgment obtained against the principal.

A surety is entitled to the benefit of all the securities obtained by the creditor from the principal for the debt.—*Mara v. Ryan*, 2 Jon. 715. (E.E.)

3. A surety paying off the debt is entitled to the benefit of a security given without his knowledge by the debtor to the creditor, at a different time, to secure another demand in addition to that for which he became surety.—*Scott v. Knox*, 2 Jon. 778. (E.E.)

4. Upon A.'s appointment as county treasurer in 1831, he, together with B., C., D., and E., entered into security by recognizance, whereby A. acknowledged himself indebted to the King in £7000 sterling. By the same instrument, B. and C. acknowledged themselves to be jointly and severally indebted in £5000 sterling, and D. and E. in £2000 sterling. The condition was that A. should duly account pursuant to the 4 G. 4, c. 33. In that condition the instrument was described as "the foregoing recognizance." In 1837, A. resigned, as a defaulter in upwards of £18,000, of which about £4000 were due to the Crown, and the residue to the county. *Held*, that this recognizance secured the single sum of £7000, and no more; that the sum secured was £7000 British, though the 4 G. 4, c. 33, only required the Treasurer to secure £7000 Irish; and that A., upon paying that sum, was entitled to have the recognizance of himself and his sureties vacated; but that, on payment of that sum by the sureties, they were

not entitled, as against the Crown, to the benefit of the recognizance acknowledged by A.

Sureties of a county treasurer, paying the amount of his recognizance, are not by reason thereof entitled to priority over the Crown, there being a debt due by him to the Crown beyond the amount of the recognizance.—*The Q. v. O'Callaghan*, 1 I. E. R. 439; Jon. & C. 154. (E.E.)

5. Testator, as principal, and his son, as surety, they being successive tenants for life, joined in granting an annuity; and gave, as a collateral security, a joint and several bond and warrant, conditioned that, if the annuity was in arrear, the annuitant might issue execution against the father during his life, and after his death against his son. Both having died, the son's executor paid several gales of the annuity. *Held*, that he could recover, as against the father's assets, only the principal sums so paid, but not interest upon them.

A fund of the father's having been originally assigned to secure the annuity, which sum became part of his assets and produced interest, the son's executor was recouped to the full amount of the bond, with interest.—*Caulfield v. Maguire*, 8 I. E. R. 164; 2 Jon. & L. 141. (C.)

6. A., having obtained from B. an advance of money, mortgaged lands, to secure that sum. C., as surety for A., conveyed a charge of £5000 further to secure the debt. Proviso for redemption, that if A., or C., or either of them, should, on a day therein named, repay B. that sum, B. would re-convey the lands and charges on the uses on which they had been held before the execution of the deed. The period of redemption having elapsed, the debt was paid out of C.'s charges. *Held*, that notwithstanding the form of that proviso, C. was entitled to the benefit of B.'s securities against A.'s lands.—*McNeale v. Reed*, 7 I. C. R. 251. (C.)

7. V. becomes security for payment of a composition by an arranging trader. When two instalments have been paid, the case is turned into bankruptcy. The creditors prove against the principal's estate for their first bills, giving credit for the instalments. V. then becomes bankrupt. The creditors, having elected, will not be allowed to prove on his estate for two sets of unpaid bills.—*Re Sheehan & Feehan's Estate*, 9 I. Jur. N. S. 198. (B.)

8. A surety in a bond for S. paid the oblige £108 five days after S. had been adjudicated a bankrupt. The surety owed S. £99, as the price of fixtures, &c., left by S. in a house which he was giving up to the surety. The Judge of the Bankrupt Court disallowed the surety's claim to set off the £99, and prove for the balance. Upon appeal, *held*, that the surety was entitled, under the 20 & 21 Vic., c. 10, s. 253, to set off and prove as he claimed.—*In re Steele*, 6 I. Jur. N. S. 274. (C.A.)

## IV. SURETY: HOW DISCHARGED.

1. In the case of principal and sureties, circumstances may exist which will prevent the principal's payment of the entire sum operating as a discharge of the sureties.—*In re O'Callaghan*, 1 I. E. R. 448, n. (R.)

2. By deed, executed in consideration of £9000, purported to be paid to L. and H. by D. and J. L. granted them an annuity charged on his estate, for three lives, and further secured by the joint and several bond and warrant of attorney of L. and H., but with a stipulation that execution should not be issued on the judgment until the annuity should be forty days in arrear. The deed contained covenants for title and further assurance by L., and a covenant to pay the annuity by L. and H. On the construction of this deed—*Held*, that H. was merely a surety; it having been proved that the £9000 were raised for L.'s use, and therefore that a subsequent alteration in the contract reducing the rate of the annuity from £20 to £9 per cent. on the loan of a further £1000, without H.'s knowledge, discharged him from his liability as surety.—*Eyre v. Hollier*, L. & G., temp. Plunket, 250. (C).—[Rev'd.: 2 Dr. & War. 590; 9 Cl. & F. 1.]

3. A creditor, having the security by bond of a third person, for the due accounting of an agent, settled accounts with that agent, and took from him a bond for the balance due, and bills at different dates for the amount of the bond and interest thereon, until the last bill should fall due. At the same time, he stipulated that he should be at liberty to proceed, at any moment, on the original security. *Held*, that this did not discharge the surety.—*Lindsay v. Lord Downes*, 2 I. E. R. 307. (C.)

4. By the will of a testator, who died in 1815, his real estates were charged with his debts as far as his personal assets should be insufficient. A creditor brought actions against his executrix, who gave pleas of confession, but then filed a bill against the creditor. The amount of the demand was ascertained by the Master's report. The executrix having no assets to meet the demands, P. advanced the money; and a deed was executed, by which the demands were assigned to P.; and the executrix covenanted that whichever of the sons who were entitled to the real estate should first come of age would execute a mortgage to P. To secure the advance, she covenanted to insure her life for the amount, and assigned her jointure to secure the regular payment of the premiums. P. covenanted on payment to re-assign to her. The insurance was not kept up, nor the mortgage executed. A suit was instituted by P. to raise the demand out of the realty. *Held*, that it could not be resisted on the ground that this was a mode of realising assets, and released the realty, by giving time to the personalty, the primary fund, or was the acceptance of a security which was suffered to be lost.

That the pleas of confession and report

were not an admission of assets by the executrix.

That the demand need not be proved *de novo* against the devisees of the realty.—*Purcell v. Blennerhassett*, 9 I. E. R. 103; 3 Jon. & L. 24. (C.)

5. A tenant's recognizance was executed at the same time as his lease, but was not enrolled until four years later. In the meantime he became insolvent, and incumbered his property. *Held*, that the neglect to enrol the recognizance, when the lease was executed, had not discharged the surety.

*Quære*—Whose duty is it to enrol the recognizance?—*Jephson v. Maunsell*, 10 I. E. R. 38, 132. (R.)

## PRINTS.

See COPYRIGHT, V.

## PRIORITY.

- *Of Deeds*. See DEEDS, XII.
- *Of Process*. See PRIORITY OF SECURITY, I.
- *Among Legatees*. See LEGACY, VIII.
- *Of Suit*. See LIS PENDENS—PRACTICE, PRIORITY OF SUIT.

## PRIORITY OF SECURITIES.

See MORTGAGE, VI.

## I. BETWEEN DIFFERENT SECURITIES, AND THE PROCESSES OF COURTS, GENERALLY.

## II. HOW LOST AND ACQUIRED.

1. Generally.
2. By Tacking Securities.
3. By Equitable Lien.
4. By Notice, and the Want of.
5. Under the Registry Acts.

## I. PRIORITY OF SECURITIES BETWEEN THEMSELVES, AND PROCESSES OF COURTS, GENERALLY.

6. P. mortgaged X. and Y. As a collateral security P.'s sons assigned their estate in N. Afterwards P. sold X. to the deft., and covenanted against incumbrances. The mortgagee purported to be a party to, but never executed this conveyance. P.'s sons joined in a bond to indemnify the deft. against all incumbrances.

In 1805 the mortgagee filed a bill to foreclose against P., his sons, and the purchaser. In 1806 the sons equitably mortgaged N. to the ptf., who took without notice of the purchaser's claim. *Held*, that the transaction at the purchase gave the purchaser a right, as against the sons, to have N. applied to pay the mortgagee before X. could be so applied; and that, as the equitable mortgage was made to the ptf., pending a suit in which that right would be given effect to, he took subject to the same liability.

*Semble*—But for the pendency of the suit, the ptf., as equitable mortgagee, would have had priority over the purchaser.

*Held*, that the ptf. was entitled to have Y. sold, and to redeem the mortgage on N.—*Going v. Farrell*, Beat. Rep. 472. (C.)

1. An attorney obtained from a client a conveyance of his real estate (out of which his wife was dowable), in trust to pay himself and the client's other creditors; and also to secure future advances to be made by him to the client. The attorney afterwards became a party to a deed, prepared by himself, whereby the client's wife relinquished her dower, in consideration of a jointure to herself, and a charge for her younger children on the lands. He did not communicate to her the existence of the former deed, or inform her of the effect of the borrowing clause therein. *Held*, that further advances made by him were not entitled, by virtue of the trust-deed, to priority over the charge for the younger children; but that equity was administered for their benefit only.—*Brown v. Lynch*, 2 Jon. 706. (E.E.)

2. A prior mortgagee instituted in Chancery a foreclosure suit, and obtained a decree for a sale. A puisne mortgagee instituted a like suit in the Exchequer (the prior mortgagee not being a party thereto), and obtained a receiver, who brought in by-gone rents of the mortgaged premises. *Held*, that the puisne mortgagee was not entitled to this sum as against the prior mortgagee, who had filed a bill in the Exchequer to attach it.—*Lismore v. Chamley*, Hayes, 329. (E.E.)

3. Two judgments for like penal sums against one deft. were obtained by different persons on one day, and in the same Court. The sum reported due on foot of one of them exceeded that reported due on foot of the other. The fund proved insufficient. *Held*, that it should be divided between the creditors in proportion to the sums reported due to them respectively.—*Woods v. Davis*, 2 Jon. 815. (E.E.)

4. B. being entitled to a large sum charged on land, in 1826, on his daughter's marriage, covenanted that he would direct, appoint, and otherwise assure that £20,000, part of his personal estate, should, within three months after his decease, be transferred to, and vested in the trustees of his daughter's settlement. In 1836, B., by will, directed that, in performance of that covenant, £20,000 should be paid to those trustees out of the charge; and, if the charge proved deficient, then out of his residuary personal estate. In 1820, B. had given his bond, with warrant, &c. Judgment had been entered on it. *Held*, that, as against the charge, the trustees, claiming under the covenant, were entitled to priority over the judgment creditor.—*Brownlow v. Earl of Meath*, 2 I. E. R. 383; 2 Dr. & Wal. 674. (C.)

5. If a creditor, with a prior incumbrance, buys the estate, which is subject to a puisne incumbrance, he lets the puisne incumbrancer in, to the injury of the prior incumbrance, the benefit of which is completely lost.—*Garnett v. Armstrong*, 5 I. E. R. 533; 4 Dr. & War. 82; 2 Con. & L. 458. (C.)

6. The puisne mortgagee's general right to compel the prior mortgagee, who has a second

fund to resort to, and the common fund is a deficient one, to exhaust the second fund before he touches the common one, exists when the mortgagor has become bankrupt.

It is perfectly settled that, if a debtor has given security to two persons, and one of them has two funds to resort to, and the other has only one of those funds as his security, and there is a deficiency in the fund which is doubly charged to meet both demands, the Court always throws upon the second security, as far as it will bear it, the claim of the creditor having the two funds.—*In re Cornwall*, 2 Con. & L. 131; *nom. Baldwin v. Belcher*, 3 Dr. & War. 173; 6 I. E. R. 65. (C.)

7. By marriage settlement in 1820, two sums of £2000 and £3000, secured by the several bonds and warrants collateral of K. and his son, were vested upon trust for D., the intended husband, for life, with ultimate remainder to D. absolutely, if there should not be any children of the marriage. Judgments were entered upon the bonds.

In 1825, the trustees transferred to D. the bond for £2000, and the warrant collateral, but did not assign the judgment. A month later D. assigned this bond and warrant to W. to secure £1998. 17s. advanced by W. to D. W. pledged them with his bankers, by whom, in 1833, notice was for the first time given to one of the trustees.

Payments were occasionally made by D. to W., so that in 1837 only £200 remained due to W. That sum being paid off, W. got up the securities from his bankers, and re-assigned to a trustee for D. Within a few days afterwards that trustee and D. assigned the securities to the ptf. in the second cause, in consideration of a pre-existing debt, and of moneys then advanced.

In 1829, D. had granted to the ptf. in the first cause an annuity charged upon his life estate. In and before 1831 this annuitant had made applications to K., and to K.'s agent, and the agent had made payments to him in respect of the annuity; and further, in 1833, a suit had been instituted in the Court of Exchequer, by this annuitant, to enforce payment of the annuity, and the trustees of the marriage settlement had been defts. therein.

A question of priority arose between the ptf. in the two causes. *Held*, that the ptf. in the second cause could not be regarded as a party claiming through or under W.; and therefore that the notice given on W.'s behalf in 1833 could not be considered as operating for the benefit of that ptf. His claim was therefore postponed.—*McCarthy v. The Earl of Kingston*; *Gregory v. The same*, Dr. Rep. temp. Sugden, 439. (C.)

8. A. having contracted to purchase an estate, obtained a conveyance from the tenant for life, in which the remainderman in fee did not join, in 1835. In M. Term 1835, A. confessed a judgment to W. for £4000. In Feb. 1836, A. mortgaged the estate to E. for £5000; and in June 1836, on a further advance of £2000 by W., he mortgaged to W. for £6000.

In March 1837, A. became bankrupt. The estate was not of sufficient value to pay both mortgages. *Held*, that the provisions of the 126th sec. of the Bankrupt Act did not apply, and that W.'s judgment had priority over C.'s mortgage.—*Baldwin v. Belcher*, 6 I. E. R. 424; 1 Jon. & L. 18. (C.)

1. In a suit to carry into execution the trusts of a will, the receiver was ordered, out of the rents, to pay H., a *femme covert*, and devisee of real estates, £400 annually, for her separate use, and on her own receipt, by way of maintenance. By a subsequent deed, whereto H. and her husband were parties, the estates, subject to charges, were conveyed in fee to such uses as H. should appoint by deed. *Held*, that the £400 a-year was not a *chose in action*, but a portion of H.'s estate in the lands; and that a puisne assignee thereof could not, by giving an earlier notice of the assignment to him to the trustees in whom the estates were vested, obtain priority over a prior assignee who had not given notice; and that the memorial of the first mortgage was a sufficient memorial of the assignment of the £400 a-year.—*Rochar d v. Fulton*, 7 I. E. R. 131; 1 Jon. & L. 413. (C.)

2. R., a judgment creditor, having sued out a *fi. fa.* in 1840, on which there was a return of *nulla bona* (the debtor's leasehold estate having been mortgaged), filed his bill on the 16th of Nov. 1840. W., a prior judgment creditor, subsequently presented his petition for a receiver. By an order in the cause and matter, and also in the cause of the prior mortgagee, a receiver was appointed. The lands having been sold to pay the mortgage, R. and W. applied for the surplus fund. *Held*, that R. was entitled to it in priority to W.

The right acquired by suing out the *fi. fa.* was not lost on the return of the writ.

The right of the judgment creditor, before the return of the writ, is but inchoate and incomplete; but when on the return it appears that his execution is frustrated by a legal impediment, then the equitable remedy is called into operation.—*Simpson v. Taylor*, 7 I. E. R. 182. (R.)

3. The devisee of a leasehold estate for lives having suffered an arrear of rent to become due, the landlord brought an ejectment. At the devisee's request, a third party advanced money to pay the rent. The money was applied accordingly, and the devisee mortgaged the lands to secure its re-payment.

The mortgagee is not entitled to priority over the judgment creditors of the deviser.—*Angell v. Bryan*, 2 Jon. & L. 763. (C.)

4. By a marriage settlement, reciting that the lady was entitled to an annuity charged on the estate of her son by a former marriage, and that the rents were inadequate to meet it, she assigned the annuity, and the arrears and future payments thereof, on trust to receive so much as the rents would answer, for the benefit of herself and husband, and to hold the arrears then due and thereafter to become due, in consequence of the rents being insuffi-

cient to answer the same, on trust, if her son should attain twenty-one, &c., in her lifetime, to release them, but if he should die before her under age, &c., that the arrears due and to become due, should form a fund subject to the appointment of the wife. It was declared that in the meantime, and until the arrears should become either absolutely vested in the son or subject to the wife's appointment, the trustees should not require payment of them. The son attained twenty-one, and the rents afterwards became sufficient to pay the annuity, and leave a surplus. *Held*, that though the case was not directly within the deed, the arrears were not raiseable as against a mortgagee of the son.—*Battersby v. Rochfort*, 8 I. E. R. 284; 2 Jon. & L. 431. (C.)

[The Lord C., doubting the correctness of his construction of the deed, directed a re-argument, upon which he pronounced the above opinion erroneous, 9 I. E. R. 191; 2 Jon. & L. 451. (C.)]—[*Affid.*: 2 H. L. Cas. 388; 14 Jur. 229.]

5. A marriage settlement, made by the husband's father, was defective on the face of it, in omitting any limitation after the life estate of the husband and a jointure to the wife, whereby the reversion would descend to X., the elder brother of the husband. A correction of the settlement was refused as against a judgment creditor of X., though sought as soon as the omission was discovered; the evidence of the intended limitations consisting of a letter and memorandum from the lady's father, and conversations with the settlor after the date of the settlement, the draft being lost, and the solicitor who prepared it being unable to account for the omission.—*Milner v. M.*, 8 I. E. R. 488. (C.)

6. A party, having an annuity charged on an estate for life, filed a bill and obtained a receiver. A judgment creditor whose judgment was a charge on the inheritance, obtained an extension of the receiver under the Sheriffs Act. *Held*, that the judgment creditor was entitled to have the entire rents applied to pay off both principal and interest due to him, in priority to the annuitant, the Court having no jurisdiction to fix an equity on the fund.—*Corbet v. Mahon*, 8 I. E. R. 635; 2 Jon. & L. 671. (C.)—[*See* 10 I. E. R. 201. (R.)]

7. A settlement charged a jointure on X. and Y.; and declared that until the death of A. (tenant for life of Y.), it should be borne out of X.; but that after that, X. should be released, and it should be borne out of Y. and not out of X. Although it was held to be charged on both estates at once, yet as between the estates themselves it was *Held*, that Y. should be wholly exhausted to indemnify X., before X. was resorted to.

A settlor having two estates, limited both to himself for life, then to secure a jointure charged on X. until a third person died, and then on Y., with power to remove the charge from both by giving other security; then as to X. to the issue of the marriage in settlement, and as to Y. to himself and his heirs.

He then covenanted to charge £3000 for children's portions, and that it should be the first charge on all property which he should die seized or possessed of, and have priority over all other charges thereon. *Held*, that the £3000, not attaching on any property during the settlor's life, were at his death a charge on Y. only, and was puisne to the jointure on it.—*Sullivan v. S.*, 8 I. E. R. 685; 2 Jon. & L. 769. (C.)

1. A judgment creditor cannot have a sale as against other judgment creditors whose judgments are prior to August 1840.

*Semble*—When his judgment affects a life estate, and he has an equity to throw other incumbrances on other estates, he cannot have those other estates sold to clear the life estate.—*Edington v. Bloomfield*, 9 I. E. R. 115. (C.)

2. When a receiver, appointed on the petition or in the suit of a puisne incumbrancer, is extended to the matter or suit of a prior incumbrancer, the rents received before the extension belong to the puisne incumbrancer.

Rents due at the date of the extension, but not received until afterwards, belong to the prior incumbrancer.

Rents, due at the date of an order appointing a receiver under the Judgment Acts, but received afterwards, belong to the judgment creditor, not to the debtor.

An equitable mortgagee is entitled to priority over a subsequent creditor by judgment affecting the legal estate, who is in possession by a receiver, though the judgment was obtained without notice of the mortgage.—*Abbott v. Stratton*, 9 I. E. R. 233; 3 Jon. & L. 603. (C.)

3. A., tenant for life; remainder to his son, B., in tail. A. and B. executed a deed whereby, after reciting an agreement between them, that A. should grant B. and his assigns an annuity of £100, chargeable on the lands, and payable during the lives of A. and B., and the survivor of them; and that, in consideration thereof, A. should have power to charge the lands with £1000, with interest from his death, for his own benefit, but not to be raised or paid until two years after his death, A. and B. declared the uses of a recovery suffered by them to be, that B., and his assigns, should, during the lives of A. and B., and the survivor of them, receive thereout, an annuity of £100, with the usual powers of distress and entry for non-payment; and, subject thereto, to A.'s use for life; and, after his death, to B.'s use in tail. A. was thereby empowered to charge the lands with £1000, with interest from his death, to be disposed of as he should appoint amongst his younger children. A., having exercised this power, died. B. and several younger children, survived. *Held*, that the £1000 were a charge prior to B.'s annuity.—*Mills v. M.*, 9 I. E. R. 299; 3 Jon. & L. 242. (C.)

4. Since the 3 & 4 Vic., c. 105, judgments of the same Term, entered after its passing, have priority *inter se* as charges on lands, according to the true dates of their entries.

*Quare*—As to the priority *inter se* of such judgments entered before the passing of that Act?—*Borough v. Williamson*, 11 I. E. R. 1. (C.)

5. D. was tenant for life of estates, subject to a charge on the inheritance of £15,000 vested in S.

A bill was filed by D.'s creditors claiming under a deed of the 20th of April 1799, and a receiver was appointed over D.'s life estate.

S. filed a bill to raise the charge which had been created by a settlement of the 12th of Nov. 1761. D. died on the 5th of Oct. 1844. S. obtained an order on the 27th of Jan. 1845, from the late M. R., that the receiver should be extended to S.'s cause so far as related to the rents due at the time of the decease of D. and then remaining uncollected. A sum being in the receiver's hands consisting of rents due in D.'s lifetime, part of which was collected before and part after the order of the 27th of Jan. 1845,—*Held* (affirming the Master's allocation report), that the creditors of D.'s life estate were entitled to the rents received before, and S. to the rents received after, the order of the 27th of Jan. 1845.—*Moore v. Donegal*, 11 I. E. R. 364. (R.)—[*Affirmed: ibid.*, 412. (C.)]

6. S., seized in fee of K., X., and other lands, by deed of Feb., reciting that he had charged his unsettled estates with £2000 for his daughter, conveyed K. and X. to B., his eldest son, for life, remainder to his issue in tail; in consideration of which B. covenanted to pay all S.'s debts and incumbrances. By deed of the 12th of June between S., B., and W. (another son of S.), reciting that S. intended to convey K. to W., he conveyed X. to B. and his issue, as in the former deed. Both deeds recited other provisions made for W. and other children in lieu of charges on estates settled on B. in remainder. By deed of the 13th of June, between S., B., and W., S. conveyed, and B. confirmed, K. to W. for life, remainder to his issue in tail. B. paid the debts and charges. On the death of S., W. went into possession of K., and so continued until his death. In a suit by the son of B., *Held* that the deed of Feb. was for valuable consideration, which extended to the issue of B. That the deed of the 13th of June was a voluntary deed, no consideration moving from W. to S. That even if both deeds were voluntary, the deed of Feb. should prevail; and that neither S. nor B., nor both of them, could revoke it by a subsequent voluntary settlement.

The futility of a defence resting on an unproved inconsistent prior conveyance, though evinced by admission, in answer to another suit, observed on.

Expenditure on the estate claimed, with ptf.'s knowledge, but chiefly in his minority, *Held*, no defence.—*Scott v. S.*, 11 I. E. R. 487. (C.)—[*See* 13 I. E. R. 212; 4 H. L. Cas. 1065.]

7. Receiver appointed on a judgment, notwithstanding a voluntary deed executed the same day as the judgment was entered; the judgment having relation back to the first day of the preceding Term.—*Beamish v. Phaire*, 11 I. E. R. 559. (R.)

1. An unregistered mortgage has priority over the subsequent certificate of the appointment of assignees.—*Leech v. Law*, 1 I. Jur. 41. (C.)

2. A., having obtained a judgment in respect of a salvage advance, extended a receiver already appointed by B., a prior judgment creditor; and moved for payment in priority. *Held*, that the Court will not, on petition, decide the question of priority, B., insisting on his right to be paid according to the priority of his judgment.—*O'Grady v. Glover*, 1 I. Jur. 153. (R.)

3. A., being declared purchaser of an estate, sold under the Court of Exchequer, for £12,000, lodged £5000, and applied to pfts. to lend £8000 on a mortgage, to be the first charge on the property. After the agreement for the loan, but before its completion, a judgment was confessed by A. Nevertheless, the pfts. proceeded with the loan; and a consent, made a rule of Court, ordered that the conveyance should be made to a trustee for both parties, who, by deed of same date with the conveyance, mortgaged the lands to pfts. *Held*, that the judgment creditor had priority to the mortgagees.—*Walcott v. Lynch*, 2 I. Jur. 309. (C.)

4. The appointment of sequestrators, for disobedience of an order on a receiver to bring in the balance due by him on foot of his account, is good cause against the appointment of a receiver by a creditor whose judgment is puisne to the receiver's recognizance.—*Warren v. W.*, 13 I. E. R. 69. (R.)

5. In 1836 a receiver was appointed under the Sheriffs Act, at the suit of A., over a term for years, which was afterwards sold under an Act of Parliament, and the money brought into Court to the credit of the matter. *Held*, that as against a prior creditor, A. was entitled only to the dividends of the fund, but not to the principal, notwithstanding the 3 & 4 Vic., c. 105, s. 22.—*Colvan v. Gregg*, 13 I. E. R. 88. (R.)

6. In an incumbrancer's suit A., the inheritor, admitting his liability to an arrear of interest, and disputing his liability for more, he was ordered, on a motion for a receiver, to pay within a certain time the admitted amount, and pay the accruing gales of interest for the future. He did pay accordingly for some years; but, having made default, the receiver was appointed under this order: and, under a consent order subsequently made, applied the funds from time to time in paying the future interest. The receiver was afterwards extended on the petitions of several puisne judgment creditors of A. A fund having accumulated, brought in by the receiver after paying the interest,—*Held*, that it could not be claimed by the judgment creditors, while the principal and disputed arrear of interest were due to the ptf.; the receiver, when once appointed, being so for all purposes of the cause, and not to be considered limited to the payment of the accruing interest.

On an appeal, counsel for the appellant only can be heard in support of his case, and not

counsel for others in the same interest who have not appealed.—*Stewart v. Marquis of Donegal*, 13 I. E. R. 106. (C.)

7. T., a trustee, lent trust-money on mortgage to M. By an arrangement on the marriage of M.'s daughter, a valuable leasehold interest was granted by M. out of the mortgaged premises, and put in settlement; T. being the person who managed it, and the solicitor who prepared the lease and settlement, the daughter or her husband not being informed of the mortgage. T. afterwards, with his co-trustee and their *c. q. trusts*, filed a bill to foreclose the mortgage, and sell, if necessary, discharged of the lease. *Held*, that the parties deriving under the settlement must be fixed with notice of the mortgage and trust, and could not rely on T.'s conduct as a defence against even him, and therefore could not object to his being a co-plaintiff.

*Quere*—Whether, if notice was not shown, such an equity against a trustee would be a defence?—*Twycross v. Moore*, 13 I. E. R. 250. (C.)

8. A father, V., upon the marriage of his son, D., executed, in 1821, a settlement, conveying a freehold and chattel real (which latter was recited to be subject to a mortgage) to trustees, to hold subject to the charges and incumbrances affecting them, and specified in the annexed schedule, for 500 years; and, subject to that term and the aforesaid charges and incumbrances, upon other trusts. One of the trusts of the term was to raise £7000 after V.'s death, for the sole use of him and his personal representatives, and to be disposed of as he should direct. There followed a proviso that the £7000 should, in the first instance, be subject to the payment of all his debts then affecting the premises, and to his covenants therein contained for payment (*inter alia*) of the incumbrances affecting them; it being the true intent of the settlement that the residue of the £7000, left after those payments, should be disposable by V., who also covenanted that the premises were free from incumbrances, other than such charges and incumbrances as at the time, or immediately before the execution of the settlement affected them, and were a lien thereon, and specified in the schedule. In the schedule, both judgment debts and simple contract debts were specified. In 1825, the mortgagee of the chattel real, having advanced to V. and D. a further sum, part of which was applied in payment of three of the judgment debts specified in the schedule, V. and D. re-mortgaged the chattel real, and mortgaged the freehold to him for the aggregate debt; and for better securing the same, V., reciting his power under the settlement, directed that the trustees of the term should, after his decease, raise £7000, and apply it to pay whatever might then remain due on foot of the aggregate mortgage debt. The judgments paid off were assigned as a collateral security to the mortgagee. In a foreclosure suit by the mortgagee, *held*, that so much only of the advance by him in 1825 as was applied in

paying the three judgment debts ranked equally, in point of priority, with the other judgment and simple contract debts specified in the schedule. That all the judgment and simple contract debts specified in the schedule were well charged by the settlement upon the term, and the £7000 to be levied thereout; and that the remaining portion of the advance made in 1823 ranked subsequently to all those judgment and simple contract debts.

That the mortgage of 1825 did not operate as a revocation of the settlement in respect of the debts specified in the schedule.

*Quære*—Whether, independently of the term and of the £7000, the debts specified in the schedule were well charged upon the freehold and chattel real, the subjects of the settlement?—*Greene v. Stoney*, 13 I. E. R. 301. (C.)

1. The lands of A. and B. were jointly mortgaged for £150. A. vested in the owner in this matter, subject to the payment of the mortgage in exoneration of B.; and B. vested in the party now showing cause. Subsequently, the petitioner advanced to the owner a further sum of money, and obtained an assignment of the original mortgage. A railway company having occasion for part of A., paid the petitioner £250 generally. *Held*, that he was bound to apply this in payment of the first mortgage.—*In re Vance*, 3 I. Jur. 247. (I.E.C.)

2. An incumbent, in 1840, by deed, charged his then present benefice with an annuity, and covenanted that any benefice to which he might be preferred, in lieu of that which he then held, should, immediately upon his becoming entitled thereto, stand charged with the annuity. In Aug. 1840, he was promoted to a new benefice. In Oct. 1840, a judgment was recovered against him by a creditor, who obtained sequestration of the new benefice. In 1849, the annuitant filed a bill to raise the arrears of his annuity by means of a receiver. That bill was taken as confessed against the incumbent, and was answered by the sequestration creditor. *Held*, that the annuity attached upon the new benefice at the moment at which the incumbent became entitled thereto, and had priority over the claim of the sequestration creditor; and that this was so, whether or not at the rendition of the judgment, he had notice of the annuity and covenant.

That the annuitant was entitled to have a receiver appointed over the benefice, upon an interlocutory application, made for that purpose before the hearing of the case.—*Battersby v. Homan*, 2 I. C. R. 232; 2 I. Jur. 121. (C.)

3. A judgment is not, as against the lands of the conuzor, entitled under the statutes 10 Car. 1, sess. 2, c. 3 (*Ir.*), and 3 & 4 Vic., c. 105, to priority over a voluntary conveyance of anterior date, executed by the conuzor when not in embarrassed circumstances.—*Evans v. E.*, 2 I. C. R. 242; 5 I. Jur. 21. (C.)

4. Registration under the 7 & 8 Vic., c. 90, does not confer any priority on judgments *inter se* during the lifetime of the conuzor.

A. recovered against B. a judgment in 1838. In that year B. died, having bequeathed (subject to charges) a chattel real beneficially to his executrix and his son. The executrix assented to the bequest. In 1843, C. recovered a judgment against B.'s executrix and son. In 1846, D. recovered a judgment against them, which judgment was immediately registered. A writ of *fi. fa.* on that judgment was lodged with the sheriff on the 18th of Jan. 1849. On the 25th of Jan. 1849, the judgment of 1843 was registered. On the 30th of Jan. 1849, the sheriff sold to A. the chattel real, under the *fi. fa.* issued on D.'s judgment of 1846. A's judgment of 1838 was, on the 6th of Feb. 1849, revived against B.'s executrix in her representative character. On that judgment a *fi. fa.* was issued, and a return of *nulla bona* made. On the 28th of Feb. 1849, the chattel real was, by indenture, conveyed to A. by the sheriff and B.'s executrix and son. A. afterwards obtained assignments to himself of the charges on the chattel real. On a bill subsequently filed by C. against A., and B.'s executrix and son, to have the amount of the judgment of 1843 raised out of the chattel real—*Held*, that the judgment of 1846 was not, in virtue of its earlier registration, entitled to priority over the judgment of 1843.

That A. was not, in respect of the judgment of 1838, entitled to the benefit of the proviso in the 3 & 4 Vic., c. 102, s. 22, in favour of purchasers, mortgagees, and creditors, who became such before the passing of that Act, *i. e.*, in 1840; and that A. was not entitled to use that judgment, or the charges assigned to him, as a protection to his title to the chattel real as against C.

That the title to the chattel real acquired by A. under the sale by the sheriff on the *fi. fa.*, issued upon the judgment of 1846, was not protected, as against C.'s judgment of 1843, by the proviso in the 3 & 4 Vic., c. 105, s. 22, "that nothing in that Act contained shall take away or prejudice any remedy or proceeding which any judgment creditor may, or, if that Act were not passed, might have or take in relation to his judgment; but such creditor shall be at liberty to proceed at law or in equity for recovery of any sum secured by, or due upon, any such judgment, whether before or after such period as aforesaid, as if that Act had not been passed." A decree was pronounced for C., as prayed by his bill.—*Hyde v. Atkinson*, 2 I. C. R. 246; 5 I. Jur. 33. (C.)

5. An ante-nuptial settlement, executed in 1782, recited that H. was seized in fee of the lands of W. (the fact being that he was seized in tail of part, and in fee of the remaining part), and that he was seized of an estate for three lives, with a covenant for perpetual renewal, in the lands of B., and possessed of a term for years in the lands of R. By that settlement, W. was settled upon H. for life (subject to a term of 500 years, to provide for younger children £1500 as portions, which



might be raised during the lifetime of H., with his consent), remainder to the first and other sons of the marriage successively in tail male. B. and R. were thereby settled upon H. for life (subject to making good any deficiency in the £1500 portions), remainder to the first son of the marriage, his heirs, executors, &c. That settlement contained a power (afterwards exercised) for H. to charge upon all the lands £2000, to be raised at any time which he might appoint; and a proviso enabling him to deprive any son, who might misconduct himself, of any estate thereby limited to him. No recovery of W. was suffered to the uses of that settlement. In 1811, E., eldest son of the marriage, being of age, joined H. in a deed making a tenant to the *procurator* in a recovery about to be suffered of W., reciting that he was seized of an estate for life, and E. of an estate in remainder in tail male in W., and their intention to bar all estates tail, remainders, &c., therein; and declaring that the recovery should enure for the purpose of securing any sums which H. and E. might jointly charge upon W., and to such other uses as they might jointly appoint; in default of appointment, to the uses of the settlement of 1782. The deed of 1811 contained a proviso that in the event of E. dying in the lifetime of H., and without issue, W. should stand charged with £2000 for the younger children of H. A recovery was duly suffered to the uses of that deed. Neither H. nor E. ever exercised the powers conferred upon them of jointly charging or appointing W. Subsequently to 1811, judgments were recovered against E., who died in 1819, in the lifetime of H., and without issue. *Held*, that the £1500, for portions created by the settlement of 1782, were primarily charged upon W., and that the other lands constituted only an auxiliary fund to pay those portions.

That the younger children of H., in regard to their charge of £2000 under the deed of 1811 upon W., were not, as against the judgment creditors of E., entitled to have, upon the principle of marshalling, the charge of £2000, created by the settlement of 1782, thrown altogether upon R., but that all the lands should bear that charge *pro rata*.—[*Hargreave, C., dissentiente.*]

That as the power for H. to charge £2000 under the settlement of 1782 overrode all the other powers and provisions in it, the £1500 portions should not be deducted from the value of W., in ascertaining the proportion of the £1000 charge of 1782, which those lands were to bear, but that proportion should be calculated upon the full value of W.—*In re Jones's Estate*, 21 C. R. 544. (I.E.C.)

1. Blanks were left for the names of the baronies in which lands, the subject of a deed of marriage settlement, were situate. After the execution of the deed, the names of the baronies were inserted. The deed was re-acknowledged before witnesses other than the witnesses to the original execution of the deed. An affidavit by one of the witnesses to the execution of the deed, verified the execution of a memorial and of the deed

itself, though the deed as altered was not re-acknowledged before him. Subsequently the grantor signed a document in the presence of the witness, declaring that the names of the baronies had been inserted in his presence, and by his direction, in pursuance of the original intention of the parties, and for the purpose of registration only. The memorial was registered, on production of the affidavit and the original deed, under the 3 G. 4, c. 116. *Held*, following *Gardiner v. Blesinton*, 1 L. C. R. 64, from which decision the Court dissented, that the insertion of the names of the baronies in the deed was an alteration in an immaterial point; and that neither the deed nor the registration was thereby invalidated.

Lands were devised to A. for life, subject to a term of 1000 years, to secure portions for his younger brothers and sisters. The testator, by a deed of 1836, charged a portion for one of the sisters on the lands, and, by a codicil referring to the deed, revoked the bequest made by the will in her favour. A party claiming from A., under a deed of 1841, registered before the deed of 1836, availed himself in the Master's office of the codicil to diminish the portions bequeathed by the will. *Held*, that he could not rely on the codicil as adeeming the legacy, and at the same time avail himself of the prior registration of his deed, by disclaiming knowledge of the contents of the deed of 1836.—*Delucour v. Freeman*, 2 L. C. R. 633. (R.)

2. Two judgments having been lodged with the officer for entry on the same day, the date of entry was the same. *Held*, that neither was entitled to priority, although one appeared before the other on the roll. The fund, under such circumstances, is distributable moiety between them; the judgments being for the same amount.—*Norcott v. Massy*, 6 L. Jur. 113. (R.)

3. V. entitled to an undivided fourth of the lands of A., B., C., and D., by deed reciting that he was entitled to D., granted an annuity out of D. A petition having been presented in the L. E. Court to sell the grantor's interest, the Court directed a partition of the lands, and awarded A. to the grantor of the annuity, and B., C., and D. to the parties entitled to the other three-fourths, without notice to the annuitant. *Held*, that as against subsequent judgment creditors of the grantor, the annuitant was entitled only to so much of the produce of A. as was equivalent to the one-fourth of the value of D.—*In re Wilkins*, 4 L. C. R. 575. (P.C.)

4. Premises were, by a post-nuptial and voluntary deed, dated 28th Feb. 1826, charged with a rentcharge of £40 per annum. A judgment was obtained by a creditor, in E. Term 1836, for the penal sum of £900, and duly registered, charging the premises. On the 21st Nov. 1846, the premises were mortgaged for £700. A bill having been filed to foreclose the mortgage, and the fund proving deficient, the rentcharge was declared to be void as against the mortgage, but good as

against the judgment; that the mortgagee, though subsequent in point of time to the judgment creditor, should have the first claim on the fund, to the extent of the value of the rentcharge as calculated by a notary; that the judgment creditor should stand second for his whole demand; the mortgagee third in respect of the balance of his demand; the residue, if any, to go to the owners of the rentcharge. — *v. M'Cowan*, 7 I. Jur. 389. (M.O.)

1. F., seized of the M. and D. estates, by a post-nuptial settlement executed in 1807, conveyed D. to the use of himself in fee, free from his wife's dower, and conveyed M. to the use of himself for life; remainder to provide a jointure for his wife in lieu of dower, remainders over in strict settlement. F. covenanted that his wife would levy a fine to the uses of the deed. F.'s wife signed this deed, but died without having ever levied a fine, and without having ever been called on to do so. *Held*, that the deed of 1807 could be supported, as not merely voluntary, against subsequent purchasers for value from F.

Very informal documents *held*, in favour of a child, to amount to the exercise of a power of appointment.—*Blake v. French*, 5 I. C. R. 246; 1 I. Jur. N. S. 60. (C.)

2. By settlement of 1810 power was given to A., the intended husband, to appoint to all and every, or any one or more of the children, grand-children, or other issue of the marriage, in such manner and form, and, if more than one, in such parts, &c., and for such estate and estates, time or times, and for such interests, and with such limitations over, or substitutions, or charges in favour of any one or more of the children, &c., respectively, and either by way of legacy, portion, present interest, remainder, or otherwise, as A. should by deed or will direct; it being the true intent of the parties that A. might divide the premises in such portions as he should think fit amongst his children, or appoint the entire to one or more child or children, and charge the said premises by way of pecuniary provision for the other children of the marriage. Power was given A. to charge £200 for his own benefit, and a jointure and portions for a second wife, and children of a second marriage.

By settlement executed in 1844 by A. and B., his eldest son, on B.'s marriage—reciting the power of appointment in the settlement of 1810; the powers to A. to charge; that A. had agreed to release the latter powers; that the lands in which A. had a life estate were subject to various debts, charges, and incumbrances stated in a schedule; and that A. had not appointed the lands,—A. appointed the lands after his own death, but subject to the debts, &c., thereinbefore mentioned, and then affecting the lands, and released his power of charging them with a jointure and portions. A present annuity of £200 a-year, and a jointure of £300 for his intended wife were provided and secured by a term; and a term *puisne* to that term was created, to raise

£4000 portions for A.'s younger children. The schedule to the deed comprised the £4000 portions, and £530, a bond debt of both father and son.

*Semble*—The power would have authorised an exclusive appointment; but *Held*, that the deed of 1844 operated as an appointment of the estate, subject to a charge of £4000, which took priority of the jointure to B.'s wife.

That a charge of the bond debt was created by the recital, and the appointment subject to it had also priority over the jointure.

That, independently of the power, the £4000 was a charge in priority to the jointure under the deed of 1844.—*In re Nash*, 5 I. C. R. 384. (P.C.)

3. H., a judgment creditor, made a debt. in a suit, permitted a report and decree to be made in 1828, which omitted all mention of his claims. In 1855, he obtained an order giving him liberty to file a charge, and obtain, at his own expense, a separate report in respect to his claims; but reserving to the persons who had proved in the cause a right to rely on the decree against his claims. The Master found that his incumbrance was subject to the rights and priorities established by the decree of 1828. *Held*, that, on the true construction of the order of 1855, the Master was right.

*Quare*—Whether the order of 1855 was right in permitting H. to file a charge in respect of a claim omitted in a decree to which he was party?—*Knox v. Waters*, 5 I. C. R. 430. (C.)

4. A was seized in fee of X., and for life, with remainder to his son in tail, of Y., subject to incumbrances. By a private Act of Parliament, passed in 1843, X. was vested in a trustee, subject to the incumbrances affecting it, and to judgments against A., which were specified in a schedule to the Act, to the use of A. for life, remainder to his son in tail; and Y. was vested in the trustee, in trust, to sell and pay incumbrances, and to pay the residue to A. A. was also seized in fee of Z., not included in the Act. A. confessed a judgment in 1846, and died, having allowed large arrears of interest to accrue on the incumbrances on X. A portion of X. and Z. were sold in the I. E. Court. X. was sufficient to pay the arrears of interest. *Held*, reversing its decision, that the arrears of interest on the judgments named in the schedule to the Act should be paid out of the produce of X., so as to leave the produce of Z. to pay the judgments of 1846.—*In re Fox*, 5 I. C. R. 541. (P.C.)

5. In 1812, a mortgage was executed by A. and B. to C. In 1813 two judgments, and in 1815 a third judgment, were obtained by C. against A. C. entered into possession of the mortgaged lands in 1812, and continued in possession until 1855. In a redemption suit—*Held*, that the judgments were not, so far as related to the question in this case, to be considered as incorporated in the mortgage so as to form one security, and therefore that the rents received, or which might have been received, by C., were to be applied—first, in

paying the interest and principal due on the mortgage; secondly, in paying the interest and principal due on the two judgments of 1813; thirdly, in paying the interest and principal due on the judgment of 1815.—*Montgomery v. Donohoe*, 5 I. C. R. 495; 2 I. Jur. N. S. 91. (R.)—[Affirmed: 6 I. C. R. 168; 2 I. Jur. N. S. 401. (C.)]

1. The order made by a Court of Law, under ss. 132, 133, 134, and 135 of the C. L. P. Act, 1853, to attach stock standing to the credit of a debtor in a cause in the Court of Ch., does not *per se* operate as a seizure of or a charge on the stock. *Semble*—The lodging of such an order with the Accountant-General, without obtaining an order of the Court of Ch. does not charge the stock.

*Semble also*, that a conditional order does not attach the fund, under the C. L. P. Act.

A conditional order to charge funds in Chancery was obtained in a Law Court, under the C. L. P. Act, on the 30th June; made absolute on the 8th August; and lodged with the Accountant-General on the 14th Nov. A conditional order to charge the same fund was obtained in Ch. by another creditor, under the 3 & 4 Vic., c. 105, on the 1st August, lodged with the Accountant-General on the 7th August, and made absolute on the 13th Nov. *Held*, that the creditor who had obtained the order in Ch. was entitled to the fund in priority to the other.—*French v. Balfé*, 6 I. C. R. 63; 2 I. Jur. N. S. 299. (R.)

2. Bequests of several legacies, followed by a gift of the residue of the testator's real and personal estate, are sufficient to charge the legacies upon the real estate.

B., who possessed both real and personal estate, by will, in 1825, after bequeathing an annuity to his wife, further bequeathed to her £1000, "in trust to give such part of said sum as she may consider my estates and assets may justify, to my daughter A., on her marriage with her consent; the entire or remainder of said sum to go and be considered as part of the residue of my property as hereinafter bequeathed to my son B." He then bequeathed £5000 to A., and, if she should die before marriage, then "this bequest shall be considered as part of the residue of my property, and shall go and merge in same." After some small pecuniary bequests, "As to all the rest, residue and remainder of any property I may die possessed of or entitled to, of what nature soever, whether estates freehold, leases, &c., &c., I hereby bequeath, devise and grant the same to my son B., with liberty to him to dispose of the same in any way he may think proper."—*Held*, that the legacies bequeathed to A. were well charged on the real estates, and entitled to priority over a subsequent mortgage by B.—*In re Browne*, 6 I. C. R. 240; 2 I. Jur. N. S. 322. (I.E.C.)—[Affd.: 6 I. C. R. 390; 3 I. Jur. N. S. 49. (C.A.)]

3. E., by a post-nuptial settlement, in 1835, limited lands, "subject to the debts, charges, and incumbrances in the schedule mentioned," to trustees for 1000 years, subject thereto, to his eldest son, V., for life; remainders over in

strict settlement. The trusts of the term were, after the death of E. "to raise money sufficient to pay off the debts, &c., specified in the schedule to the said deed, or such or so much thereof as should then remain unsatisfied; and to apply the money to so be raised in paying off such debts," &c. "accordingly." E. acquired by the same deed, a general power of charging the lands, subject, to the term. Amongst the debts, mentioned in the schedule were two, secured to J. by promissory notes. In 1844, E. gave J. a bond, on which judgment was recovered against him. In exchange, the promissory notes were delivered up.

E., by will, in 1843 referred to the settlement of 1835, and confirmed it. Under his general power of charging, he charged the lands with payment of his debts, so far as his personal estates should be insufficient to discharge them, and bequeathed the residue of his personal property, after payment of his debts, to the petitioners, whom he appointed his executors.

After the decease of E., J. obtained payment of the sum due on foot of his judgment out of E.'s personal estate. *Held*, that the lands comprised in the settlement of 1835 were the primary fund to pay the judgment obtained by J. on the bond given in extinction of the promissory notes.—*Stuart v. Castlestuart*, 6 I. C. R. 289; 3 I. Jur. N. S. 6. (C.)

4. R., before his second marriage, in 1832, executed three bonds, with warrants of attorney to confess judgment thereon; and by a deed executed the same day, erroneously reciting that judgments had been entered on the bonds, declared the trusts of those judgments to be for the three daughters of his first marriage.

Judgments were not entered on the bonds until after the solemnization of the second marriage. By settlement executed in contemplation of the second marriage, which did not mention the bonds or judgments, R. settled lands for the purposes of that marriage. R. afterwards, for value, charged his reversionary interest in those lands. *Held*, that the judgments of 1832 were to be treated as voluntary, and postponed to the subsequent charges created by R.

After the creation of the charges by R., two of the daughters assigned their judgments, for value. *Held*, that such assignment for value did not operate by relation, so as to give the judgments priority over the charges created by R.—*O'Donovan v. Rogers*, 7 I. C. R. 496; 3 I. Jur. N. S. 291. (C.A.)—[Affirming Rolls decision: 7 I. C. R. 1.]

5. A., in consideration of £2632 advanced by B., his son, in pursuance of a previous agreement, by deed dated the 21st Nov. 1844, settled his fee simple estates in strict settlement, and conveyed the lands of C. and K., which he held under a f.f. grant, to trustees, to sell, and apply the proceeds to the payment of debts affecting the fee-simple estates, incurred prior to T. Term 1842; and to take an assignment of those debts, to secure £6000 for A.'s younger children.

The advance was secured by a judgment entered up immediately before the execution of

the deed of 1844. A schedule to that deed contained a considerable number of judgment debts, entered up subsequently to T. Term 1842, but before the judgment securing B.'s advance. *Held*, that upon the construction of the deed of 1844, the trusts of the deed were intended to have priority to B.'s judgment [Hargreave, C. dissenting.]

C. and K., were held under a f.-f. grant, subject, as to K., to a lease for three lives, all of which, at the execution of the deed of 1844, were alleged to be dead. The deed provided that B. should take proceedings to recover actual possession of K. B. took those proceedings; but on investigation it appeared that one life was in being. *Held* (Hargreave, C., *dubitante*), that the proviso was a condition precedent to the carrying out of the contract intended by the deed of 1844; and that, as it never had been fulfilled, B. was not bound to carry out the trusts of the deed.—*In re Blake*, 7 I. C. R. 65. (I.E.C.)

1. A. bequeathed a legacy to H., which she directed to be paid and retained by him in the first instance, without any delay or deduction immediately after her decease. She then made other bequests, among which was a bequest of £250 to R.; and if the full amount of the debt due to her should be recovered, she left R. £200 in addition. She appointed H. her executor and residuary legatee. *Held*, that the legacy to H. should not have priority; but should, on a deficiency of assets, abate rateably with the other legacies.—*Roche v. Harding*, 7 I. C. R. 338; 3 I. Jur. N. S. 253. (R.)

2. In March 1857 the bankrupt borrowed from W. £200 and deposited with W., as a security, a memorandum of agreement between the bankrupt and his landlord, that, on paying £400, by instalments of £50, a lease would be granted to the bankrupt. The instalments were not paid, and the benefit of the agreement was forfeited. In April 1858, the bankrupt being indebted to R. in £160, proposed, as security to R., an equitable mortgage on the premises. The landlord agreed to execute a lease, on payment of £100, the balance due of the £400. The lease was executed, and R. paid the £100—*Held*, that R.'s demand for £260 was prior to the claim of W. on the leasehold premises.—*In re Clarke*, 8 I. C. R. 216. (B.)

3. A tenant for life of estates, with a power to charge them with £7000 for the benefit of his younger children, executed on the marriage of P., his third son, a bond and warrant of attorney, on which judgment was entered, to secure £1400 as provision for such third son. By will he devised his estates to his eldest son, subject to his debts and incumbrances of every kind, and bequeathed £2000 to his only daughter, M., and £1000 to his only son, H., charging these legacies on the estates, in exercise of the power. The testator concluded his will by stating that he had avoided making mention in his will of his married children, as he had already, by bond or otherwise, provided for them at their respective marriages,

adequately to the provision made by his will for his other children.

It having been decided (7 I. C. R. 18), that the charge of the judgment debt to P., by the will, operated as an execution of the power to charge for younger children,—*Held*, overruling a decision of the I. E. Court, that the charge of £1400 had not priority over the legacies.—*In re Morgan*, 8 I. C. R. 266; 3 I. Jur. N. S. 357. (C.A.)

4. By marriage settlement, it was covenanted that a term should be vested in trustees, to secure portions for the younger children of the marriage, as the father should appoint by deed or will. On the marriage of one of the younger sons, he wrote a letter promising to appoint a portion of the fund in his favour. On the marriage of another younger son, the father made a regular appointment, by deed in his favour. *Held*, that the former, though but a contract to appoint, being prior in date, should be preferred to the subsequent regular appointment.—*In re Jennings*, 8 I. C. R. 421. (P.C.)

5. V., possessed of a term of years, with a *t. q.* covenant for renewal, devised all his landed property, houses, and tenements, goods and chattels of every description, ready money and outstanding debts, to his sons, A., B., and C., to be equally divided between them, and appointed his wife executrix.

V. died, in 1833. On his death his widow, who proved the will, and B. went into possession of the lands, until the death of the wife in 1847, when A. took out administration *de bonis non*, and continued in possession, applying all the rents to his own use. In 1850 a perpetuity grant of the lands under the Church Temporalities Act, reciting V.'s will, and that A. was administrator *de bonis non* was made to him expressly in that character. In an administration suit—*Held*, that the perpetuity grant rebutted the presumption of an assent by the executor to the bequests, arising from lapse of time.

That the lands should be sold, and divided into three shares, for the benefit of V.'s sons or their representatives.

That the claim of A.'s representative, by reason of the surplus rents received by B., should be paid out of B.'s share in priority to judgments against B. registered as mortgages.—*M'Connell v. Crothers & others*, 9 I. C. R. 217. (R.)

6. Two judgments, of 1797, were obtained against D., seized of the lands of B. & S. B. was sold in the I. E. Court, on the petition of a mortgagee of 1845; and the proceeds of the sale, being insufficient to pay the mortgage, an issue was directed by that Court, to try whether the judgments had been paid. A verdict found that they had not. The mortgagee was thereupon directed by the I. E. Court to pay the sum due on the judgments, and they were assigned to a trustee for her. *Held*, that the judgments were subsisting charges against S., and were not barred by the Statute of Limitations.—*Morris v. Herbert*, 9 I. C. R. 327. (R.)

1. By deed, reciting an intention on the grantor's part, to found and benefit charities, lands were conveyed, on trust, to pay annuities for the maintenance of some of the charities, on certain gale days, "without any abatement, deduction, or defalcation whatsoever." The trustees were then directed to pay other annuities for the benefit of the other charities. The estate proving deficient to pay all the annuities, the Master, upon a reference to him, decided that those ordered to be paid "without any abatement, &c., &c., had priority." *Held*, that the annuities had no priority over each other. The doctrine of *cy-pres* in reference to charities expounded. — *In re Evans's Charities*, 10 I. C. R. 271. (C.)

2. A., by will, in 1836, executed a power of appointing amongst his younger sons, £2000, charged by his marriage settlement on the lands of H., of which he was tenant for life. After his death, his eldest son V., who took H. as tenant in tail, conveyed them in 1837 to trustees, to secure £1600 by way of mortgage, the younger sons being parties to the mortgage, and consenting thereby to postpone their claims. At the same time, V. executed his bond collateral, to secure the same sum, and warrant, upon which judgment was entered.

In 1841, V. purchased the lands of F.; and in 1845, a judgment was obtained against him by S. H. and F. were subsequently sold in the L. E. Court. The proceeds of H. having proved insufficient to pay the amount due on foot of the mortgage, a Judge of that Court ordered that the mortgage debt should be paid rateably out of the proceeds of H. and F., and the surplus of H. applied in discharge of the appointees' claims, and the surplus of F. in discharge of the judgment of 1845. This Court, upon appeal, reversed that decision, being of opinion that no equity had arisen upon the purchase of F. in favour of the appointees under the will, so as to entitle them to insist upon the mortgagee's claim being paid rateably out of the proceeds of H. and F., and that consequently the doctrine of marshalling did not apply. — [*Barnes v. Racster*, 1 Y. & Col. Ch. Cas. 401, commented on.] — *In re Lawder's Estate*, 11 I. C. R. 346; 6 I. Jur. N. S. 210. (C.A.)

3. A. mortgaged B. to V., and gave him as a collateral security a judgment, which attached on both B. and W. Subsequently V. assigned his debt and securities to C. And A. at the same time mortgaged B. to C. for a further sum, with a covenant against all incumbrances, except the mortgage to V. *Held*, that C., as against a puisne incumbrancer, was entitled to be paid the debt assigned to him by V. out of W. first, so as to leave B. unimpaired to meet the second mortgage made to C. himself. — *In re Roddy's Estate*, 11 I. C. R. 369. (L.E.C.)

4. A. devised several annuities, which she directed only to be a lien upon and charged on the yearly income of her lands, real, freehold, and chattel real, but not upon any other

personal estate. She directed that, if the yearly income of her lands should fall short of paying the annuities, the deficiency should equally and proportionably be upon all such annuities; each to receive according to the magnitude of such annuity, and in proportion thereto, but no such deficiency to be vested upon her personal estate. She devised the residue of her property, real and personal, after satisfying the annuities, &c. The income of the lands was insufficient to pay the annuities. *Held*, that they being charged on the income only of the lands, were, for each year, satisfied by payment of a proportionable share, and that the arrears were not charged on the future rents. — *Fitzgerald v. O'Connell*, 11 I. C. R. 457. (R.)

5. In a marriage settlement, a husband covenanted with his trustees that his heirs, executors, &c., would, from his death, pay his wife a yearly jointure of £40; and pay them £400 for the benefit of the children, if any. The husband became indebted to one of the trustees, who entered up judgment against him, and insured the husband's life for its amount. Upon sale of the trust property — *Held*, that the assignee of that judgment was entitled to be placed upon the final schedule of incumbrances in priority to the settlor's wife and children; and that, in considering dealings between a trustee and his c. q. t., the length of time during which the trustee's acts have been acquiesced in, with the knowledge of the c. q. t., is to be taken into account in the trustee's favour. — [*Ennis v. Smith, Jon. & Car.* 400, followed.] — *In re McKenna's Estate*, 6 I. Jur. N. S. 330. (C.A.)

6. A. was seized in fee of estates called the family estates, and tenant for life of devised estates, with remainder to B., his eldest son, in tail, subject to large incumbrances affecting each estate. A. and B. agreed that all the incumbrances should be paid by the sale of C., a portion of the devised estate, which was of sufficient value for the purpose; and that the residue of the devised estate, and the family estate, should be settled on A. for life, remainder to B. for life, remainder over. Two deeds were executed. By one the entail of the devised estate was barred, and it was conveyed to such uses as A. should appoint. By the other A. conveyed the family estate, and conveyed and appointed the devised estate to such uses as A. and B. should jointly appoint; in default of appointment, to the use of trustees for 1000 years, to secure younger children's portions; and subject thereto to the use of A. for life, remainder to B. for life, remainder to the first and other sons of B. in tail, remainder over. A. covenanted with B., that he would sell C., and would, out of the rents received by him before the sale, and the money which should arise from such sale, pay all the charges and incumbrances affecting both estates.

A. misapplied the rents, and suffered an arrear of interest of the incumbrances on the family estate to accrue. Consequently the price of C. proved insufficient to pay the

incumbrances and the interest on them; and a portion of the family estate was sold. *Held*, that B. had an equity against A. to be recouped out of the rents of the life estate which he derived under the deed, to the extent of all interest on the incumbrances scheduled in the deed, which accrued after its date, and which were levied by sale of any of the family estates, in consequence of A.'s misapplication of the rents.

That although A. was not bound, before the execution of the deed, to pay the arrear of interest then due on the family estate, it was, under the deed, to be paid out of the rents and produce of the sale of C.

That the rents and the produce of the sale of C. were also applicable to pay arrears due on the devised estate.

That the equity of the petitioner to be recouped prevailed over the right of judgment creditors of A., whose judgments were obtained after the deed, and who had appointed a receiver over his life estate.—*Kilworth v. Mountcashel*, 12 I. C. R. 43. (R.)

1. A., seized of real estate, subject to a mortgage, which he had covenanted to pay, by will, in 1829, bequeathed pecuniary legacies, and directed that all his chattel property whatever (except as before bequeathed) should be sold; and, in the first place, the produce thereof to be applied to pay his just debts and funeral expenses; and in the next place, in discharge of his legacies. The mortgaged estate descended to the heir-at-law. *Held*, that he was entitled to have the mortgage paid out of the personal estate in preference to the legacies.—*Burley v. Armstrong*, 12 I. C. R. 270; 7 I. Jur. N. S. 50. (R.)

2. A rector, by deed, granted for value an annuity charged on his tithe rentcharge and glebe lands, payable on the 1st May and 1st Nov. in each year. The deed gave a power of distress when the annuity should be 31 days in arrear; and contained a power of attorney to the grantee to receive the rentcharge, and a demise to a trustee to secure it. The annuity was paid to the 1st of Nov. 1860. In April 1861, the grantee served notices on the tithe rentcharge-payers to pay their rentcharge to him. Afterwards, on the 19th of April, a sequestration was issued on foot of a judgment paise to the annuity deed. On the 2nd May 1861, the grantee of the annuity deed filed a petition for a receiver over the tithe rentcharge. *Held*, that he was entitled, as against the sequestration creditor, to the tithe rentcharge received by the sequestrator after the filing of the petition.—*Irvine v. Frew*, 12 I. C. R. 418; 7 I. Jur. N. S. 72. (C.)

3. The assignor of a judgment, who, by the deed of assignment, covenants not to do anything to vitiate or defeat the assigned judgment, is not entitled to enforce prior securities vested in him, so as to exhaust the property subject to the assigned judgment.—*Williams v. W.*, 12 I. C. R. 507. (C.)

4. A covenant in a marriage settlement, that the wife shall, out of the property of which the husband shall die seized or possessed, receive an annuity, only binds the property remaining after payment of debts.—*Rowan v. Chute*, 13 I. C. R. 169. (C.)

5. By settlement, in 1787, on the marriage of E., lands held for lives renewable were settled to the use of E. for life; remainder to the use of the issue of the marriage, as E. should appoint; in default of appointment, to them, share and share alike; on failure of issue, to E. absolutely. The issue of the marriage were F. and the petitioner M. On the marriage of F., in 1816, a settlement, to which E. was a party, was executed, which recited the limitation contained in the settlement of 1787; also, that F. was entitled to one moiety of the lands in that settlement, subject to the life estate of E., and put that moiety in strict settlement. E., by this deed, did not exercise his power of appointment, nor convey the settled lands. In 1817, M. married; and a settlement was then executed, in which E. joined, using words sufficiently large to convey all his interest in the lands comprised in the deed of 1787. *Held*, that, whatever might be the construction of that deed, the petitioner, claiming under E., would not be allowed to disappoint the provisions of the deed of 1816.—*Nunn v. Donovan*, 13 I. C. R. 184; 7 I. Jur. N. S. 313. (C.)

6. In a marriage settlement, executed in 1812, the husband, V., covenanted with the trustees of the settlement that his heirs, executors, &c., would, from and after his death, pay to his widow an annuity of £40 a-year, and pay the trustees £400 for the children of the marriage. V. became indebted to one of the trustees, who, in 1828, entered up judgment against him for £600, and also effected a policy of insurance upon V.'s life for a similar amount. The judgment was assigned to B., who also purchased a judgment obtained against V. in 1834 for £200, on which occasion a policy of insurance had been effected upon V.'s life. In 1860, the property comprised in the settlement of 1812 was sold in the L. E. Court. Upon settling the final schedule of incumbrances, a Judge declared that the jointure of £40 per annum, and the £400 for the children, were entitled to priority over the judgment of 1828; and that the judgment of 1834 had been satisfied by payment of the amount reserved by the second policy above mentioned. *Held*, reversing that decision, that both judgments should have precedence of the jointure and of the £400.

That the provision made in the settlement of 1812 for the widow and children, was only to affect such property as the settlor should have after payment of his just debts; that the trustee was not, as such, disqualified from dealing with the settlor, even though such dealings might have the effect of injuring the provision for the widow and children.

That when such transactions have been, with full knowledge of the state of facts, acquiesced in by c. q. trusts for a long period

of time, it would be dangerous, and against public policy, to allow them to be re-opened.—*In re M'Kenna's Estate*, 13 I. C. R. 239. (C.A.)

1. A. being possessed of two estates, X. and Y., both were sold in the L. E. Court. X. was subject to a mortgage, and also to prior incumbrances. Y. was subject to the prior incumbrances, but not to the mortgage. There was a subsequent judgment affecting both estates. *Held*, that the mortgagee was entitled to have the securities marshalled, so as to have the prior incumbrances paid, in the first instance, as far as possible, out of the produce of Y., and that the subsequent judgment creditor had no equity modifying the mortgagee's right in that respect.—*In re Scott's Estate*, 14 I. C. R. 63. (C.A.)

2. S., in 1854, purchased several denominations in the I. E. Court, as trustee for E. Before the conveyance was executed, E. agreed to sell them to S. in consideration of a bill of exchange for £10,000, and a mortgage upon them. S. forged a conveyance from the I. E. Court, and executed for value a conveyance to W., reciting the forged conveyance as if genuine. Afterwards the L. E. Court executed a conveyance to S., reciting the purchase-money to be E.'s. *Held*, that no interest under the genuine deed passed by estoppel to W., so as to give him priority to E.'s demand. That E. had a lien for the amount of the bill.—*Eyre v. Sadleir*, 14 I. C. R. 119. (C.)

3. By marriage settlement, lands were limited (amongst other uses) to the use of trustees for 500 years, and, subject to that term, to the use of A. for life, remainder to the use that A.'s intended wife should receive a jointure; and, subject to these limitations, to the use of the first son of the marriage in tail male, remainders over. The trusts of the term were, to secure the payment of the jointure; and upon further trust, after the decease of A., or, in his lifetime, with his consent in writing, to raise £10,000 as portions for younger children, to be divided between them as A. should appoint. There were issue of the marriage an eldest son, and two younger children. A., by two deeds poll, appointed the whole of the £10,000 to his two younger children in certain proportions, and directed that it should be raised with interest immediately. Before the registration of the deeds poll, A. had, in conjunction with his eldest son, mortgaged the lands in fee, and confessed judgments to a large amount before the mortgage. Some of them A. charged by mortgage on his life estate. The aggregate amount of the judgments and of the mortgage in fee exceeded the value of A.'s life estate. One of A.'s younger children presented a petition to sell A.'s life estate to raise her appointed share of the £10,000; but the petition was dismissed, at the instance of the creditors on A.'s life estate. A petition was then presented by the same younger child, to raise her portion, by sale of the reversion expectant on the determination of A.'s life estate. On cause shown against the conditional order for payment by

the remainderman, and various mortgagees and judgment creditors—*Held*, that the petition must be dismissed, with costs; that the power given to A., to raise the £10,000 in his lifetime, was a power appendant to his life estate, and was suspended by his acts: that it was inequitable for him to exercise it, as the effect would be to throw exclusively on the estate of the remainderman the payment of the interest which accrued during A.'s lifetime, and for the payment of which his estate was the primary fund.

That this equity does not apply to judgment creditors, for, as they do not acquire any security by contract, there is nothing inequitable in diminishing their security by a power of charging. When cause shown by different parties, who represent but one estate, is allowed, and costs are awarded, they are to be paid to the person first showing cause.—*In re Greene's Estate*, 14 I. C. R. 325; 8 I. Jur. N. S. 348. (L.E.C.)

4. In 1846, A. mortgaged to B. the lands of X., and in 1854 assigned them to his son, in consideration of natural love and affection. They were held under a renewable lease, and the son covenanted to perform the lessee's duties. A. merely covenanted for further assurance. In 1856, the assignment was registered. In 1860, A. mortgaged lands which, with X., had been included in the mortgage of 1846. Proceedings for the sale of A.'s lands having been instituted, a supplemental petition for the sale of X. was presented on foot of the mortgage of 1846. The order was made, but a direction was given that A.'s lands should be sold first. The proceeds of their sale sufficed to pay off the mortgage of 1846 and the prior incumbrances, but left no sufficient residue for the mortgage of 1860. *Held*, that the assignment was not to be deemed to have exonerated X. from the mortgage of 1846, notwithstanding the covenant for further assurance; that the assignment was to be deemed a voluntary conveyance, and therefore no indemnity could prove effectual against a purchaser for value; that the proceedings which had been instituted gave jurisdiction, and that, independently of such proceedings, jurisdiction would have been given by any well-founded equity of marshalling, or of contribution.—*In re Rorke's Estate*, 15 I. C. R. 316. (L.E.C.)

5. Estates, subject to charges, were settled on A. for life; remainder to his eldest son, B., for life; remainder to B.'s first and other sons in tail. A. covenanted to sell C. a portion of the estates; and, out of the rents received by him before the sale and the purchase-money, to pay off all the charges on the settled estates. C., in consequence of A.'s default in not keeping down the interest, proved insufficient to pay off the incumbrances, and another portion of the estates was sold to defray the deficiency. *Held*, that B. had an equity to be recouped the sum so raised for payment of the principal, as well as the interest of the charges which C. had proved insufficient to pay, out of the rents of

A.'s life estate, and in priority to A.'s judgment creditors whose judgments had been obtained subsequently to the date of the settlement.—*Kilworth v. Mountcashel*, 15 I. C. R. 565. (R.)

1. A judgment creditor, on behalf of himself and the other judgment creditors on the life estate of X., instituted a suit to which a trustee for all the judgment creditors was a party. At the hearing, it was dismissed on the merits. Another judgment creditor, who (save so far as the trustee represented him) had not been a party to it, subsequently instituted, for a like purpose, a suit, which relied upon different equities, and put forward additional facts supported by new evidence. *Held*, that the dismissal of the first suit was not an absolute bar to the prosecution of the second.

A., seized in fee of estates, subject to a charge of £2000, for his sisters, between whom it was to be equally divided, gave on the occasions of their marriages judgments dated respectively H. Term 1802 and E. Term 1802, to secure to his sisters respectively portions of £1000 and £2000. In 1809 he executed a voluntary post-nuptial settlement, whereby, after reciting that he was seized in fee of those estates, subject to a jointure of £600 for his wife, and subject also to charges amounting in the whole to £3000, principal money, with which they stood charged for the use of his sisters, as expressed in their several marriage settlements; and reciting that from the love and affection which he bore his wife and children, he was anxious to settle and assure the inheritance of those estates, in order to secure for his family the most certain and liberal provision which the nature and value of his estates would admit of, he settled the lands on himself for life, remainder to his eldest son for life, remainders over in strict settlement. He subsequently contracted debts, which were secured by judgments on his life estate; and, on the marriage of his eldest son in 1831, executed a deed by which he adopted and confirmed the limitations of 1809. The judgment of E. Term 1802 was paid off out of the rents and profits of the life estate of A., who died in 1861. *Held*, that the deed of 1809 showed no intention to onerate A.'s life estate with the judgment of E. Term 1802; and that therefore the judgment creditors on that estate were entitled to raise out of the inheritance the amount paid on foot of this judgment out of the life estate.—*Dolphin v. Aylward*, 15 I. C. R. 583. (C.A.)

## II. HOW PRIORITY IS LOST OR ACQUIRED.

1. Generally.
2. By Tacking Securities.
3. By Equitable Lien.
4. By Notice, or its Want.
5. Under the Registry Acts.

### II. 1. How, generally, Priority is Lost or Acquired.

2. By deed of Sept. 7, 1812, lands, subject to outstanding incumbrances, were settled on

A. for life; remainder to his first and other sons in tail. In 1816, A. granted B. annuities charged on the life estate; and, in 1818, paid off some of the prior incumbrances, and had them assigned to a trustee for his own benefit. In 1820, A., and his trustee joined in assigning to C., for value, without notice, those paid incumbrances. *Held*, that the arrears of the interest on those charges were incumbrances on the life estate prior to the annuitant; and that, as against him, the interest, payable on those charges out of the life estate, had not been merged by the dealings of the owner of the life estate therewith.—*Harman v. Foster*, 1 Dr. & Wal. 637. (C.)

3. A party claiming under an annuity, charged on a rectory and vicarage by the incumbent, is entitled to priority over a judgment creditor of the incumbent, although prior in point of time, who did not obtain a sequestration until after the date of the charge.—*Wise v. Beresford*, 5 I. E. R. 407; 3 Dr. & War. 276. (C.)

4. W., being, in 1824, indebted to judgment and other creditors, by indenture made between him; H., a creditor and trustee; and such of the creditors as had executed and should execute; conveyed his real and chattel-hold estates to H., in trust, by sale or mortgage, to pay, first, the mortgage creditors; secondly, the judgment creditors; thirdly, the bond; and fourthly, the simple contract creditors; all of whom were set out in different schedules to the deed; and to hold the surplus in trust for W. H. was empowered to pay the debts (as to those of each class) at such times, and in such order as he should think most convenient and proper; and also, to settle the amount of any of the debts in such manner as he should think expedient, save only that no security of any of the creditors who should execute the deed should thereby be prejudiced or affected. *Held*, that by the operation of that deed the judgment creditors lost the original priorities of their judgments, and, the fund being deficient, they were bound to abate *pari passu* amongst themselves.—*Taylor v. Gorman*, 6 I. E. R. 321. (R.)

5. The judgment creditors of G., of whom T., his solicitor, was one, joined in a trust deed, the effect of which was, that they should be paid without priority. T. claimed a lien for costs on title deeds of G.'s property. In a suit for carrying into effect this trust deed, which included mortgage creditors who were to be first paid, and whose mortgage was prior to T.'s lien, the decree (under which G.'s property was sold) ordered T. to bring in the title deeds, without prejudice to his lien. T. lodged the deeds. The lien was prior to the claims of other judgment creditors. *Held*, that T. could not insist on his lien.

*Taylor v. Gorman*, 6 I. E. R. 330, affirmed on appeal.—*Taylor v. Gorman*, 7 I. E. R. 259. (C.)

6. A father, tenant for life, with power to charge £500 for younger children; and his



son, tenant in tail, settled the estate to the uses, that the son should receive a rentcharge of £100 for their lives, and that of the survivor, with powers of distress and entry for non-payment; then to the father's use for life, with power to charge an additional £1000 for younger children; then to the son in tail. The father, having exercised the power, died. His son, and several younger children, survived. *Held*, that although, if it was the intent to give the annuity priority over the £1000, equity would not allow a legal merger to destroy it, yet the true construction of the deed showed, that it was not the intention that the annuity should exist after the father's death, though granted for the son's life; and, therefore, that the general rule, which in family settlements gives priority to charges for younger children, must prevail.—*Mills v. M.*, 9 I. E. R. 299; 3 Jon. & L. 242. (C.)

1. The 2nd sec., as well as the 1st, of the Redocking Act, 9 G. 4, c. 35, only avoids judgments in favour of purchasers becoming such after twenty years from their entry. Therefore, a judgment of M. T. 1818 was not rendered void by sec. 2, in favour of a purchaser under a conveyance of 1831, though not revived or redocketed either within twenty years from its entry, or five years from the passing of the Act.—*Hickson v. Collis*, 10 I. E. R. 447. (C.)—*Rev.*, on re-hearing, 6 I. E. R. 524; 1 Jon. & L. 271. (C.)]

2. The re-docketing mentioned in the 7 & 8 Vic., c. 90, s. 2, is re-docketing under the 9 G. 4, c. 35. Therefore, when a judgment creditor of T. Term 1840, before the former Act came into operation, lodged the affidavit with the proper officer, and obtained a certificate that the judgment was re-docketed, but the officer neglected to make the proper entry in the book, as required by the 9 G. 4, c. 35, so that the judgment did not appear to be re-docketed as against one of the conuzees—*Held*, that the creditor had lost his priority as against subsequent mortgagees.

Registration under the 7 & 8 Vic., c. 90, gives no priority to judgments *inter se*.—*M'Minn v. M'Connell*, 2 I. C. R. 609. (R.)

3. A. borrowed money by mortgage of his estates, D. and S., to which B., a prior incumbrancer on D., and C., a prior incumbrancer on S., were parties, and consented to give the mortgage priority over their respective charges. The lands were subsequently sold, and the mortgage paid out of their joint produce. The residue of the fund produced by sale of the S. estate was not sufficient to pay C.'s incumbrance. *Held*, that C. was not entitled to contribution against B.; there not having been any common liability to pay a common demand.—*In re Keily*, 9 I. C. R. 87. (C.A.)

4. A solicitor, failing to obtain a loan for his client from a stranger, lent him the money on mortgage, in the stranger's name, and used that name to obtain from his client priority for the loan, over two jointures payable

out of the estate, and concealed the fact of himself being the lender. *Held*, that such a loan by a solicitor to his client, accompanied with concealment of the real lender's name, and the absence of independent advice by a solicitor to a client in such transactions, rendered the mortgage deeds voidable, so far as they acquired priority over the jointures.

When a supplemental petition in the nature of a petition of review, on newly-discovered matter, has been filed, the original cause must be re-heard before the C. A. simultaneously with the supplemental petition.

The original cause petition should, for this purpose, be set down in the Lord Chancellor's list of causes; and the order for re-hearing should direct that the supplemental petition be heard together with it.—*[Barton v. Sampson]*, 3 I. Jur. N. S. 71.—*Radcliffe v. Orme*, 5 I. Jur. N. S. 245. (C.A.)

## II. 2. By Tacking Securities.

5. On lending money on mortgage, the mortgagee procured, as an additional security, an assignment of a judgment on a bond in a penalty, which had been obtained against the mortgagor before the mortgage, and in paying which part of the mortgage debt had been applied. At the date of the assignment, the principal only was due. *Held*, that, as against the mortgagor's judgment creditors, intervening between his judgment and his mortgage, the mortgagee was entitled to levy, under his judgment, the whole principal, and all interest (not exceeding the sum due on foot of the mortgage) thereon, although he had been paid the interest due on the mortgage.—*Kirby v. O'Shea*, 1 Jon. 565. (E.E.)

6. It is a mistake to suppose that the doctrine of tacking does not apply in this country as well as in England, in cases unaffected by the Registry Act.

*Ex parte* proceedings under the Sheriffs Act, for the appointment of a receiver, are not a *lis pendens* which would affect a purchaser with notice of the judgment.—*Tennison v. Sweeney*, 7 I. E. R. 511; 1 Jo. & L. 710. (C.)

7. In 1792, C. obtained against B. a judgment, which was never revived or re-docketed, but interest on it was paid within twenty years before the proceedings by the creditor.

In 1812, B. entered into a recognizance to abide the decree to be pronounced in a cause of *L. v. O'B.*, in which, though revived, a decree had not been pronounced.

In 1816, B.'s heir granted an annuity for value, charged on the lands which he inherited. The lands being sold, a fund remained in Court, consisting partly of the surplus of the purchase-money, partly of rents received in the cause, and partly of dividends of stock purchased by the two former sums. An order having been made in May 1844, to report priorities and distribute these funds amongst the creditors, pursuant to the 102nd G. O., and report thereon—*Held*, that the judgment was to be postponed to the annuity.

That payment of interest on the judgment within twenty years prior to the order was sufficient to take it out of the Statute of Limitations, though more than twenty years had elapsed between the obtaining of the judgment and the payment. The annuity, by gaining priority over the judgment, under Moore's Act, does not carry up the recognition so as to give it priority over the judgment, no provision being found in that Act similar to that in the Registry Act, and the judgment being only affected to the extent of the annuitant's claim against the land.

That it was possible there might be a decree in the revived suit of *L. v. O'B.*, and if so, the recognition would be a subsisting charge, and would have priority over the annuity as against the surplus produce of the sale, but would not attach upon the rents or dividends.—*Latouche v. O'Brien*, 10 I. E. R. 113. (R.)

1. A prior unredocketed judgment is not postponed to a subsequent re-docketed judgment, in consequence of the existence of a mortgage pious to the re-docketed judgment, if the owner of the mortgage makes no claim upon foot of it, even though his omission to claim may be in consequence of an agreement with the owner of the unredocketed judgment, made after the institution of the proceedings in which the question was raised.

The appointment of a receiver in a mortgage cause does not take the case out of the operation of the 81st G. O. of 1843.—*Woodroffe v. Greene*, 15 I. C. R. 176. (C.A.)

### II. 3. By Equitable Lien.

2. An incumbrancer agreed to advance money to preserve K. from eviction for non-payment of rent, and took a security by deed affecting K. and other lands, for the repayment of the money so to be advanced. She afterwards paid the rent, and redeemed K. *Held* that she was entitled, as against an incumbrancer on K. when redeemed, to be paid the sum advanced, in priority; and that, since full effect could not be given to her security by deed, she was remitted to her lien.—*Kehoe v. Hales*, 5 I. E. R. 597. (E.E.)

3. The conuzor of a judgment, being seized in *quasi fee*, became, by deed prior to 1840, tenant for life of the lands; and created charges thereon. Afterwards, the judgment creditor advanced money to save them from eviction; and, during the conuzor's life, filed a bill to sell them. *Held*, that, as a salvager, he was entitled to a sale of the *quasi fee*, though not, as a judgment creditor, against remainderman, or creditors prior to 1840.—*Fetherstone v. Mitchell*, 11 I. E. R. 35. (C.)—[See s. c. 9 I. E. R. 480. (R.)]

4. A sub-tenant, having redeemed his landlord's interest by advances for head rent, filed a bill to sell that interest; and afterwards made further advances for the same purpose. *Held*, that these advances were the first charge on the mesne landlord's interest in priority to incumbrances prior in date; and that the sal-

vager was entitled to a sale for payment.—*Locke v. Evans*, 11 I. E. R. 52. (E.E.)

5. When a tenant for life has permitted arrears of charges to accumulate, the claim of a remainderman for compensation out of the life estate, for the increased burden cast on the inheritance, has priority over charges on the life estate created by the tenant for life, and secured by a demise of a legal term, without notice of the facts constituting the remainderman's equity.—*Fitzmaurice v. Murphy*, 8 I. C. R. 363; Dr. Rep. temp. Napier, 500. (C.)

### II. 4. By Notice and Want of Notice.

6. V. mortgaged X., by a deed containing a borrowing clause. On obtaining a further loan he mortgaged Y. to secure the entire sum borrowed. The mortgagee's representatives conveyed X. by a deed which recognised the first mortgage as then subsisting. *Held*, a sufficient acknowledgment under the old law to keep alive the right to redeem Y.

J., the mortgagee, while in possession, made a lease; the mortgage having been duly registered. The lessee set up a title as a purchaser without notice, and relied on there being no acknowledgment to bind him. *Held*, that notice was rendered immaterial by the priority which V.'s equitable title acquired by the registration.

That the acknowledgment by J. alone sufficed against his lessee.—*Ball v. Lord Riversdale*, Beat. Rep. 550. (C.)

7. A. and B. were equal partners in mills and concerns of which A. was lessee. In Nov. 1810, they took in C. as partner, for £8500. In Jan. 1811, B. proposed to sell to A. and C. his share for £8500, and to let his name continue in the firm for five years, they paying interest at £8 per cent. on his money remaining in their hands. This proposal was accepted. Thenceforward, A. had two-thirds, and C. one-third of the profits. In July 1812, A. conveyed to C. the legal estate in one-third of the mills and concerns, by a deed which was never registered. In August, 1812, C. by his marriage settlement, conveyed his one-third to A. and D. as trustees for himself for life, with remainder to ptfs. as tenants in common. This deed was registered in 1814. In 1819, B. withdrew his name from the firm, and furnished A. and C. with an account current, showing a balance due to him of about £24,000; made up of the £8500, with interest at £8 per cent., and of advances made since 1814 to the firm on B.'s credit. A. and C. then mortgaged the mills to B. to secure the £24,000. The mortgage was registered soon after. C. died in 1820, and A. in 1823. In 1826, B. procured from A.'s representatives an assignment of the equity of redemption, and entered into possession of the mills. The bill charged that, before the mortgage was executed, B. had been informed by A. and C. of the prior settlement; and prayed for an account and partition, and for an allotment of one-third. The only evidence of notice was the testimony of

E., who had been A.'s family solicitor, and who swore that he had apprised B. of the settlement. *Held*, that the registration of the mortgage did not give it precedence over the settlement, which was founded on the unregistered deed of 1812; that the settlement, having been registered before the mortgage, thereby prevailed over it, even though no actual notice had been given to deft.; and that deft. had not a claim, as a creditor, against the ptf.'s one-third of the partnership assets.—*Stuart v. Ferguson*, *Hayes*, 452. (E.E.)

1. The registration of a deed of separation and maintenance having been fraudulently prevented by the agent of the husband, who afterwards negotiated a registered mortgage—*Held*, that the mortgagee was fixed with notice of the separation deed through the mortgagor's agent, who acted for both parties; and his security was postponed to the unregistered deed.—*Nixon v. Hamilton*, 1 I. E. R. 46; 2 Dr. & Wal. 364. (C.)

2. In a foreclosure suit, B. claimed under a mortgage of the equity of redemption, executed by the defts. in Feb. 1839, and duly registered on the 7th of that month. The mortgage was obtained to secure a debt due to B. from the mortgagors, which had been previously secured in 1825, by the bond of D., who then held the mortgaged premises in trust for the mortgagors. Upon the death of D., the premises (which were chattel) were assigned to the *c. q. trusts* by his personal representatives. The priority of B. under her mortgage was disputed by simple contract creditors of the mortgagors, who, having brought actions at law, had agreed that the proceedings in such actions should cease upon the terms contained in a consent dated the 19th Jan. 1839, and made a rule of Court on the 2nd Feb. following—namely, that they should be paid their respective demands, when proved, together with costs, out of the produce to be realised by a sale of the mortgaged premises, after payment of prior incumbrances. The attorney acting for B. in procuring the execution of the mortgage to her, not only knew of the rights, and had notice of the proceedings of the other creditors, but was in fact an active agent for the defts. (the mortgagors) in effectuating the arrangement whereby the other creditors had been induced to relinquish their proceedings at law upon the terms contained in the consent. *Held*, that such notice to B.'s attorney was sufficient to prevent her (although unaffected by *personal* notice) from gaining a priority by force of the registry of her mortgage deed over the other creditors, who had acquired a prior equitable lien on the land by virtue of the consent.

That B. had no equitable right or claim (as against the consent creditors) to the mortgaged premises in respect of their having been the assets of D., the obligor in the bond of 1825.

*Semle*—That under no circumstances, would B. have had such an equity, as it was competent for the representatives of D., upon his death, to assign over to *c. q. trusts* the trust

premises, without their being in the first instance subject to the debt due to B. Notice to an attorney or agent is not to be considered as implied or constructive notice merely, which is properly referable to something that a party or his agent ought, if reasonable diligence had been used on his behalf, to have acquired a knowledge of, but which possibly neither he nor his agent ever did know or acquire any knowledge of. The general proposition that notice to an agent, so as to affect his principal, must be in the same transaction, admits of qualifications.—*Executors of Lenihan v. M' Cabe*, 2 I. E. R. 342. (E.E.)

3. The Count and Countess D'O. being entitled in her right to estates subject to incumbrances, a receiver was appointed; and was directed to pay her £400 a-year out of the estates, for her separate use. An arrangement was entered into by a subsequent deed, by which the estates were settled to her separate use, subject to charges in favour of Count D'O. and others; and until this arrangement was completed, the allowance was to be paid to Lady D'O. Lady D'O. afterwards mortgaged the estates for £2100 to the ptf., excepting the £400 a-year, which was by a separate clause in the deed assigned to a trustee to secure payment of the interest. The deed was registered as a deed of mortgage of the estates generally, and the memorial did not particularise the £400 a-year. The receiver refused to recognise the title of the trustee, but paid the £400 on Lady D'O.'s order to him. Lady D'O. afterwards borrowed £5000 from the deft., who previously to the loan was informed by the receiver that he had heard that there had been an assignment of the £400 a-year, but that he did not recognise it. A mortgage was executed of the estates to the deft., and the £400 a-year was assigned by a separate deed to a trustee (who had been agent and solicitor to Lady D'O.) to secure an interest of the £5000, and an order was obtained to pay it to him. This order was afterwards rescinded, and a bill was filed to settle the priority of the claims of the ptf. and deft. *Held*, that the £400 a-year, being a portion of the estate, was within the Registry Act, and that the description in the memorial was sufficient to include it.

*Semle*—That the information given by the receiver to the deft., coupled with the memorial, was sufficient notice of the ptf.'s mortgage.

The doctrine of *Dearle v. Hall*, 3 Russ. 1, is confined to *choses in action*, and was not, therefore, applicable to this case.—*Roehard v. Fulton*, 7 I. E. R. 181; 1 Jon. & L. 413. (C.)

4. A father, seized of the absolute interest in the lands of K. and M., and of an estate for life, with remainder to his first and other sons in tail, in the lands of F., and indebted by judgments which were charges upon all these lands, by settlement, executed on the marriage of his second son, settled K. on him, and the issue of the marriage; and by a contemporaneous deed conveyed his life estate in F., and the reversion, subject to his life estate in M., to his eldest son, who thereby covenanted generally

to indemnify the lands settled on the second son against all the father's incumbrances. *Held*, that a subsequent mortgagee of F. and M., with notice of this covenant and of the incumbrances, was bound by them, and was not entitled to contribution as against K.—*Power v. Standish*, 8 I. E. R. 526. (E.E.)

1. A judgment was obtained in 1817. By a consent in causes in 1833, it was admitted that the amount of that judgment and of several others was due, and it was ordered that the receiver should be continued to keep down the interest, which, if paid, the creditors should not proceed on their judgments for eight years. In 1834 J., by his solicitor D., filed a bill referring to the consent, and in 1837 took a mortgage of the estates from the heir of the judgment debtor; D., still acting as his solicitor. *Held*, that J. had notice of the judgment of 1817.

That though the judgment had not been revived or redocketed (nor registered under the recent statute), the mortgagee having notice of it took subject and paise to it.—*Beere v. Head*, 8 I. E. R. 647. (R.)—[Second point reversed: 9 I. E. R. 76. (C.)]

2. An estate having been sold under a decree of the Court of Exchequer, for £12,000, the purchaser lodged in Court £5000 of his own moneys, and applied to the ptf. in the present suit to lend him the remaining £7000, on the terms of securing that sum as the first incumbrance upon the lands. After an agreement with the ptf. for this loan, but before it was carried out, the purchaser confessed a judgment for value. The ptf., although having notice of the judgment, advanced £8000, of which £7000 was paid into Court as the residue of the purchase-money, and £1000 to the purchaser. By consent, made an order of Court, the conveyance of the lands was made to a trustee for the purchaser and the ptf. The trustee, in consideration of the £8000, mortgaged the lands to the ptf. *Held*, that the judgment was prior to the mortgage as a charge upon the lands.—*Walcot v. Lynch*, 13 I. E. R. 199. (C.)

3. A., in 1835, granted out of leasehold lands an annuity to B., who neglected to register his deed till 1852. B. was a tenant to a part of the lands. The grantor shortly after 1835 assigned his interest in the entire lands to C., who employed a solicitor as his land agent, who received the rents till 1847, and always allowed B. to deduct the amount of his annuity from his rent, and gave receipts to that effect. In 1845 the entire leasehold lands were reconveyed to the former owner, who, by deed of the same date, granted another annuity to D., charged on the same lands. The solicitor who had been receiving the rents from B., acted as solicitor for D. in this transaction. D.'s deed was registered in 1848. The grantor's leasehold interest in that portion of the lands to which B. was tenant, was evicted in 1850, whereupon B. filed his petition to establish the priority of his annuity over that of D. as to the remainder of the lands. *Held*,

that D. was affected through his solicitor, with notice of B.'s annuity. That B.'s annuity should be declared prior, though D.'s was first registered. That actual notice to a solicitor is actual notice to his principal.—*Richards v. Brereton*, 5 I. Jur. 336. (C.)

4. A., tenant for life, subject to old charges affecting the inheritance, and having a general power to charge £10,000 on the estate, paid off the charges with a loan from B. and C., to whom they were assigned; and by a contemporaneous deed, in execution of his power, charged the estates with £10,000, and created a term to secure that sum to B. and C., to whom power was given to raise the charges and the £10,000, and apply them to pay the principal, interest, and costs due on foot of the loan. It was declared that the moneys to arise from the sale of or by virtue of the charges should be vested in B. and C., in trust to pay the surplus to A. for his own benefit. The deed also contained a clause of redemption of the old charges and the £10,000 thereby appointed, on repayment of the loan. Afterwards, in 1842, a judgment was obtained against A., who, in 1844, mortgaged his equity of redemption in the charges and £10,000 to D., who had constructive notice of the judgment. The lands having been sold in the I. E. Court—*Held*, affirming its decision, that as to so much of the fund as represented the value of A.'s life estate, the judgment had priority over D.'s mortgage of the charges.—*In re Phillips*, 4 I. C. R. 584. (P.C.)

5. A judgment registered as a mortgage under the 13 & 14 Vic., c. 29, s. 6, takes precedence of prior unregistered instruments of which the conuzee has not notice.—*Corbett v. De Cantillon*, 5 I. C. R. 126. (C.)

6. Two judgments were obtained in 1803, and another in 1805, against A., seized in fee of lands. A. died, and the lands descended on B. and C., his daughters and co-heiresses. In 1809, on the marriage of C., her moiety was settled to uses, under which the respondents, M'C. and wife, claimed. An agreement for a partition was afterwards entered into between the owners of the two moieties, which was never carried into legal execution. One term was, that the judgments should be thrown on B.'s moiety. In 1843, B.'s moiety was mortgaged, in trust, to the petitioner, who had notice of that agreement. The judgments were assigned as a collateral security. Petitions were filed in the I. E. Court to sell both moieties; but the Commissioners stayed the sale of C.'s moiety, until it should be ascertained whether B.'s moiety would be inadequate to pay the judgments and the mortgage. A petition was filed in this Court for a receiver pending the proceedings in the I. E. Court; and the Master appointed a receiver over both moieties.

On appeal from his order—*Seem* that the petition was not sustainable as against the appellants, M'C. and wife; because no *elegit* had issued on the judgments, and the suit was not to administer the conuzor's assets; because

the judgments were not made charges by the 3 & 4 Vic., c. 105, as against M.C. and wife, as purchasers under the settlement of 1809. *Held*, that the petitioners having had notice of the agreement to throw the judgments on B.'s moiety, the Court would not, until it ascertained that that moiety was insufficient to pay them, appoint a receiver over C.'s moiety.

*Semble*—That the petitioner, as mortgagee of B.'s moiety, having had notice of the agreement, was not entitled to throw the judgments on C.'s moiety, in order that the proceeds of B.'s moiety might suffice to pay the mortgage.

The Court will not in general admit affidavits not used before the Masters on appeals from orders made by them in cases referred under the Ch. Reg. Act, s. 15, especially when they refer to matters not put in issue by the petition or discharge.

In this case, such affidavits were admitted by consent.—*Tressilian v. Caniffe*, 4 I. C. R. 399. (R.)

1. M. was tenant for life of K. and other lands, with remainder to his first and other sons in tail. W. was supposed to be the eldest son of M. In 1832, M. and W. suffered a recovery of all the lands, by which they were conveyed to the use of M. for life, remainder to provide £100 a-year for S., the wife of M., remainder to W. in tail. This deed was duly registered. By marriage articles, dated the 12th March 1833, W. agreed to charge all the lands with a jointure of £200 a-year for his intended wife, J. This deed was never registered. After the death of M., T., one of his sons, claimed the lands. W. and T. entered into a compromise by a deed, dated the 13th Feb. 1835. By it £100 per annum was charged on K. for S. She released the former annuity. Subject thereto K. was limited to W. in fee. This deed was registered. W. was a solicitor, and as such prepared the deed. No other solicitor was employed about the preparation of the deed, save one who by affidavit stated that he acted only for T. *Held*, that W. must be taken to have acted as solicitor for S., and that she was in consequence affected with constructive notice of the unregistered deed of 1833. — *Tucker v. Hensill*, 4 I. C. R. 513. (C.)

2. By marriage settlement, not registered, lands were charged with £800 for M., and £250 for each of the younger children of the marriage. There was issue, B. a son, and A. a daughter, who, respectively, became entitled to the lands and the £250. Upon the marriage of A., a settlement was executed, which recited that A. was entitled to £250, and M. to £800; and that M. had agreed to settle £550, part of same, on A. Of this settlement B. was trustee. B. subsequently married C., when he, by deed, settled the same lands upon himself for life; remainder to the issue of the marriage. No allusion was made to the charges of £250 and £550 settled by the prior deed. Both deeds were registered on the same day, by the same person, but the latest deed was first registered. The entry by the officer as to

both was, "Registered on Monday the 12th of May 1817, at or near the hour of two o'clock." *Held*, that the deeds were of equal priority in point of registry.

K., a solicitor employed in the preparation of A.'s settlement, was afterwards employed by B. in the preparation of the second deed. No property of C. was settled thereby, but it was stated that K. had been consulted by her. K. afterwards registered both instruments. *Held*, that C. had notice of A.'s settlement.—*Moore v. Mahon*, 2 I. Jur. N. S. 277. (C.)

3. A., tenant for life of lands, was also entitled to be paid during his life the interest upon an incumbrance prior to his life estate, vested in the trustees of his marriage settlement. B. who had full notice of A.'s interest, took from him a mortgage of his life estate in the lands, with some collateral securities, without requiring any assignment of his interest in the incumbrance.

The deed of mortgage contained, in the common form, a covenant that, in default of payment, the mortgagee might enter and hold the land free from incumbrance.

The lands were subsequently sold in the I. E. Court, and the Commissioners invested in stock a sum to answer the charge vested in the trustees. *Held*, that by the deed of mortgage and the covenant, the life interest of A. in the stock was specifically charged with payment of the mortgage debts.—*King v. Daly*, 6 I. Jur. 50. (C.)

4. In 1840, C. having a charge by judgment for £1500 upon X., applied to B. for £1500 to enable him to purchase X. in Ch. B. consented, on the terms of a conveyance being made to R. as a trustee for B., as well as for C. R. became the purchaser for £3000, of which £1500 was paid by B. in cash, and R.'s promissory note was given for the remainder. By deed of the 2nd June 1840, X. was conveyed to R. without any declaration of trust in the deed.

C. having got R.'s promissory note accepted as cash, subsequently, by sundry payments, reduced his debt of £1500 to £900.

By deed of the 9th July 1844, reciting the deed of the 2nd June 1840, and that C. purchased X. from B., save so far as they should stand as a security to B. for £900, it was declared that X. was vested in R., in trust in the first instance, by sale or mortgage, to pay B. £900, with interest and costs, then in trust for C., his heirs and assigns, for ever. This deed was not registered until the 2nd of Dec. 1852.

In 1852, L. obtained a judgment against C. for £60, and registered it as a mortgage against X. on the 13th Nov. 1852.

In 1843, a judgment obtained against C. in 1836, was assigned to W., and by him duly redocketed in 1844, and afterwards registered in 1850.

In 1854, X. was sold in the I. E. Court, on the petition of L.; and on the settlement of the final schedule of incumbrances, the Commissioners postponed B.'s claim of £900, to

the claims of L. and W. on foot of their respective judgments. *Held*, on appeal, that the original transaction should be regarded as C.'s own purchase, B. lending him £1500; that R. was a trustee for C., and for no other person; and that the judgments obtained against C., became, in the order of their priority, available against the trust estate; that B.'s claim to priority, founded on the recitals in the deed of 1844, could not be sustained; that B. was entitled to such priority only as was given him by the deed of 1844, and its subsequent registration in Dec. 1852; and that his claims should be postponed to the claims of L. and W.—*In re Cooke*, 6 I. C. R. 430. (C.A.)

1. Notice, to V., one of the directors of a Bank, of a prior unregistered deed is not notice to the board of directors so as to bind the shareholders, when V. has not communicated his knowledge, and the existence of the prior unregistered deed has been fraudulently concealed, V. being a party to the fraud.

Notice to the trustee of a duly registered deed will not affect the priority of that deed when such notice consists of the trustee's knowledge of a prior unregistered instrument executed by himself, which knowledge he fraudulently abstained from communicating.

Notice to a person, employed only for some specific purpose, and under no obligation to communicate the knowledge which he possesses, does not bind a purchaser who employs an agent, who really transacts the business.

On the 15th March 1855, J., being largely indebted to the T. Bank, and requiring further advances, agreed in writing, in consideration of an advance to him by the T. Bank of £10,500, to assign the lands of C. to S. and R., upon trust to sell, and out of the proceeds pay all past, present, and future advances made to him by the T. Bank. This agreement was not registered, but J. signed it; his signature being witnessed by N., the sec. of the L. & C. Bank. J. was then chairman of the board of directors of the L. & C. Bank; S. was sole managing director of the T. Bank; and R. was a director of the L. and C. Bank.

In July 1855, S. made a proposal to the board of directors of the L. & C. Bank for a loan to J., and stated that J.'s debt to the T. Bank did not exceed £40,000, and that the T. Bank did not hold any security from him. The directors of the L. & C. Bank advanced to J. £95,000; and by deeds of the 1st Aug. and 7th Sept. 1855, J. conveyed the lands of C. to B., L., and S., upon trust to sell, and pay all incumbrances. These deeds were registered in Aug. and Sept. 1855.

In 1857 the lands were sold in the I. E. Court; and the Judge held that the registered deeds of the 1st August and 7th Sept. were entitled to priority over the unregistered agreement. The official manager of the T. Bank appealed, on the ground (among others) that the Directors of the L. & C. Bank had, at the time of the execution of those deeds, notice of that equitable agreement.

The evidence disproved actual notice to the

directors. It appeared that that agreement had been allowed to remain unregistered by the express direction of S.; that he had fraudulently concealed the knowledge of it for the purpose of saving the credit of J. (whose solvency was essential to the welfare of the T. Bank); and that it was the intention of all parties from the commencement to keep secret that agreement. *Held*, that actual knowledge possessed by J. the chairman, and R. a director, of the L. & C. Bank, and S., a trustee of the deed of the 1st Aug., did not bind the L. and C. Bank.

D. the solicitor of the L. & C. Bank, when about to register the deeds, applied to K., the solicitor of the T. Bank, for information and assistance. K. did not disclose the agreement which had, he thought, been abandoned, and which he knew was to be kept secret; but gave D. information as to other securities; in consequence of which, the L. & C. Bank stopped part of the loan. K. assisted D. in registering the deeds. *Held*, that these transactions did not make K. the solicitor and agent of the L. & C. Bank, so as to fix them with the notice which he possessed of the agreement.—*In re Burnmaster*, 9 I. C. R. 41; Dr. Rep. temp. Napier, 559. (C.A.)

2. A., upon his marriage in 1808, executed marriage articles, whereby he covenanted with trustees to provide at his decease £30,000 for an eldest son, V., of the marriage, and (if there should be then living issue of the marriage other than a son or a daughter) £20,000 for the younger children. He died in 1821, seized of real and personal estate; leaving an eldest son, V., and two daughters, by whom a suit to administer his assets was instituted. In it a receiver was appointed. Pending this suit, one of the daughters died. V. soon after coming of age, having become indebted on his own personal account to B., and being entitled as heir or devisee to his father's real estate, mortgaged to B. the real estate, to secure the debt. The deed of mortgage recited the articles, the pendency of the suit, and V.'s intention to pay his sister. *Held*, that the claim of the sister, under the articles of 1808, had priority, as against the real estate of A., over V.'s mortgage.—*Richardson v. Horton*, 7 Beav. 112, disapproved of.—*Hynes v. Redington*, 10 I. C. R. 206. (C.)

3. In 1835, A., by deed of settlement, upon the marriage of his daughter, agreed with two trustees to charge his lands with £1000, to be held upon trust for the husband and wife for life, remainder to the children. This sum was collaterally secured by a contemporaneous bond, with warrant given by it to the trustees, on which they entered judgment in 1836. In that year (one of the trustees having previously died), a negotiation was entered into between A.; the husband of his daughter; the surviving trustee; and G.; whereby, to enable A. to borrow money on the security of his lands, in priority to the judgment, the surviving trustee executed a warrant to satisfy the judgment, reciting in it that the sole right to the judgment was vested in him by virtue of

an indenture executed in the life of the deceased trustee; and that the debt was paid and satisfied. The warrant did not otherwise refer to the settlement. The statement as to the payment was false in fact. G. received the warrant, but did not satisfy the judgment. In 1843 A. entered into a negotiation with E. for a large loan by mortgage. Upon that occasion the judgment was referred to in a list of incumbrances of A.'s lands, furnished by A. to E., as paid. By the terms of the agreement the money was to be paid in to the joint names of D. and S., as "mutual trustees," to be applied in discharge of the incumbrances on A.'s lands. D. was solicitor for A., and S. for E. The mortgage was executed and registered in 1843. The settlement of 1835 was registered by D., in April 1845. The warrant finally came into the hands of one of the agents of E., upon the payment of the creditor who held it, and satisfaction was entered in Dec. 1845. A.'s lands having been sold in the L. E. Court, Judge Longfield gave precedence to the mortgage deed over the settlement. On appeal therefrom—*Held*, affirming the ruling below, that A. had power to pay off the £1000 during his life. Distinguishing this case from those of *Shppard v. Wilson*, 4 Hare, 392, and *Winter v. Bodd*, 2 S. & S. 507.

*Per* the Lord Justice of Appeal (following *In re Burnmaster*, 9 I. C. R. 41), assuming that D. had notice of the settlement before he and S. paid out the money raised by the mortgage, E. was not affected with notice.

*Held*, that assuming E. to have had notice by D., or otherwise, the effect of notice was qualified by the recital in the warrant, that the judgment was paid. That the mortgage of 1843 took, by the registration, priority of the settlement of 1835.—*In re Lane's Estate*, 5 I. Jur. N. S. 32. (C.A.)

1. R., the owner of lands, and also a solicitor, executed to S. a mortgage, dated March 29th, 1856, of the lands, but, by arrangement between the parties, not registered until 3rd April 1859. On the 7th March 1859, R. made a lease on fine of the lands to M. The lease was registered 16th March 1859. R. prepared it and had it registered, for which M. paid him costs out of pocket only. M. employed no other solicitor in the transaction, nor had he ever employed R. as his solicitor in any other transaction. *Held*, that R. was M.'s solicitor in the transaction; that M. must therefore be held to have had through R. notice of the prior unregistered mortgage; and that the lease should be postponed to the mortgage.—*In re Rorke's Estate*, 14 I. C. R. 442; 8 I. Jur. N. S. 245. (C.A.)—[Affg. 13 I. C. R. 273; 8 I. Jur. N. S. 53. (L.E.C.)]

## II. 5. Under the Registry Acts.

2. A judgment entered within 20 years before the passing of the 9 G. 4, c. 35, and not revived or redocketed since its entry, or within five years after that Act passed does not thereby lose its priority over a subsequent conveyance executed before that Act passed. *Blake v. Darcy*, S. & Sc., 493. (R.)

3. Ptf., claiming lands under a deed registered in 1805, filed his bill against the deft. in possession under a deed executed and registered subsequently, praying an issue at law or an ejectment, and removal of temporary bars; and in the event of succeeding, an account of rents and profits. Deft. pleaded a purchase for value without notice in 1830 (as in *Walwyn v. Lee*, 9 Ves. 24), and demurred to the account. *Held* (dis-allowing the plea), that the prior registration gave priority both in Law and Equity, even as against a purchaser for value without notice.

*Semble*, a person cannot protect himself by this plea when, by due diligence, he could have discovered the real state of the title. Neglecting to search the registry is a failure of due diligence.

*Held also*, that when at the time of a purchase tenants are in possession, the purchaser entering into possession and receipt of the rents has constructive notice of the title by which the tenants hold.

*Held*, overruling the demurrer, that as the ptf. could not have full relief except in Equity, he was entitled to the account, as consequential to the relief, after he should have established his title at Law.—*Hamilton v. Lyster*, 7 I. E. R. 560. (R.)

4. A. obtained a judgment in T. T. 1845. B. obtained a judgment in T. T. 1846. A. sued out an *elegit*, the inquisition on which was returned and filed on the 20th of July 1846, and went into possession of the lands extended. B.'s judgment was registered in Sept. 1846; A.'s in Feb. 1847. *Held*, that A.'s judgment had priority.

*Semble*—The registration of a judgment under the 7 & 8 Vic., c. 90, gives no priority as between judgment creditors, except for the protection of heirs and personal representatives in the administration of assets.—*O'Brien v. Scott*, 11 I. E. R. 63. (R.)—[On appeal an issue was offered, but not taken; *ibid*, 459. (C.)]

5. A., entitled to the benefit of articles of agreement entered into by the owners of lands situated in Ireland to mortgage them to him for £42,000, by a deed executed in 1840, reciting the articles, assigned that sum and all the securities for its payment, upon trusts. By a deed executed in England in 1842, reciting the articles, A., for value, assigned the same sum, with all the securities for its payment, to M. by mortgage. The deed of 1842 was registered before that of 1840. The memorial of the deed of 1842 described the lands on which the £42,000 were charged in the same manner as they were described in that deed itself; but neither deed nor memorial mentioned the names of the baronies or parishes in which the lands were situated.

*Semble*—That the deed of 1842 would have been properly the subject of registry, if the memorial had stated the names of the baronies and parishes. *Held*, that in consequence of the omission from the memorial, of the names of the baronies and parishes, the deed of 1842 was not formally registered, and there-

fore had not gained priority over the deed of 1840.

*Malcolm v. Charlesworth*, 1 Keen, 63, observed upon.—*Gardiner v. Blesinton*, 1 I. C. R. 64; 3 I. Jur. 116. (R.)—[Reversed: 1 I. C. R. 79; 3 I. Jur. 125. (C.)]

1. K., by an unregistered deed, granted a rentcharge to his daughter, by whose marriage settlement, executed on the following day, to which K. was a party, and which recited the grant, the rentcharge was conveyed by her to trustees. The latter deed was registered. K. afterwards mortgaged the land out of which the rentcharge issued, by a deed, which was registered. *Held*, that the rentcharge, though granted by an unregistered deed, had priority over the mortgage, by reason of the registration of the settlement.—*Hunter v. Kennedy*, 1 I. C. R. 148. (R.)—[Affirmed: *ibid*, 225; 3 I. Jur. 128. (C.)]

2. A judgment was obtained on the 3rd of Dec. 1845. The conuzor died on the 19th of Jan. 1847. Another judgment was entered against the same conuzor, on the 3rd of Feb. 1847, after his death, and was registered under the 8th & 9th Vic., c. 90, on the same day. The judgment of 1845 was not registered until the 22nd of Nov. 1847. *Held*, in a suit for the administration of the real and personal assets of the conuzor, that the judgment of 1847 had priority over the judgment of 1845.—*Revell v. R.*, 4 I. C. R. 436; 1 I. Jur. N. S. 42. (R.)

3. R., by marriage settlement in 1758, settled K., in the barony of C. and county of L., to the use of himself for life, remainder to his first and other sons in tail. In 1786, R., and O., his eldest son, entered into articles of agreement, which recited, that by the deed of 1758, K., in the barony of C. and county of L., had been settled in strict settlement, and by which R. and O. agreed to suffer a recovery of K. (without further describing them), which should enure to the use of R. for life; remainder to the use of O. for life; remainders over to the other sons of R. and their children, in strict settlement. No words of limitation were contained in the articles, which further provided an annuity of £50 a-year out of K. for O. during the life of R. These articles were not registered until 1791, and the memorial altogether omitted to state the barony in which K. was situate. A recovery of K. was duly suffered in 1786; and the deed, which was enrolled, but not registered, creating the tenant to the *præcipe*, declared that the recovery should enure to the uses of a deed to be executed in pursuance of the articles. No deed declaring the uses of the recovery was executed. The petitioner was son of one of the sons of R., and all the limitations previous to the estate limited to him were exhausted. In 1788, O., by a deed reciting that he was entitled to K. in fee, subject to the life estate of R. therein, and that he was entitled to an annuity issuing out of K., conveyed to M., K., subject to a perpetual rent of £15 a-year, and conveyed to a

trustee for M. the annuity during R.'s life. A document purporting to be a memorial of this deed was registered in 1788, but neither described the lands conveyed nor the nature of the conveyance. R. died in 1789. In 1808, O. conveyed the rent of £15 a-year, reserved by the deed of 1788, to a trustee for M. In 1811, K. was, with other lands, settled by M. for value. The respondents claimed under that settlement. On a petition, filed to have the articles of 1786 carried into execution—*Held*, that neither the deed of 1786 nor the deed of 1788 was effectually registered; that the mention in the deed of 1788 of the annuity created by the articles of 1786 was not, as against persons claiming under the settlement of 1811, notice of the articles; and that the petitioner was not entitled to recover.

If the barony in which the lands affected by a deed are situate be mentioned, even in a recital in that deed, the memorial for registration must also mention the barony.

A purchaser is not fixed with notice of a deed by evidence that he had notice of an annuity created by that deed, and which, from the notice given of its existence, appeared to have expired many years before the purchase.—*Stephenson v. Royce*, 5 I. C. R. 401; 2 I. Jur. N. S. 68. (C.)

4. By a post-nuptial settlement of Nov. 13th, 1850, John M'Evoy settled certain lands, of which he was then seized, to the uses declared by the settlement. In M. Term 1853 a judgment was recovered by the petitioner against John M'Evoy, and on the 12th Dec. 1853 it was duly registered as a mortgage against the lands comprised in the settlement. The settlement was not registered until April 1854.

The judgment of M. Term 1853 was declared well charged on the lands in the petition mentioned; and the post-nuptial settlement of the 13th Nov. 1850 was declared void as against the registered mortgage of the 13th Dec. 1853; and the settlement was postponed to the judgment mortgage vested in the petitioner.—*Montgomery v. M'Evoy*, 5 I. C. R. 128, *note*. (C.)

5. A judgment was obtained for poor-rates in 1848, against the owner of land. In 1850 he took the benefit of the Insolvent Act. In 1855 the judgment was registered. *Held*, that the judgment did not, by reason of the registration, take priority as a charge over a mortgage of 1832, under the 12 & 13 Vic., c. 104, s. 18.—*In re Malley*, 5 I. C. R. 342. (P.C.)

6. The memorial of registration of a deed was witnessed by the witnesses who had attested the execution of the deed, but did not contain in its body their names or additions. *Held*, that the registration was void.

*Quære*—Whether a deed appointing money secured on lands by a term of years is within the Registry Acts?—*In re Jennings*, 8 I. C. R. 421. (P.C.)

7. In 1851 B. obtained a judgment against A. In 1855 a decree, on consent in an ad-



ministration suit, declared A. a trustee for himself and his brothers and sisters, as to lands in which he had the legal estate. In 1856 the judgment creditor registered his judgment as a mortgage under the 13 & 14 Vic., c. 29, against the lands. *Held*, that the registration of the judgment affected that portion only of the lands in which A. was beneficially interested.

The registration of a judgment as a mortgage under the 13 & 14 Vic., c. 29, operates in equity to pass the beneficial interest of the debtor only. If the debtor has a legal estate, it is transferred to the creditor, subject to the same equities as it was liable to before the registration.

An administrator *cum test. an.*, being in possession of premises which the testator held as tenant from year to year under C., took a lease from D., the head landlord, to commence from the expiration of C.'s lease. *Held*, that the lease was a graft on the testator's interest, and formed part of his assets.—*M'Auley v. Clarendon*, 8 I. C. R. 568; Dr. Rep. temp. Napier. 433. (C.A.)

[Approved of: *Eyre v. McDowell*, 7 I. Jur. N. S. 41. (H.L.); 9 H. Lds. Cas. 619.]

1. A creditor, having obtained a judgment against the official manager of a banking company, registered an affidavit of the judgment against the real estate of a former shareholder in the company, without having issued a *sci. fa.* against him. *Held*, that a Court of Equity ought to give relief against such registration, as being a cloud on the shareholder's title.—*Hone v. O'Flahertie*, 9 I. C. R. 119; Dr. Rep. temp. Napier, 505. (C.)

2. The defence of a purchase for value without notice, is not available against a covenant to renew, or other equitable claim under a prior registered instrument.

A. conveyed lands on trust to pay his debts. The deed was registered. Before it was acted on, A. made a lease with a covenant for renewal, which was also registered. The lands were sold in an administration suit by a judgment creditor of a deceased owner. The purchase-money was paid into Court, and the balance paid to the trustee, who joined in the conveyance. A. had not been served with subpoena, or appeared till after the date of the lease. In a suit, instituted after a great lapse of time, for renewal, by the representative of the lessee against the representative of the purchaser, insisting that the trust deed was voluntary and revocable, and that the sale in the suit did not affect the lease—*Held*, that the purchaser having got a prior legal estate under the trustee, and the equitable estate from payment of the prior incumbrances, was not bound to renew, especially after such a time had passed without recognition of the ptf.'s rights.—*Drew v. Lord Norbury*, 9 I. E. R. 171. (C.)—[*Affid.*: *ibid*, 524. (C.)]

3. A judgment registered as a mortgage under the 13 & 14 Vic., c. 29, is entitled to priority over a prior unregistered instrument of which the connee has not had notice.—*In re Hamilton*, 9 I. C. R. 512. (C.A.)

4. A., B., and C. were seized severally of equal portions of the lands of D. which were subject to a mortgage and to collateral judgments against them obtained in 1846. The lands were sold in the I. E. Court in separate lots, and A.'s share being insufficient to pay his one-third of the mortgage, the deficiency was paid out of the proceeds of B.'s share, and the judgment against A. was assigned to a trustee for B. A. was also seized of the lands of E., against which a judgment obtained in 1856 had been registered as a mortgage. The connee of the latter judgment had been a purchaser of one of the lots of D. in the I. E. Court, and thus had notice of, or an opportunity of ascertaining, the assignment of the judgment. *Held*, that as to the deficiency of A.'s share of the mortgage paid out of the proceeds of B.'s share of D., the judgment of 1846 had priority over the judgment mortgage of 1856.—*Scott v. S.*, 9 I. C. R. 319. (R.)

5. A judgment recovered in 1819, never revived or redocketed, must be postponed, not only to the gales of a rentcharge created by the judgment debtor in 1827, and assigned in 1841, which accrued due after that period, but to its arrears which were then due, and were included in the assignment.—*Walcott v. Smyth*, 11 I. C. R. 266. (C.)

6. On the 6th Oct. 1855, V. equitably mortgaged his estate to E. The deed of mortgage was not registered. On the 25th Aug. 1856, D. obtained a decree in the Court of Ch. against V.'s estate; and, on the 7th of the ensuing Nov., registered the decree as a mortgage under the 13 & 14 Vic., c. 29. *Held*, that this registration did not give the decree statutable priority over E.'s equitable mortgage.

A judgment, registered under the 3 & 4 Vic., c. 105, and the 13th & 14th Vic., c. 29, only affects the property of which the debtor was at the judgment's date lawfully possessed of in his own right, and over which he had disposing power; but does not displace the prior equitable mortgagee's interest.—*Eyre v. McDowell*, 7 I. Jur. N. S. 41. (H.L.); 9 H. Lords Cas. 619.

7. A., a solicitor, mortgaged lands to B. on March 20th, 1856. By agreement, the deed was not registered till April 3rd, 1859. A lease on fine of the lands was made by A. on March 7th, 1859, to C., and registered on March the 16th in that year. A. drew the lease and registered it, and was paid costs out of pocket by C., who employed no other solicitor. *Held*, that A. was C.'s solicitor. That the Court felt itself constrained by the decisions to treat C. as affected with notice of the mortgage, through A. as his solicitor, and to postpone the lease to that mortgage.—*In re Rorke's Estate*, 13 I. C. R. 273; 8 I. Jur. N. S. 53. (L.E.C.)—[*Affid.*: 14 I. C. R. 442; 8 I. Jur. N. S. 245. (C.A.)]

8. In an ordinary marriage settlement, when the lands settled are the property of the husband, he cannot be considered a purchaser,

for value, of the life estate in those lands limited to him by the settlement. A., by his settlement, executed in contemplation of his marriage, settled lands, which he owned in fee, to himself for life, remainder to provide a jointure for his widow, remainder to the children of the marriage. *Held*, that a judgment which, before the execution of the settlement, was a charge on the lands, remained a charge upon A.'s life estate, although the judgment had not been registered pursuant to the 7 & 8 Vic., c. 90, within the time (viz.: five years) required by the 13 & 14 Vic., c. 29, s. 3, for keeping it in force against purchasers under the settlement.—*In re Brown's Estate*, 13 I. C. R. 283; 7 I. Jur. N. S. 289. (C.A.)

1. When a settlement contains a covenant that all the real and personal estate of the settlor whereof he then was, or should at any time thereafter be possessed or entitled unto, should stand charged with the payment of a sum for the trusts in the settlement mentioned, that covenant to charge after-acquired property is not capable of registration under the Registry Acts, so as to give the settlement priority over subsequent purchasers for value without notice of the after acquired lands. *Gubbins v. G.*, 1 Dr. & Wal. 160, n. considered, and held not to be a decision to the contrary.—*Re F. & W. Olden*, 9 I. Jur. N. S. 297. (B.)

2. In 1853, P. conveyed by deed all his life estate in eighteen townlands, to the trustees of a Life Ass. Society. In 1856 Q. obtained a judgment for £1000, and registered it as a mortgage against thirteen of those townlands. The eighteen townlands were sold in the I. E. Court; and the Ass. Society was fully paid out of the produce of the thirteen denominations against which Q. had registered his judgment as a mortgage. This payment wholly exhausted the produce of those thirteen townlands. The produce of the other five remained to be disposed of. The assignee of Q. insisted that he was entitled to marshal the securities so as to give him the same priority over these five denominations as he had over the other thirteen. *Held*, that Q. merely took that beneficial interest which P. had, at the time of the registration of the judgment, power to convey; and that Q.'s assignee was not entitled to marshal the securities, or to have the judgment mortgage declared a charge on the remaining five denominations.—*Lynch v. Cooke*, 11 I. Jur. N. S. 102. (C.A.)

3. Upon a motion allowed to be made after settlement of the final schedule of incumbrances in the L. E. Court, an order was made which postponed an unregistered judgment to a registered deed, and also to several intermediate registered judgments. Soon after that order, the owner of the unregistered judgment arranged that the owner of the registered deed should withdraw his claim; and consented that the order should be rescinded. *Held* (reversing the decision below), that the order was not a final adjudication of the priorities of the parties, equivalent to a decree in Ch.; that it ought to be rescinded, and

the priorities placed in the order in which they originally stood on the first schedule.—*In re Scott's Estate*, 14 I. C. R. 57. (C.A.)

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#### PRISONER.

See PRACTICE, PRISONER.

— *Attachment against*. See PRACTICE, ATTACHMENT.

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#### PRIVATE ACT OF PARLIAMENT.

See STATUTE, I.

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#### PRIVATE LETTERS.

See COPYRIGHT, II.

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#### PRIVILEGE.

— *Of Suitors and Witnesses*. See BANKRUPTCY, VII—ARBITRATION, IV—PRACTICE, EVIDENCE.  
 — *Of Bankrupt*. See BANKRUPTCY, VIII.  
 — *From Arrest, generally*. See PRACTICE, PRIVILEGE FROM ARREST.  
 — *Of Officers*. See PRACTICE, OFFICERS OF COURT.

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#### PRIVILEGE FROM ARREST.

See BANKRUPTCY VII, VIII—PRACTICE, PRIVILEGE FROM ARREST.

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#### PRIVILEGE OF PARLIAMENT.

See MEMBER OF PARLIAMENT—BANKRUPTCY, IV.

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#### PRIVILEGE OF SOLICITORS.

See SOLICITOR, IV.

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#### PRIVITY OF CONTRACT, TITLE, AND BLOOD.

— *When Debtor to Executor may be made Defendant in a Bill against Executor*. See DEBTOR AND CREDITOR, II—PLEADING, PARTIES.

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#### PRIVY COUNCIL.

See PRACTICE IN PRIVY COUNCIL—3 & 4 W. 4, c. 41.

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#### PRIZE-MONEY.

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#### PROBATE AND PROOF OF WILLS.

See WILL, X—PRACTICE, EVIDENCE.

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#### PROCEDENDO.

See BANKRUPTCY, VI.

**PROCEEDINGS BEFORE MASTER.***See PRACTICE, MASTER, PROCEEDINGS BEFORE.***PROCEEDINGS IN BANKRUPTCY.***See BANKRUPTCY, X.***PROCEEDINGS, REFERENCE ON.***See PRACTICE, MASTER, REFERENCE TO, &c.***PROCEEDINGS AT LAW.***— Injunction to stay them. See PRACTICE, INJUNCTION.***PROCESS.***See PRACTICE, PROCESS.***PROCESS.***— Priority of. See PRIORITY OF SECURITY.***PROCESS.***— Of Contempt. See PRACTICE, CONTEMPT.***PROCHEIN AML.***See PRACTICE, PROCHEIN AML—PRACTICE, COSTS.***PROCLAMATIONS.***— Attachment with. See PRACTICE, ATTACHMENT.***PRO CONFESSO.***See PRACTICE, BILL PRO CONFESSO—PRACTICE, DECREE.***PRODUCTION OF DEEDS.***See PRACTICE, PRODUCTION OF DEEDS.***PRODUCTION OF PARTIES.***See PRACTICE, PRODUCTION OF PARTIES.***PROFESSIONAL CONFIDENCE.***See SOLICITOR, VI.*

1. An attorney cannot, on the ground of professional confidence, refuse to answer an interrogatory as to his having seen a certain instrument, and, if so, where, and in whose hands?—*O'Gorman v. M'Namara*, Hayes, 174. (E.E.)

**PROFITS.***See RENTS AND PROFITS—INTERMEDIATE PROFITS.***PROHIBITION.***See PRACTICE, PROHIBITION.***PRO INTERESSE SUO.***— Examination. See PRACTICE, EVIDENCE.***PROMISSORY NOTES.***See BILLS OF EXCHANGE.***PROOF.**

- Of Debts before Master. See PRACTICE, MASTER, PROCEEDINGS BEFORE—PRACTICE, COSTS.*
- Generally. See PRACTICE, EVIDENCE.*
- Of Deeds. See ibid.*
- Of Wills. See ibid—WILLS, X.*
- Of Handwriting. See ibid.*
- Of Marriage. See MARRIAGE, II.*
- Under Joint Commission. See BANKRUPTCY, VI.*
- In Bankruptcy generally. See BANKRUPTCY, XIII.*
- In Bankruptcy, Mode of Proof. See ibid.*
- In Bankruptcy, Proof by Holders of Securities. See ibid.*
- In Bankruptcy, Proof as between Principal and Surety. See ibid.*
- In Bankruptcy, Proof of Annuities. See ibid.*
- In Bankruptcy, Proof under Marriage Settlements. See ibid.*
- In Bankruptcy, Proof of Interest. See ibid.*
- In Bankruptcy, Proof of Damages and Costs. See ibid.*
- In Bankruptcy, Proof of Debts accruing after Bankruptcy. See BANKRUPTCY, XII.*
- In Bankruptcy, Proof of Future and Contingent Debts. See BANKRUPTCY, XIII.*
- In Bankruptcy, of Expunging Debts. See ibid.*

**PROPERTY OF PARTNERSHIP.***See PARTNERSHIP, IV.***PROPERTY, ATTACHMENT AGAINST.***See PRACTICE, VII.***PROPERTY OF BANKRUPT.***See BANKRUPTCY, XII.***PROPERTY OF LUNATIC.***See LUNATIC, VI.***PROPERTY TAX.***See STATUTES, CONSTRUCTION OF, II, 71.***PROPERTY OF BANKRUPT ACQUIRED AFTER COMMISSION, &c.***See BANKRUPTCY, XI.*

**PROPERTY OF CHARITY.***See* CHARITY, III.**PROPORTION OF CONTRIBUTION.***See* CONTRIBUTION, II.**PROSECUTION OF DECREE.***See* PRACTICE, DECREE.**PROSECUTION OF FIAT, TIME FOR.***See* BANKRUPTCY, VI.**PROTECTION OF TITLE.***See* TITLE, VII.**PROTECTION OF INFANT'S ESTATE.***See* INFANT, I.**PROTECTOR***— Of Settlement.***PROVISIONAL ASSIGNMENT IN BANKRUPTCY.***See* BANKRUPTCY, VI.**PROVISIONAL CREDIT IN LANDED ESTATES COURT.****PUBLIC ACCOUNTS.***See* ACCOUNT, VII.**PUBLIC CALAMITY.****PUBLIC OFFICERS.***See* AMBASSADOR—OFFICES AND OFFICERS, PUBLIC.**PUBLIC PENSION.***See* PENSION.**PUBLIC POLICY.***— Injunction to Stay Proceedings at Law in Cases of. See* PRACTICE, INJUNCTION. *See* AGREEMENT, IV—BOND, III.**PUBLICATION.***— Of Evidence. See* PRACTICE, EVIDENCE.  
*— Of Will. See* WILL, VII.  
*— Of Books, Music, &c. See* COPYRIGHT.**PUFFERS.***See* AUCTION.**PURCHASE.***— In Child's Name. See* PARENT AND CHILD, IV.  
*— Plea of. See* PLEADING, PLEA.  
*— Estate of. See* ESTATE, XI.  
*— By Parties in a Fiduciary Situation. See* FRAUD, VII—TRUSTEE, IV.**PURCHASER.***— Generally. See* VENDOR AND PURCHASER—PLEADING, PARTIES.  
*— Payment into Court by. See* PRACTICE, PAYMENT INTO COURT.**PURCHASE-MONEY, PAYMENT OF.***— Generally. See* VENDOR AND PURCHASER, I.  
*— Interest on. See* *ibid*, III.  
*— Investment. See* *ibid*, III.  
*— Refunding. See* *ibid*, X.  
*— Application of. See* *ibid*, XIV.**QUAKERS.***See* 6 G. 1, c. 6, ss. 5, 6; 21 & 22 G. 3, c. 25.**QUALIFICATION OF SOLICITOR.***See* SOLICITOR, I, II.**QUIA TIMET.***See* PLEADING, BILL.**QUIETING POSSESSION.***See* PRACTICE, INJUNCTION.**QUIT RENTS.**

1. A., seized in fee of premises, subject to an entire quit rent, by indenture sold a portion of them, then in the possession of B., who was his attorney and tenant, to him, his heirs and assigns. The same indenture recited that A. was seized of other premises, which, with the premises conveyed, were subject to the quit rent, and that B. had agreed to indemnify A., his heirs and assigns, and the other premises, the estate of A., from payment of the quit rent, B., for himself, his heirs, executors, &c., covenanted with A., his heirs and assigns, that he, B., his heirs and assigns, would at all times thereafter pay the quit rent of all the premises, as well of such as were thereby sold to him, as of the others the estate of A.; and would, at all times thereafter, save harmless and indemnify A., his heirs and assigns, from the payment thereof. *Held*, in a suit by an assignee of the unsold lands against a volunteer under B., that the sold lands were speci-

fically bound to indemnify the unsold lands against the payment of the quit rent.

The proper mode of indemnifying against the payment of a quit rent is, by a grant of a rentcharge in fee, equal in amount to the quit rent, and issuing out of lands held in fee.—*Hutton v. Waddy*, 2 Jon. 541, 549. (E.E.)

1. A bill for chief rent is sustainable in this Court when the acts of the party liable to pay it have occasioned all the difficulty in the way of ptf.'s proceeding at law.—*Archbp. of Dublin v. Lord Trimleston*, 2 Dr. & War. 535. (C.)

2. Quit rent is a debt or incumbrance affecting the lands in payment of which money lodged in Court, and awarded as compensation for damages occasioned by works carried on by the Commissioners of Public Works, may be applied, under the Lands Clauses Consolidation Act 1845 (8 & 9 Vic., c. 18), s. 69.

Advances to a tenant for life, under the Drainage Act (5 & 6 Vic., c. 89), should not be paid out of the fund so lodged in Court, such fund representing the *corpus* of the estate; the tenant for life being bound to pay the annual instalments; and it being possible that all such instalments may become payable during his life.—*In re Commissioners of Public Works, ex parte Studdert*, 6 I. C. R. 53. (R.)

3. Quit rents and Crown rents are charges and incumbrances within a covenant indemnifying a purchaser against specified charges, "and all other debts, charges, and incumbrances, that might at any time thereafter affect the" purchased lands.—*Massy v. O'Dell*, 5 I. Jur. N. S. 293. (C.A.)

### RAILWAYS.

See CANALS, &c.—JOINT-STOCK COMPANIES—JOINT-STOCK COMPANIES WINDING-UP ACT.

#### I. IN GENERAL.

#### II. DIRECTORS OF—THEIR RIGHTS, DUTIES, AND LIABILITIES.

#### III. SHAREHOLDERS OR PROPRIETORS OF—THEIR RIGHTS, DUTIES, AND LIABILITIES.

#### IV. PURCHASE OF LANDS BY RAILWAY COMPANIES.

#### V. INVESTMENT OF PURCHASE-MONEY—COSTS.

#### VI. SUITS BY, AGAINST, AND BETWEEN A RAILWAY COMPANY AND ITS MEMBERS.

#### VII. ACTS, CONSTRUCTION OF.

#### I. RAILWAYS IN GENERAL.

4. Railway calls, made payable by instalments, cannot be enforced.

The twenty-one days' notice of a call required by 8 Vic., c. 16, sec. 22, must be exclusive of the first and last days.

The abandonment of part of a railway is no defence to a claim for calls; nor is the non-subscription of the prescribed capital a defence.

A Railway Co., proving against the estate of a bankrupt for calls, must, according to the universal principle in bankruptcy, deduct the

price or value of the shares from the amount of their claim, or give up the shares for the benefit of the creditors of the bankrupt.—*In re Jennings*, 1 I. C. R. 236. (B.)—[Affd.: 1 I. C. R. 645. (C.)]

5. A Railway Co. is "a Joint-stock Company," within the meaning of the Irish B. and I. Act (20 & 21 Vic., c. 60), and, as such, is liable to be made bankrupt.—*In re Bognalstown and Wexford Railway Co.*, 15 I. C. R. 491. (C.A.)

6. When a judgment, obtained against a Railway Co. for a debt due to a contractor for executing railway works, is registered as a mortgage under the 13 & 14 Vic., c. 29; and the company are then declared bankrupt; that mortgage will be declared a valid charge upon their lands and premises, purchased for the construction of a railway thereon.

The word "person" in that statute includes a "body corporate:" e. g., a Railway Co.—*In re Bognalstown Ry. Co.*, 10 I. Jur. N. S. 156. (B.)

7. A Railway is a Joint-stock company established for trading and commercial purposes. Part of the earthworks of a railway had been made, but no rails had been laid, nor had any traffic or trading taken place—*Held*, that it was not necessary to prove trading on the company's part; and that it might be declared bankrupt, as a company established for trading and commercial purposes.—*Re Banbridge Extension Ry.*, 10 I. Jur. N. S. 195. (B.)—[Affd.: *ibid*, 278. (C.A.)]

#### II. DIRECTORS OF: THEIR RIGHTS, DUTIES, AND LIABILITIES.

8. C., one of the provisional directors of a projected Railway (which was not carried into execution) was sued by the engineer for services performed in surveying the proposed line. In that action judgment was recovered against C. C. filed a bill against his co-directors for contribution. It was objected that the suit should been for the general administration of the partnership affairs. *Held*, that it was properly framed.

One who is originally named in the prospectus as a director, and afterwards ratifies and consents to his appointment as such, is liable on the intermediate contracts entered into by his co-directors.

The test of liability to contribution is, liability to the ptf. at law; not the holding of shares in the projected Co.

The amount of each director's contribution is to be ascertained by dividing the total loss by the number of directors who consented to act; not of those named in the prospectus as directors; nor by reference to the number of shares subscribed for by each director.

Ptf. having released one of the directors, in order to make him a competent witness on the trial at law—*Held*, that, if such a release was an act proper to be done to further the defence of the action, his share of the loss should be borne equally by all parties having the

benefit of the defence at law; and enquiries upon that point were directed.—*Leffroy v. Gore*, 7 I. E. R. 228; 1 Jon. & L. 571. (C.)

### III. SHAREHOLDERS IN, OR PROPRIETORS OF RAILWAYS: THEIR RIGHTS, DUTIES, AND LIABILITIES.

1. Shares in a Ry. Co. stood in the name of a bankrupt at the time of his bankruptcy, on the 13th of Nov. 1837. A large sum for calls was then due on the shares. The company proved for it in the bankruptcy in July 1849, and received a dividend, the assignees not requiring the shares to be brought in, and the secretary of the company expressly stating that they had no security for the calls. Subsequent calls were made, the shares still remaining in the bankrupt's name. In July 1852 the company served a notice on the bankrupt, that the shares would be forfeited. Accordingly the shares were declared forfeited, at a meeting of the directors. In May 1853, the assignees tendered the amount of the calls which fell due after the *fiat*.

On a petition filed by the assignees against the company, *Held* that the assignees might, when the company proved for the calls, have had the transmission of the shares authenticated to them under the 8 Vic., c. 16, s. 18, and have had them sold for the benefit of the bankrupt's estate.

But that the assignees not having then accepted the shares, they continued the property of the bankrupt; and had been forfeited for non-payment of the calls.

*Semle*—The proof under the bankruptcy was not equivalent to payment of the calls, so as to satisfy the provisions of the statute, which makes the payment of the calls a condition precedent to the right to transfer the shares.—*Turner v. The D. & B. J. Railway Co.*, 3 I. C. R. 526; 6 I. Jur. 225. (C.)

2. Shares in a Ry. Co. were declared forfeited, for non-payment of calls. On petition filed to redeem them, the redemption was decreed (*vide* 3 I. C. R. 526), on payment of all arrears of calls, and of interest thereon. *Held*, that the owner of the shares was entitled to set off, as against such arrears of calls, and interest, the amount of all dividends which, but for default in payment of calls would have been payable in respect of such shares, in proportion to the capital paid up.—*Turner v. D. & B. J. Railway*, 4 I. C. R. 194. (C.)

3. The petitioner, a shareholder in a Railway Company, made default in paying calls upon his shares, which the directors declared forfeited. He subsequently paid the amount due upon these calls, and resumed his original shares. By their Act of Incorporation (8 & 9 Vic., c. 119, Loc. & Per., sec. 7), the company were enabled before the completion of the line to pay interest at £4 per cent. upon calls paid up (provided that no such interest should be paid to any shareholder who should be in arrears to any calls). Under this sec. the directors had proceeded to pay interest out of the proceeds of the railway to such share-

holders as had paid up the calls made, but not to the petitioner, who had made default in payment. He having presented a petition complaining that he had been deprived of a proportionate share of the profits of the railway, because the directors had applied its profits in paying the interest upon the money paid up, to which he by his default had become disentitled; and praying that he might be declared entitled to the profits of the shares that had accrued—*Held*, that he was not entitled to relief.—*M'Kenna v. Mid. Gt. Westn. Ry. Co.*, 7 I. Jur. 301. (C.)

4. A director of a Joint-stock Banking Company assigned to another director a number of shares, at a price far above the market price of the shares, which were unsaleable. The price was paid, but the transfer was not made with the formalities required by the partnership deed. *Held*, that it was invalid, and that the transferor was rightly placed on the list of contributories in respect of his shares.—*Ex parte Kennedy*, 6 I. C. R. 121. (R.)

### IV. PURCHASE OF LANDS BY RAILWAY COMPANIES.

5. A Ry. Co. having served notice to treat with the owner of land, under 8 & 9 Vic., c. 18, and been furnished with the title and a claim for £500 compensation, obtained possession from the occupying tenant, and commenced the works without paying the money; or lodging it in Court, and giving security required by the Act. The Court granted an injunction against the company's proceeding with the works; and to compel them to restore the land to its former condition. The injunction not to issue on the Company's undertaking to lodge the sum claimed and give the bond required.—*Armstrong v. Wat. & Lim. Ry. Co.*, 10 I. E. R. 60. (R.)

6. A Railway Company, having agreed to purchase lands, entered, and carried on their works without the vendor's leave, and without having paid him, or lodged the money in bank. The Court granted an injunction till the money should be paid.—*Anderson v. N. & W. Ry. Co.*, 1 I. Jur. 11. (E.E.)

7. A Railway Company having taken lands occupied by D.'s tenants, and the parties not agreeing to the compensation offered, steps were taken for holding an inquisition, in which one solicitor acted for D. and the tenants. The company afterwards acceded to the valuation made for tenants. A verdict was taken by consent for D., and the company gave a written undertaking to pay any sum to which the solicitor was entitled as solicitor for D. and his tenants, when ascertained by the proper officer, under their Act of Incorporation. They took from D. a conveyance, the costs of which and of making title were taxable in Ch. under their Act. The costs of ascertaining the compensation for the tenants should properly under it have been settled with their claim by Justices of the Peace, and the costs of an

inquisition were taxable in a Law Court. The solicitor, having furnished separate bills of costs for D. and the tenants, to which the Co. objected, petitioned for taxation; and to enforce payment. *Held*, that the costs of D. only could be taxed or enforced in this Court, and that the undertaking gave no jurisdiction as to the costs of the tenants.—*Marquis of Drogheda v. Gt. S. & W. Ry. Co.*, 12 I. E. R. 103. (C.)

1. A Railway Co., having need of lands for the construction of their railway, served, in Nov. 1846, a notice to treat, upon the owners of the legal estate in the lands; but the parties not having come to any arrangement in pursuance of that notice, the company, in May 1847, proceeded by inquisition before the sheriff and a jury, and a verdict was then given for sums for purchase-money and compensation. Afterwards, in the same month, the company went into possession of the lands. In March 1848 an abstract of the title of the owners was furnished to the company, and from that period up to Jan. 1851, a correspondence took place between the respective parties, partly relating to title, and partly to a claim made by the owners for interest upon the purchase and compensation moneys. Eventually the company refused to pay interest, and in Jan. 1851 lodged the purchase-moneys in the Bank of Ireland to the credit of all persons interested in the lands. A cause petition having been filed by the owners, praying a specific performance, and interest at the rate of £5 per cent. upon the purchase and compensation moneys, from the period at which the company took possession of the lands up to the time of the lodgment of those moneys in bank—*Held*, that the ordinary relation of vendor and purchaser, under the circumstances above detailed, existed between the parties.

That the owners were entitled to the interest as prayed for.—*Blount v. Gt. S. & W. Ry. Co.*, 2 I. C. R. 40. (C.)

2. A Ry. Co., in 1846, served upon a landowner the usual notice to treat, which not having been complied with, they served him in 1847 with a second notice, offering a nominal sum for purchase-money for his land, and compensation for consequential damage; and stating, that if that sum were not accepted, they would proceed by the inquisition of a jury to ascertain the amount to which he was entitled. That sum he refused to accept; but afterwards, in May in the same year, entered into an agreement to accept £110 for purchase-money and compensation. The company constructed the greater part of their line, but neither entered into possession of the land in question, nor paid the £110. In 1849 their compulsory power for acquiring land, and in 1851 their power to construct the railway, expired. A petition, afterwards filed by the landowner, praying specific performance of the agreement of May 1847, or, alternatively, that the company should be compelled to complete the purchase conformably to the

notice to treat of 1846, and to the Lands Clauses Consolidation Act, 8 & 9 Vic., c. 18, was dismissed without prejudice to the petitioner's right to proceed at law on the agreement of 1847.—*Munroe v. Newry and Warrenpoint Ry. Co.*, 2 I. C. R. 260. (C.)

3. The Court will grant an *ad interim* injunction to restrain a Ry. Company from carrying out, without the sanction of Parliament, a contract to purchase the property of a Canal Company, when that purchase would create a monopoly.

Railway Companies purchasing a canal; constructing a new branch line, or becoming proprietors of coaches, will, unless authorised to do so by their Acts of Incorporation, be considered as getting such monopoly contrary to public policy. Their purchase must be sanctioned by Parliament.

The Court will not permit the defeat of this doctrine by a colourable agreement or lease.

The Canal Carriers Act, 8 & 9 Vic., c. 42, does not sanction a transfer of the working stock or fixed property of a canal.

An injunction will not be granted to restrain a company from applying to Parliament for an Act to enlarge their powers, or to sanction an agreement with any other company; but will be granted to restrain them from using the company's funds to defray the expenses of procuring such an application, when a monopoly is likely to be created thereby.

*Quære*—When shareholders purchase a share in an opposing company, whose acts they desire to restrain, immediately before filing a petition to restrain them, and in order to enable them, as shareholders, to file such a petition, whether they are entitled notwithstanding to their equitable relief as shareholders of such other company?—*McDonnell v. The Mid. Gt. W. Ry. Co., Ireland*—*McDonnell v. The Grand Canal Company*, 5 I. Jur. 185. (R.)

4. P. agreed with the promoters of a railway bill, then before Parliament, that their railway, which would pass through his estate, might be made upon these conditions:—First, that if the company obtained an Act of Incorporation they should pay him £1000 for all lands required by them, and £4000 for residential injury. Secondly, that the tunnel near his property should be constructed in a specified way. Thirdly, that they should make a station at a particular place, &c. The company obtained their Act, but never made the railway. *Held*, that the true construction of the contract was, that the moneys were to be paid only if the railway was made, and the land used, since the whole contract must be construed together, and all the conditions contemplated the event that the railway would be made.

Lord Cottenham's doctrine, stated in *Edwards v. The Grand Junc. Ry. Co.*, 1 Myl. & Cr. 650, that an incorporated company are the successors or assignees of the projectors, and come into existence bound by all the burdens created by those projectors, discredited by *Lords Cranworth, L. C., and Brougham*.—

*Preston v. The Liv., Man., and New. Ry. Co.*, 1 I. Jur. N. S. 217. (H.L.)—[S. c. 5 H. L. Cas. 605.]

1. A Ry. Co. entered upon lands without giving previous notice to the occupier holding under a lease, and without his consent, but having agreed with the owner of the lands. They deepened a drain thereon, which had been connected with the railway, but was not marked on their plans. It was necessary for the maintenance of the railway, and was executed with as little injury as possible. The occupier presented a petition praying an injunction to restrain the company from committing waste, and from keeping the drain open, or keeping possession of the premises. *Held*, that the Court ought never to interfere to restrain a company by injunction from doing an act already done; that if a company enter upon lands without giving the requisite notice, when notice is required, the proper course is to proceed at law for the trespass, as this Court cannot in such a case properly estimate the amount of damages.

The motion was directed to stand over, to enable the petitioner to bring an action of trespass, first, to establish that the entry of the company on the lands without notice was not warranted by any statute, and, secondly, to ascertain the amount of damages.

*Quære*—Whether a company intending to execute any of the works mentioned in the Rys. Cl. Consol. Act, 8 & 9 Vic., c. 18, s. 16, when such works are not set out in the plans, can for this purpose enter upon lands not on the plans, without giving previous notice to the occupier of the lands?—*Newcombe v. D. & W. Ry. Co.*, 7 I. Jur. 323. (R.)

2. A person who traverses the award of the arbitrator under the Railways Act (*Ir.*), 1851, is not entitled under the 22nd sec. of the Act, to interest at £5 per cent. on the amount of the damages, awarded by the verdict, from the time when the R. Co. went into possession of the lands.—*In re D. & E. Railway*, 11 I. C. R. 467; 6 I. Jur. N. S. 148. (R.)

#### V. INVESTMENT OF PURCHASE-MONEY: COSTS.

3. The Gt. S. & W. R. Co. having purchased settled land, the tenant for life conveyed to them under their Act. He and the tenant in tail applied to draw the purchase-money out of Court. No disentailing deed had been executed. *Held*, that the money was to be considered as bound by the limitations affecting the land, and to be dealt with as subject to be invested in lands, to be settled to the same uses as the sold lands; and that a disentailing deed was necessary to enable the parties to draw the money.—*In re Gt. S. & W. Railway*, 9 I. E. R. 482. (R.)

4. The costs of preparing and verifying the execution of a power of attorney from parties residing in Jersey, to draw out of Court purchase-money lodged in Court under the provisions of a Railway Act, are chargeable against the company as costs incident to

drawing out the money.—*In re Godley*, 10 I. E. R. 222. (R.)

5. A tenant at will, having agreed to give possession of lands to a Railway Company for £23, subsequently refused to give possession unless his sister, who, he alleged, had an equal interest in the premises, was also satisfied. The money was offered to be paid on his giving possession, but was not formally tendered. The company having lodged the sum agreed on in Court to the separate credit of the tenant, solely, alleging in the warrant his refusal to accept it as the reason for the lodgment—*Held*, that the tenant was entitled to draw the entire money out of Court. Costs were refused, each party having been in default.—*In re S. E. Ry. Co.*, 12 I. E. R. 398. (E.E.)

6. An application, to draw out of Court money lodged there by a Ry. Co. could have been avoided, had the company, on bringing in the money, obtained a continuing order to pay it out. *Held*, that the company should pay the costs of the motion.—*Ex parte Cremon v. Gt. S. & W. Ry. Co.*, 4 I. Jur. 182. (R.)

7. Under the Lands Cl. Consol. Act, 1845, 8 & 9 Vic., c. 18, s. 80, Ry. Cos. are liable to the cost of orders obtained by successive tenants for life for payment to them of the dividends accruing on stock purchased with the price of land taken by them, and by them paid into Court; but not to any costs incurred consequent on the order.—*Ex parte Gordon v. Belfast & Co. Down Ry. Co.*, 11 I. Jur. N. S. 1. (R.)

#### VI. SUITS BY, AGAINST, AND BETWEEN A RAILWAY COMPANY, AND ITS MEMBERS.

8. A bill, filed in 1850 by the owner of a leasehold, stated that a R. Co., whose railway was intended to intersect the ptf.'s lands, in Sept. 1847, served upon the ptf. the usual notice to treat; and that, no agreement having been come to between the parties, the company, in Dec. 1848, issued their precept; upon which an inquisition having been held, the jury awarded to the ptf. a sum for purchase-money, and a sum for compensation. The ptf., offering to perform her part of the contract, frequently applied to the company to complete their part, which they failed to do. The bill averred that the ptf. could have adequate relief in equity only, and prayed specific performance, payment of the sums awarded by the inquisition, and interest thereupon from the date of the inquisition. Demurrer, for want of equity, and on the ground that the ptf.'s remedy was at law, overruled.—*Doherty v. Wat. & Lim. Ry. Co.*, 13 I. E. R. 538. (C.)

9. The abandonment of part of a railway is not a defence to a claim for calls. Neither is the non-subscription of the prescribed capital a defence.—*In re Jennings*, 1 I. C. R. 286. (B.)

10. A company had notice from the Railway Commissioners to state their views as to the



liability of the company to contribute to expenses incurred by another company; and, instead of objecting to the amount or character of the expenses, expressly repudiated any liability whatsoever. The Commissioners decided that they were liable to contribute. A cause petition, to set aside the award on the ground that evidence was in existence to show that the expenses and charges were improper, but which evidence was not received by the Commissioners, was dismissed with costs.—*D. & En. R. Co. v. Ulster R. Co.*, 5 I. Jur. 217. (C.)

## VII. RAILWAY ACTS: THEIR CONSTRUCTION.

[See STATUTES.]

### RAISING.

- Portions. See PORTIONS, VI.
- Legacies. See LEGACY, VIII.

### RATE OF INTEREST.

See INTEREST PECUNIARY, II.

[The Court rate is now £4 per cent.: G. O., (1867), 211.]

### REAL ASSETS.

See EXECUTORS, X, XI.

### REAL ESTATE.

- When Charged. See PORTIONS, VII.
- Generally. See ESTATE, VIII.
- Of Husband. See HUSBAND AND WIFE, II.
- Of Wife. See HUSBAND AND WIFE, III.

### REBELLION.

See PRACTICE, COMMISSION OF REBELLION.

### RECALLING.

- Certificate. See BANKRUPTCY, XVI.

### RECEIPT.

See EXECUTORS, VI—TRUSTEES, V.

### RECEIVER.

See PRACTICE, RECEIVER.

### RECOGNIZANCE.

[As to Recognizance of a Tenant to Court, see also PRACTICE, RECEIVER.]

1. A surety by recognizance, having paid the debt, though after a *levari* issued against him, but never returned, is entitled to the benefit of the recognizance, and to stand as a creditor by matter of record against his co-surety for contribution.—*Salkeld v. Abbot*, Hayes, 576. (E.E.)

2. The costs of suing a surety upon his recognizance for a tenant under the Court cannot be recovered in addition to the sum secured by the recognizance; such a recognizance not being a security for a debt really due to the Crown.—*Keily v. Murphy*, S. & Sc. 479. (R.)

3. The recognizance of a tenant under the Court and his sureties is not a debt due to the Crown.—*Bell v. Tape*, S. & Sc. 488. (C.)

4. A tenant under the Court, being in default, took the benefit of the Insolvent Act. Held, that the sureties' recognizances should be put in suit, though the arrears might have been recovered from the tenant, if the receiver had used due diligence.—*Richardson v. Walsh*, 1 I. E. R. 147. (R.)

5. In 1831, A., being appointed county treasurer, entered with four others into security by recognizance, whereby A. acknowledged himself indebted to the King in £7000 sterling. By the same instrument, B. & C. acknowledged themselves to be jointly and severally indebted in £5000 sterling; and D. & E., similarly, in £2000 sterling. The condition was—that A. should duly account pursuant to the 4 G. 4, c. 33. In that condition the instrument was described as "the foregoing recognizance." In 1837, A. resigned. He was a defaulter in upwards of £18,000, of which about £4000 was due to the Crown, and the residue to the county. Held, that this recognizance secured only one sum of £7000; that £7000 British was the sum secured, although the Act required the treasurer to secure only £7000 Irish; and that A., upon paying that sum, was entitled to have the recognizance of himself and his sureties vacated; but that the sureties, on payment of that sum, were not entitled as against the Crown to the benefit of the recognizance acknowledged by A.

A county treasurer's sureties, paying the amount of his recognizance, are not therefore entitled to priority over the Crown, if the treasurer owes the Crown a debt beyond the amount of the recognizance.—*The Queen v. O'Callaghan*, 1 I. E. R. 439; Jon. & C. 154. (E.E.)

6. Costs paid under a decree or order, which is afterwards reversed on appeal, must be repaid by the solicitor who received them, to the person from whom they were received.—*Malone v. O'Connor*, 2 I. E. R. 13. (C.)

7. After plea, the Court will permit a *sci. fa.* to be amended.—*Reg. v. Fennell*, 1 Dr. & Wal. 511. (C.)

8. The sheriff returned *nil* on two several writs of *sci. fa.* issued on a recognizance, entered into by parties residing abroad, and directed to the sheriff of the county where the party's estate lay. Held, that rules to plead might be entered as on a return of *scire feci*.—*Reg. v. Barry*, 2 I. E. R. 189. (C.)

1. Bill for specific performance of an agreement to grant a lease, and for an injunction to restrain execution of an *habere*. On the coming in of the answer, the injunction was continued to the hearing, on the terms, amongst others, of the ptf.'s giving security by recognizance "in the sum of £827, being the sum stated in the deft.'s answer to be due for rent up to and including the 1st of May last." A recognizance reciting the order, and purporting to be in pursuance of it, was entered into, but by mistake was conditioned, "if the said J. O. L. (the ptf.) shall well and truly account (&c.) for mesne rates, and well and truly pay (&c.) such sum as shall be decreed for the said mesne rates," then the recognizance to be void. Afterwards the bill was dismissed with costs, and the ptf. having become insolvent, the Court (for the purpose of enabling the deft. to proceed against the sureties for the £827, upon the recognizance) ordered, that the ptf.s. should, within one month, pay the £827, in the injunction order, and recognizance mentioned, as and for the mesne rates of the lands in the pleadings mentioned; and in default of such payment, that the defts. should be at liberty to sue on the recognizance, without order.

When the intention of the parties to a recognizance has been mistaken, the Court will, on putting it in suit, either reform it so as to conform to the intention, or construe the words used so as to have that effect.—*O'Leary v. Purcell*, 3 I. E. R. 329; Fl. & K. 126. (R.)

2. Recognizances and crown bonds, although the Crown is but a trustee in them for a subject, are not within 8 G. 1, c. 4 (Statute of Lim.).—*Regina v. Bayley*, 4 I. E. R. 142; 1 Dr. & War. 213. (C.)

3. On a *levari* on a recognizance at the suit of a subject, the sheriff is entitled to levy one shilling only in the £1 for the first £100, and sixpence for every other £100.—*Creed v. C.*, 4 I. E. R. 299; Fl. & K. 396. (R.)

4. On the Petty-bag side of the Court of Ch. it is not the practice that the *sci. fa.* on a recognizance should set out the condition, although to do so would be more correct; the Court refused to alter the practice.

An averment of facts showing the jurisdiction of the officer before whom the recognizance is taken, is necessary in a *sci. fa.*; though the statement be omitted in the recognizance itself. But the position in the *sci. fa.* of that averment is unimportant; and its being intermixed with the statement in the body of the recognizance, from which it had been omitted—*Held*, not a ground for a plea of *nul tiel record*; and liberty to plead to the merits was refused.

A *sci. fa.* on a recognizance, conditioned for a tenant's paying his rent, in the usual form, stated that the conuzors, describing them as of the county of Cork, came before A. B., "who then and there was a Master Extraordinary in and for said county, and duly authorised in that behalf, and then and there acknowledged themselves to be bound," &c.; concluding "as by the said recognizance of

record may appear;" but did not set out the condition. Defts. pleaded *nul tiel record*. *Held*, that the omission of the condition was a variance; but that, since the uniform practice appeared to be to omit the condition, the Court would sustain that practice, and not allow the objection to prevail.

That the introduction into the *sci. fa.* of the allegation, that A. B. was a Master Extraordinary for the county of Cork, was not a variance, not being a statement of the record, but an independent averment upon which issue might be taken.—*Reg. v. Hurley*, 4 I. E. R. 637; 2 Dr. & War. 433; 1 Con. & L. 473. (C.)

5. To a *sci. fa.* on a recognizance by a tenant under the Court, and his sureties, one of the defts. pleaded performance of the condition by the tenant, by payment of the rent, and also a discharge under the Bankrupt Act. Replication, that the tenant did not pay the said rent, contrary to the form and effect of the condition—*Held*, bad, as not assigning a particular breach.

But the Crown was allowed to amend, on the terms of not proceeding personally against the bankrupt, nor against his after-acquired property.—*Reg. v. O'Donnell*; *Reg. v. Kelly*, 6 I. E. R. 639; 1 Jon. & L. 271. (C.)

6. A *sci. fa.* on a recognizance stated that three persons, described respectively as "of A., B., and C., in the county of G., came before J. R., who then and there was one of the Masters Extraordinary of the High Court of Ch. in Ir., in and for the said county of G.; and jointly and severally acknowledged themselves to be indebted." *Held*, on special demurrer, that the *sci. fa.* was bad for want of an averment that the recognizance was taken in the county of G.

The Court of Ch. can dispose of Petty-bag cases out of Term.

A *sci. fa.* on a recognizance stated that "on, &c., at Ballinasloe, in the county of Galway, M. F., J. L., and T. L. came before J. R., who then and there was one of the Masters Extraordinary, &c., and then and there jointly and severally acknowledged themselves to be indebted." The record of the recognizance did not contain the words in italics, but at foot of it were these words, "Taken and acknowledged before me at Ballinasloe, in the county of Galway aforesaid, the day and year above mentioned." *Held*, on the plea of *nul tiel record*, that the variance was fatal.—*The Queen v. Lynch*, 7 I. E. R. 263; 2 Jon. & L. 462. See 2 Jon. & L. 103. (C.)

7. In *sci. fa.* on a receiver's recognizance, the replication assigned as breaches that the Master's certificate found in his hands a balance, which, by two orders of Dec. 1843, was directed to be lodged and invested in two several parts, which had not been done. The rejoinder stated that the Master's certificate directed part of the balance to be applied pursuant to an order of 1841, which was other than and different from those mentioned in the replication, and the rest to be invested; and that the Master had power to make, and the

receiver was bound to obey that certificate. The facts were, that the directions in the certificate and order of 1841 had not been obeyed, and side-bar rules were entered to enforce them, in which only the time allowed was different, and which were the orders mentioned in the replication. The rejoinder was taken off the file as frivolous, and filed for delay.—*The Queen v. Beatty*, 8 I. E. R. 132. (C.)

1. Vacating a recognizance as to one of the sureties.—*Callaghan v. C.*, 8 I. E. R. 572. (R.)

2. Two pleas to a *sci. fa.* on a recognizance, the second of which commenced with the averment, by leave of the Court, &c., pursuant to the statute in that case, &c., though informal—*Held*, sufficient on demurrer.

To a *sci. fa.* on a recognizance, averring that it was taken in the county of C., before A. B., a Master Extraordinary for the county of C., it was pleaded that A. B. was not a Master Extraordinary for the county of C.; *Held*, a good plea.

To a *sci. fa.* stating a recognizance taken before A. B., and that it was so taken at X., in C., before the said A. B., then being a Master for the county of C., duly authorised in that behalf; a plea that the recognizance was not taken and acknowledged in manner and form as in the *sci. fa.* alleged, at X., in the county of C., or elsewhere in C.—*Held*, bad, for duplicity, and as too large a traverse.—*The Queen v. Irwin*, 9 I. E. R. 546. (C.)

3. The proceeding by *sci. fa.* on a receiver's recognizance is an award of execution, and not a judgment recovered, and does not bear interest under 3 & 4 Vic., c. 105, s. 26.—*Feely v. Kilkenny*, 10 I. E. R. 443. (C.)—[Affirming the decision at the Rolls: 10 I. E. R. 423. (R.)]

4. The appointment of sequestrators for disobedience of an order on a receiver, to bring in the balance due by him on foot of his account, is good cause against the appointment of a receiver by a creditor whose judgment is pious to the receiver's recognizance.—*Warren v. W.*, 13 I. E. R. 69. (R.)

5. When, subsequently to the 13 & 14 Vic., c. 51, a *sci. fa.*, at the Petty-bag side of the Court of Ch., upon a recognizance entered into by a surety for a tenant of lands, the subject of a suit at the Equity side of the Court of Exchequer, after reciting the recognizance, proceeded thus:—"As by the said recognizance, which was on, &c., in, &c., duly enrolled in her Majesty's said Court of Exchequer, and now remaining as of record in our said Court of Chancery, by virtue of the statute in that case made and provided, might appear;" to which *sci. fa.* the deft. pleaded that the Court of Ch. ought not to have or take further cognizance of the action, because the recognizance was, on, &c., duly enrolled in the Court of Exchequer, whereby that Court then and there acquired, and still retained and possessed, full jurisdiction and authority to award execution against him for the said

sum of, &c., according to the tenor and effect of the recognizance; and which plea concluded with the following averment, viz.—"that there is not any such record of the said supposed recognizance now remaining in her Majesty's said Court of Chancery, as in said writ of *sci. fa.* is above alleged; and this the said deft. is ready to verify; wherefore he prays judgment whether this Court can or will take further cognizance of the action aforesaid." Upon a motion at the Petty-bag side to take this plea off the file as irregular, as not having been verified by affidavit, and as being false and frivolous, this Court refused to make any rule.

Under the concluding part of the 13th sec. of the statute, such recognizances may, upon agreement between the Lord Chancellor and Lord Chief Baron, be delivered over to such persons as may be appointed by the M. R.

*Quære*—Whether recognizances so transferred become records of, and capable of being sued upon in the Court of Ch., unless perhaps by the Crown, under its special privilege to select its Court.—*The Queen v. Jones*, 1 I. C. R. 524. (C.)

6. The costs of the appointment of a receiver under the 4 & 5 W. 4, c. 55, and the 3 & 4 Vic., c. 105, on a receiver's recognizance, beyond the penalty of the recognizance, are chargeable against the receiver.—*The Queen v. Dillon*, 4 I. C. R. 545. (C.)—[Affirming Rolls decision, 3 I. C. R. 564.]

#### RE-CONVEYANCE: REFUNDING: RE-IMBURSEMENT: RE-TRANSFER OF STOCK AND UNCLAIMED DIVIDENDS.

See MORTGAGE, V—STATUTE, 56 G. 3, c. 60.

7. A decree, with costs, of this Court was reversed by the Lords, who directed the bill to be dismissed with costs. Before the appeal, the ptf.'s solicitor had compelled deft. to pay the costs below on receiving ptf.'s receipt therefor. Ptf. had directed his solicitor to retain these costs in his possession to defend the appeal. *Held*, that deft. could not, on the Lords' decree, compel ptf.'s solicitor to refund those costs.—*Smith v. Clarke*, 5 I. E. R. 423; 3 Dr. & War. 344; 2 Con. & L. 160. (C.)

#### RECORDS.

See DEEDS.

#### RECOVERY OF DIVIDENDS.

See BANKRUPTCY, XV.

#### RECOVERY OF DOWER.

See DOWER, I.

#### RECOVERIES.

See FINES AND RECOVERIES.

**RECTIFYING.**

- *Settlements.* See SETTLEMENTS, IX
- *Decrees.* See PRACTICE, DECREE.
- *Deeds.* See DEEDS, I.

**RECTOR.**

See ECCLESIASTICAL PERSONS.

**REDEMPTION.**

See ANNUITY, VII—MORTGAGE, V—PRACTICE, DECREE—PRACTICE, MASTER, REFERENCE TO—SECURITY, V.

**REDUCTION.**

- *Of Chose in Action into Possession.* See HUSBAND AND WIFE, III.

**RE-EXAMINATION.**

See PRACTICE, EVIDENCE.

**REFERENCE.**

- *On Exceptions.* See PRACTICE, ANSWER.
- *On Scandal, Impertinence, and Insufficiency.* See PRACTICE, ANSWER—PRACTICE, MASTER, REFERENCE TO, &C.
- *To Master generally.* See PRACTICE, MASTER, REFERENCE, &C.
- *On Title.* See PRACTICE, MASTER, REFERENCE TO, &C.
- *Whether two Suits are for the same object.* See *ibid.*
- *Of Suit for Infant's Benefit.* See PRACTICE, MASTER, REFERENCE TO, &C.
- *To Appoint Guardian.* See *ibid.*
- *In Cases of Foreclosure.* See *ibid.*
- *Of Plea of former Suit.* See PLEADING, PLEA.
- *Generally.* See ARBITRATION.

**REFORMING DEEDS.**

See DEEDS, I—SETTLEMENT, IX.

**REFUNDING.**

See PAYMENT—LEGACY, IV—RECONVEYANCE, &C.—VENDOR AND PURCHASER, X.

**REFUSAL TO CONVEY.**

See TRUSTEE, VII.

**REGISTRAR.**

See PRACTICE, OFFICERS OF COURT.

**REGISTRY.**

See SHIP REGISTRY—DEEDS, XII—PRIORITY OF SECURITY—JUDGMENT.

**REHEARING.**

- *Generally.* See PRACTICE, RE-HEARING.
  - *For Costs.* See PRACTICE, COSTS.
  - *Further Evidence on.* See PRACTICE, EVIDENCE.
  - *Bankruptcy Petition.* See BANKRUPTCY XVII.
- [See also PRACTICE, APPEAL.]

**REIMBURSEMENT.**

See RE-CONVEYANCE, &C.

**REJECTION OR ACCEPTANCE OF LEASE BY ASSIGNEES.**

See BANKRUPTCY, XI.

**REJOINDER.**

See PRACTICE, REJOINDER.

**RELATIONS.**

- *Undue Advantages taken by.* See FRAUD, VII—CONSIDERATION, III.

**RELATOR.**

See CHARITY, IV—PRACTICE, INFORMATION.

**RELEASE.**

- *Plea of.* See PLEADING, PLEA.
- *Of Trustees.* See TRUSTEES, III.
- *Presumption of.* See PRESUMPTION, II.
- *Fraudulently obtained.* See DEEDS, VI.

[See DEBTS, IV—DOWER, IV—PRINCIPAL AND SURETY, IV.]

1. A settlement of 1800 secured a jointure of £200 a-year to S., if she survived her husband, who died in 1809. For many years afterwards, S. received the jointure from her stepson, H., the inheritor of the estate on which it was charged. In 1830, the jointure being two years in arrear, S. wrote to H. that, to serve him, she would feel happy in thenceforth giving up the jointure, and would make him a present of the arrears then due. In 1834, H. died. By will, he charged his estates with an annuity of £200 to S. By codicil, he substituted an annuity of £100, accompanied by a declaration that it was granted on condition that S. would not seek to raise the jointure. In 1837, S. died, having made ptf. her sole residuary legatee and executor. After the date of the letter in 1830, S. never demanded either the jointure or the annuity of £100. Ptf. filed a bill to raise the arrears of the jointure. *Held*, that the bill should be dismissed, so far as it sought relief respecting the arrears which accrued during H.'s life; but directed an account of what became due between his death and that of S. — *Langley v. L.*, 2 I. E. R. 313. (E.E.)

1. Release of an annuity, given by an illiterate person, without professional assistance, and for an inadequate consideration, set aside after several years, the price being held inadequate as to the debt, by whose covenant the annuity was secured; although, considering the nature of the security, it might not have been so from a stranger. — *Garcey v. McMinn*, 9 I. E. R. 526. (C.)

2. The decision of the C. P. in *Handcock v. H.*, 10 I. L. R. 565, respecting the effect of a release of the debtor's lands from a judgment, in discharging his other lands, doubted. — *Handcock v. H.*, 11 I. E. R. 472. (C.)

3. A., in 1838, devised his real estates at M. to his nephew, and bequeathed to other persons legacies amounting to £8000, which were primarily charged upon the moneys which might be in bank to A.'s credit at his death. In 1839 the nephew, in compliance with A.'s express desire, purchased real estates at C. A., out of moneys standing to his credit in the bank, lent the purchase-money to the nephew, who shortly afterwards repaid it in part, but a balance of £7700 still remained due to A. By a codicil made in 1840, A. reciting that he had devised real estates to his nephew, charged them with £8000, with interest at £5 per cent. from his decease, and directed that sum and interest to be paid to his executors within six months from his decease, to pay legacies named in his will. *Held*, that parol evidence was admissible of facts showing that A. stood *in loco parentis* to the nephew; and also to show the above-mentioned circumstances attendant upon the purchase of the estates at C.; and that the nephew being unable to repay the balance of £7700, A. refused to accept a security from him for it, but instead thereof, directed his own solicitor to prepare a codicil, charging £8000 upon the estates at M., which sum was to be applied towards the purposes to which he had by will directed a similar sum formerly in cash at bank to be applied; in consequence of which direction the codicil executed by him in 1840 was prepared.

*Held also*, that these facts amounted in Equity to a release by A. of the debt of £7700 due to him from the nephew, and that the charge of £8000 upon the estates at M. must be considered as substituted for that debt.

The Court admitted the parol evidence, not for the purpose of construing the will or codicil, but in order to ascertain whether or not the £7700 was a debt due to A. at his death.

*Semble*—The dictum of Wigram, V. C., in *Cross v. Sprigg*, 6 Hare. 552, that if a debt be not released at Law it cannot be considered in Equity, is not sustainable. — *Hedges v. Althworth*, 13 I. E. R. 406. (C.)

4. H., being seised of an estate tail in W., certain judgments were obtained against him in 1824. Upon his marriage, subsequently in that year, W. was settled upon him for life, with remainders over for the benefit of the issue of the marriage; and a recovery was suffered to the uses of the settlement. In 1826, H., by purchase, acquired B. in fee. In

1826 several other judgments were obtained against him. In 1829 the ptf. agreed to lend to H. £2000 upon mortgage of his fee in B., and his life estate in W., provided that the judgment creditors of 1824 would release B. from their judgments, to which they assented, and then (1829) executed a deed-poll, which recited that H., being desirous to have B. clear of incumbrances, had requested the judgment creditors of 1824 to release it from the incumbrances thereupon by their judgments; and that they, being satisfied that the residue of H.'s lands were a sufficient security for their judgments, agreed thereto; and by the operative part they released, exonerated, and for ever discharged B. from their respective judgments, and from all writs of execution and executions, and every other writ then sued out, or thereafter to be sued out, against B., by virtue of their respective judgments, or otherwise in relation thereto; and they agreed (for their respective judgments only) to indemnify H. for all costs, damages, and expenses, which should at any time be incurred by reason of B. being attached in execution under those judgments. Afterwards H. executed the proposed mortgage to the ptf. *Held*, that both at Law and in Equity, the operation and effect of the deed-poll of 1829 was to exonerate W. as well as B. from the rights and remedies of the judgment creditors of 1824.

The 11 & 12 Vic., c. 48, s. 72, enacting that the release of any portion of lands in Ireland from any judgment affecting the same, shall not nullify or affect the force of such judgment as regards the residue of such lands, or any other property not specially released, does not apply to releases executed before that statute passed.

A *sci. fa.* under O'Neill's Act, issued after the execution of the release, and the death of H., at the suit of one of the judgment creditors of 1824, against the three infant daughters of H. (tenants in tail of W. under the marriage settlement of 1824) as his co-heiresses-at-law, and against other persons as terre-tenants of W. The sheriff in his return stated that he had summoned the three infants, "co-heiresses of the abovenamed H., deceased," and also that he had summoned the terre-tenants of W. specially named in the *sci. fa.*; and testified that there was not any other heir or heiress of H., and that he (the sheriff) had not served any other terre-tenants of W., or of any other lands of H., except those specially named in the *sci. fa.* Judgment of revivor was obtained on default. *Held*, that the original judgment was by the revivor re-established as against W., and that the infants, having pretermitted their opportunity of pleading the release to the *sci. fa.*, could not afterwards set up that release as a defence in equity against raising the amount of that judgment out of W. — *Handcock v. H.*, 1 I. C. R. 444. (C.)

5. A., by will, left property to trustees to be divided among his five grandsons, V., W., X., Y., Z., and directed the shares to become vested, and to be payable to them as they

severally attained the age of twenty-five years; but if any one of them should die under that age, "then, that the share of the one so dying should be divided equally among such other of his said grandsons as should survive." The minors were made wards of Court. The shares of each had been ascertained, and lodged to the credit of the matter, and to the separate credit of each respectively. V., W., and X. had attained the age of twenty-five, Y. and Z. had not; but all had been discharged from the wardship of the Court. W., X., and Y. by deed released to Z. their contingent right to the share standing to his separate credit. V. did not release his right; and Z. filed a petition praying that three-fourths of the entire sum standing to his separate credit be paid out to him.

Under these circumstances, the M. R. declined making any order on the petition.—*In re Matheus Minors*, 5 I. Jur. 154. (R.)

1. A lease for lives contained a covenant by the lessor that, upon the death of any of the lives, he would, at the request of the lessees, his heirs, &c., and on payment of a fine, from time to time, and at all times for ever, renew and put in a new life; provided that the life or lives of these that should be renewed be of the issue or posterity lawfully begotten of the lessee. The lease also contained a clause giving the lessor a right of pre-emption. Several renewals, for the lives of persons not the issue of the lessee, were granted, but subject to the covenants in the original lease. The last of these renewals was made by a tenant in fee of the reversion. *Held*, that the lease was a lease in perpetuity, and as such within the Ren. Lease. Conv. Act. The owner of the reversion would be bound by the covenant to renew, though the performance of the condition became impossible by the failure of the posterity of the lessee.

*Quære*—Whether a release of the condition might not be presumed from the renewals?—*Sherlock v. Kennedy*, 15 I. C. R. 160. (R.)

#### RELIEF.

- *Respecting Title*. See TITLE, VII.
- *From Covenant before Breach*. See COVENANT, VI.
- *From Effect of Breach*. See COVENANT, VIII.
- *Against Forfeiture*. See FORFEITURE.

#### RELIGION.

See DISSENTERS—PAPISTS.

2. A testator, after devises to his sons, bequeathed portions, charged on his real and personal estate, to each of his daughters, to be paid to them respectively on attaining age, or day of marriage, provided they should marry with consent of the executors; and if either of his sons or daughters should at any time thereafter intermarry with a Papist, he

revoked and made void to all intents and purposes the devises and bequests, so as aforesaid made to, such child or children, and instead thereof left to each of his children so offending one shilling, and devised and bequeathed such child or children's share or shares to the survivors. *Held*, that on the construction of the whole will, the restriction upon a daughter's marrying a Roman Catholic was to be confined to the period of minority.—*Duggan v. Kelly*, 10 I. E. R. 473. (C.)

3. A father, a professed Roman Catholic, had his children baptized by R. C. priests, and their births entered in a Douay Bible; but they never during his life attended R. C. worship, except on one occasion of great solemnity, to see Mass performed by way of spectacle. He had a Protestant governess for the younger, and placed the two elder children at a Protestant school, and they, with his sanction, attended worship at a Protestant church, and were generally brought up as Protestants. By will he appointed his wife, a Protestant, their testamentary guardian. *Held*, that the children, who were wards of Court, should be brought up as Protestants. The Court will be guided by the intention of the father as to the faith in which his children shall be brought up, and will not act on the ground of the worldly advantage of the children. The circumstance that the children have, for several years after the father's death, been brought up in a particular faith, is one which should have weight with the Court as to those of the children who are of an age to have formed opinions on religious subjects.—*In re Kellers*, 5 I. C. R. 328. (R.)

4. A father, by will, appointed a guardian; and directed that his children should be brought up in the Protestant faith, and that their mother should have no control over their education or religion. She was a Roman Catholic. Her application, under the 2 & 3 Vic., c. 54, for an order to obtain the custody of the children, was refused by this Court.—*In re Cornwallis Minors*, 2 I. Jur. N. S. 458. (C.A.)—[Affirming Rolls decision: *ibid*, 148.]

5. A ward of Court, aged about nine years, who had been ordered to be brought up as a Roman Catholic, was, in disobedience to the orders of the Court, removed out of the jurisdiction of the Court by one of her relatives, and educated in the doctrines of the Established Church. At the age of fifteen years she was brought back within the jurisdiction. The Lord Chancellor having, in a personal interview with her, been convinced that she was herself attached to the religious opinions in which she had been brought up, ordered her future religious education to be conducted in conformity with them.

The actual conscientious convictions of a minor, who has arrived at the age of conscious responsibility, are to be secured against pressure or coercive influence.—*In re Browne*, 8 I. C. R. 172; *Dru. Rep. temp. Napier*, 351. (C.)

## REMAINDERS AND REVERSIONS.

See ASSIGNMENT—BARRING REMAINDERS—HUSBAND AND WIFE—INTEREST IN PROPERTY, IV, V—TRUSTEES, IX.

1. Remoteness does not affect the validity of contingent remainders.—*Cole v. Sewell*, 6 I. E. R. 66; 4 Dr. & War. 1; 2 Con. & L. 344. (C.)—[Affd.: 2 H. L. Cas. 186; 12 Jur. 927.]

## REMAINDERMAN AND REVERSIONER.

See ESTATE, II, III—PLEADING, PARTIES.

## REMOVAL.

- *Of Receiver.* See PRACTICE, RECEIVER.
- *Of Assignees.* See BANKRUPTCY, X.
- *Of Trustees.* See TRUSTEES, III—CHARITY, II.
- *Of Coroner.* See PRACTICE, WRIT.
- *Of Guardian.* See GUARDIAN AND WARD, III.

## RENEWAL.

- *Of Fiat.* See BANKRUPTCY, VI—COVENANT, IX—LEASES, VIII.
- *Renewable Leaseholds.* See LANDLORD AND TENANT—LEASE, VIII.

## RENOUNCEMENT.

- *Of Trust.* See EXECUTORS, III—TRUSTEE, II.
- *Of Probate.* See EXECUTORS, III.

## RENTS.

See APPORTIONMENT, I—LANDLORD AND TENANT, VI—QUIT RENTS.

## RENTCHARGE.

See TITHES.

2. The Court will entertain a suit to raise the arrears of a rentcharge, although ptf. appears by his bill to have full legal remedies.—*Ahearne v. O'Callaghan*, Hay. & J. 339. (E.E.)

8. A testator's heir-at-law admitted that the will, which was lost, had been duly executed and attested, and that thereby lands were devised to him, subject to a perpetual rentcharge. Upon evidence of its contents by two witnesses, who had heard the will read, but could not state that it was executed and attested, as by law required, further than that the person reading it read out the names of the testator, and of certain persons, as if they had executed and attested it; and upon proof of the payment of the rentcharge for 35 years up to the year before the filing of the bill, the Court declared the lands well charged therewith; and that the heir-at-law, and the persons deriving title with notice under a settlement of the lands, executed

by him on his son's marriage, and duly registered, and also his judgment creditor, were bound to give effect to the devise of the rentcharge.—*Wise v. W.*, 2 Jon. & L. 603. (C.)

4. Since the statute of *Quia Emptores*, there cannot be a grant in fee-farm. A rent reserved on a grant in fee, if accompanied by a power of distress, is a rentcharge, and as such a bill will lie to recover it.—*Brady v. Fitzgerald*, 11 I. E. R. 55; *Pennefather v. Stephens*, 11 I. E. R. 61. (R.)

5. A bill in equity does not lie to recover the arrears of a rentcharge, unless it be proved that there are circumstances which render the legal remedies useless or very difficult.—*Brady v. Fitzgerald*, 12 I. E. R. 273. (C.)

6. A., seized of P. and other lands, directed all his just debts, funeral expenses, and legacies to be paid by his executors, and devised all his real and freehold estates (save a part devised to his wife), upon trust, that his wife and her assigns should, after his decease, receive a rentcharge, with power of distress; and that three of his daughters should receive rentcharges, with like remedy by distress and entry, as provided with respect to the rentcharge to his wife. A. then bequeathed pecuniary legacies to his children, and left all the residue and remainder of his real, freehold, and personal estates, subject to his debts and the aforesaid legacies and annuities, to the trustees. *Held*, that the rentcharges to the daughters were specifically charged on the same lands as the rentcharge to the wife, and had priority over the legacies which were charged by the residuary clause only.—*Weir v. Chamley*, 1 I. C. R. 295. (R.)

7. A rentcharge was granted to A. and his heirs, charged on land held for lives, with covenant for perpetual renewal. A. died intestate, and without an heir. *Held*, that his administratrix was entitled to the rentcharge under the 1 Vic., c. 26, s. 6.—*Plunket v. Reilly*, 2 I. C. R. 585. (R.)

8. No more than six years' arrears of tithe rentcharge can be recovered by the owner of such tithe rentcharge from the owner of the lands.—*Ecclesiastical Commrs. v. Shigo*, 5 I. C. R. 46; 7 I. Jur. 261. (C.)

## RENTS AND PROFITS.

See ACCOUNT, III, *et passim*—INTERMEDIATE PROFITS—PRACTICE, RECEIVER.

9. Ptf. filed his bill to set aside an instrument for fraud, and to obtain possession of lands devised to him. Before this suit ended, the original deft. died. It was revived against his devisee and personal representative. The Court decreed ptf. entitled to mesne rents from the time at which his title accrued, with costs.—*Blackwood v. Gregg*, Hay. & J. 310. (E.E.)

1. Devise of realty to W. and his heirs, on trust, to receive the rents, &c., and apply them in discharging testator's debts and legacies; then to convey part to testator's brother, R., for his life, and the residue, and R.'s part after his death, to such of W.'s sons as should at W.'s death be his second son, for life; remainder to the first and other sons of such second son, in tail male; remainder to W.'s third, &c., sons, in strict settlement. W. was also residuary legatee. The debts and legacies having been all paid, R. died during W.'s life. *Held*, that testator's heir-at-law was entitled to the rents, &c., as undisposed of realty, till W.'s death; that the residuary clause was confined to personalty, so that thereunder the intermediate rents, &c., did not pass to W.—*Wills v. W.*, 4 I. E. R. 531; 1 Dr. & War. 439. (C.)

2. In a suit instituted by a judgment creditor to redeem an *elegit* creditor in possession, the latter must account only for the rents received, not for those which, without wilful default, he might have received, except from the filing of the bill, from which date he must account for what rents he might, without wilful default, have received.—*McDonnell v. Walsh*, 2 Dr. & War. 252; 1 Con. & L. 289. (C.)

3. A lease for lives, reserving a rent and duties, or a sum in lieu of the duties, with a covenant for perpetual renewal upon payment of a renewal fine, contained a proviso that if the lessee should not within three months after the fall of each life pay to the lessor, &c., the renewal fine over and above the rent, fees, and duties, and nominate a new life, the lessor might refuse to renew. The lessee covenanted to pay fees and duties, sums of money in lieu of duties, and renewal fines; and that if it should happen that the rent, fees, and duties, or other sums of money thereinbefore mentioned should be unpaid for 21 days after the days on which they ought to be paid, the lessee, his heirs, &c., should forfeit to the lessor, &c., one shilling in the pound, in the name of a penalty, and so proportionably thereafter for a greater or lesser time whenever the same should be so behind afterwards. There was a power of distress, as well for the rent, fees, and duties, and other sums of money to be paid for the renewal, as also for the sums so to be forfeited; with a right of re-entry, if the rent, &c., or any of them, or any part thereof, &c. One life dropped many years before, without payment of the renewal fine. On a petition for a fee-farm grant—*Held*, that the lessee was bound to pay the penalty of one shilling in the pound on the renewal fine before the grant should be executed.—*Ex parte Sheil*, 1 I. C. R. 190. (R.)

#### REPAIRS.

#### REPLICATION.

See PRACTICE, REPLICATION—PLEADING, REPLICATION.

#### REPORT.

— *Of Master.* See PRACTICE, LVI.

#### REPRISES.

#### REPUBLICATION OF WILL.

See WILL, VII.

#### REPUTED OWNERSHIP.

See BANKRUPTCY, XI.

#### RESIDUE.

— *Executors' Rights to.* See EXECUTORS, VII.  
See DISTRIBUTION—WILL.

- I. ITS INCIDENTS.
- II. WHAT CONSTITUTES IT, OR PASSES AS.
- III. WHO TAKE IT.
- IV. RESIDUARY LEGATEES AND DEVISEES.

#### I. ITS INCIDENTS.

#### II. WHAT CONSTITUTES IT, OR PASSES AS.

4. A testator concluded his will in these words:—"As to all my personal estate, &c., subject, however, to my debts and legacies hereinbefore bequeathed, I give the same to W., whom I appoint executor of this my will; and also, in case of any residue, I appoint him my residuary legatee." *Held*, that this clause was confined to personal estate; and that by it certain rents, undisposed of during W.'s life, did not pass to him for life.—*Wills v. W.*, 4 I. E. R. 531; 1 Dr. & War. 439. (C.)

5. V., seized of an estate *pur autre vie*, and possessed of about £4500 of personalty, bequeathed "£1500, the other part of the £4500, together with any further property," in trust for the use of his father, to be disposed of by him, share and share alike, as he by deed or will should appoint, among V.'s brothers, and the daughter or daughters of his sister. The residuary clause was in these words:—"As to the rest," &c., "of my worldly estate and fortune, not heretofore and hereby disposed of, in trust to the use of my affectionate father, J. C., and his heirs, executors, and administrators, for ever." *Held*, that the estate *pur autre vie* passed under this clause, and not under the words "any further property."—*Acheson v. Fair*, 3 Dr. & War. 512; 2 Con. & L. 208. (C.)

6. V., by will, after bequeathing legacies and directing that his debts should be paid, ordered all his effects to be sold by auction, and such money or valuables as he should die possessed of to be handed over to D. to be applied to the use of K. to a fixed amount, during her life, and any residue, remaining



after her demise, to be expended in masses for his son's soul. V. directed a security in J.'s hands to be applied as above. "My Royal Canal stock is to be sold; also my Grand Canal debentures, as necessity may require, at the discretion of my executors." *Held*, that this clause disposed of all the residue, including the stock and debentures, and that it all passed to the executors on K.'s death; that the bequest for masses was valid, not void as a superstitious use.—*Read v. Hodgins*, 7 I. E. R. 17. (R.)

1. "I bequeath to my wife all the household furniture and moveable goods and chattels in and belonging to my dwelling-house, except my books. I bequeath to her the use of my plate, with power to dispose of such portion thereof as she shall think proper." *Held*, that she took only a life interest in the plate; and that, since she had not disposed thereof during her life, it fell into the residue.—*Espinasse v. Luffingham*, 8 I. E. R. 129; 3 Jon. & L. 186. (C.)

2. C., having a power to appoint a money fund to all and every or any children of hers, and to the exclusion of any one or more of them, in such shares and payable at such times as she should appoint, and in default of appointment, the fund to be equally divided amongst them, C. by will appointed different sums to several of her children; reciting that her daughter, M., had declared her intention of becoming a nun, and had retired into a convent preparatory thereto. C. declared that she deemed M.'s patrimony in that case sufficient for her maintenance; but, if M. should change her mind, and return to her family and friends, C., bequeathed £1000 in trust for M. to receive the interest thereof during her life, and at her death to be divided amongst her children, if any; or, if she did not leave the convent, or did not leave issue, the £1000 to be divided amongst C.'s three daughters therein named, to whom C. bequeathed any residue of the fund that might remain after paying her legacies. *Held*, that the power authorised an appointment to take effect upon the happening of a contingency, and that the interest, which should accrue on the £1000 while that contingency remained undetermined, passed under the residuary bequest.—*Caulfield v. Maguire*, 8 I. E. R. 164; 2 Jon. & L. 141. (C.)

### III. WHO TAKE IT.

3. V. devised all his estates to three trustees, whom he named executors, and charged them with annuities and pecuniary legacies. The will concluded thus:—"I give, devise, and bequeath unto my said trustees, to be equally divided between them, share and share alike, all the rest, residue, and remainder of my property not herein disposed of, to answer any contingency that may arise or happen with respect to the trusts of this my will, or in case of non-payment of my rents, as also to answer the several legacies and bequests herein mentioned, and to pay the expense of agency." By codicil, V. altered some of the bequests of

the annuities, and proceeded thus:—"I leave my brother-in-law, P." (one of the trustees), "residuary legatee to all my property; and I hereby empower him to keep clerks, agents, &c., in any manner he thinks proper, and also to fee one of the first lawyers upon any question he may think fit to consult for advice, and to do all other acts he may think proper, with or without the consent of my other trustees or executors." *Held*, that all V.'s real estates, not previously disposed of, passed to P., who took the beneficial interest therein.—*Warren v. Newton*, Dr. Rep. temp. Sug., 464. (C.)

4. V., being seized in fee of T., S., and B., and also seized as of freehold of several lands, and possessed of considerable property, devised T. to his daughter, L., and her issue, taking his surname, in strict settlement; and, in lieu of such issue, to his nephew, R., and his issue, in strict settlement, with several limitations over; but left the ultimate reversion in fee undisposed of. V. devised S. and B. in strict settlement, leaving the ultimate reversion in fee undisposed of; and, after devising several parts of his freeholds, devised the residue "of my properties, both freehold and personal, I may die possessed of to my brother R. T., and, if he shall survive me, I request and desire that he shall convert all the personal property into fee-simple property, and, at his decease, leave the same entailed on his son, R., in the same manner as I have myself entailed the T. estate." *Held*, that the direction to entail applied as well to the freeholds which passed by the residuary devise, as to the freehold lands to be purchased with the residuary personal estate.—*Tennant v. T.*, Dr. Rep. temp. Sugden, 161; 1 Jon. & L. 379. (C.)

5. V. devised part of his real estates to his son, W., in settlement, and other parts in fee, and the residue, not specifically devised, to W. whom, with E., V. appointed executor and executrix. By codicil, reciting W.'s death, and the devises of the particular estates to him, V. devised the aforesaid estates, if E. should die without issue in his wife's life, to his wife for life; remainder to R.; and appointed E. sole executrix and residuary legatee. V. died seized of estates other than those specifically devised. *Held*, that E. did not take the residuary realty.—*Hillas v. H.*, 10 I. E. R. 134.

### IV. RESIDUARY LEGATEES AND DEVISEES.

[See also LEGACY.]

6. V. bequeathed all his property, real and personal, to trustees, to be distributed by them as trustees in the following manner—i. e., to pay to his daughter, A., the interest of £6000 at the rate of £5 per cent. for life, and after her death to be divided among the children of A., share and share alike; the portions to be paid to each of the boys at 21, and to each of the girls at her marriage, provided her husband should settle a jointure equal to

her portion; if not, the portion not to be paid, but the interest at £5 per cent. on her own receipt, and the principal to be paid to her children (if any) share and share alike; if she should die without children, then to be paid to her surviving brothers and sisters, share and share alike; and to pay to his daughter, B., the wife of Y., and her three children, the interest of £6000 at £5 per cent.—i. e., to B., £180, to her son, H. £40, to her daughter F., £40, and to her daughter M., £40; making among them £300 a-year; the above payment to continue during the life of B.; after her death the £6000 to be appropriated among her children in the same manner and on the same terms and conditions as required respecting A. and her children; to pay to his daughter, C., £300 a-year for life, and after her death £100 a-year to her husband, Z.; should C. leave any children, they were to have £6000, the same as A.'s children; the £100 a-year to be paid to Z. to be considered part of the interest. He gave all the residue of his property to his son, one of the trustees, and authorised them to advance any part of his daughters' portions, with their consent, to provide for any of his grandchildren. £1300 was paid with B.'s consent for the advancement of H. *Held*, in a suit instituted by the son to have sums set apart to provide for payment of the legacies, and to have the residue transferred to him, that as the £300 a-year, bequeathed to B. and her children, was a distinct bequest from that of the principal sum of £6000, a sum of stock sufficient to provide for the interest at £5 per cent. on £4700 (the remainder of the legacy of £6000, minus £1300 paid to H.) should be set apart during the life of B.—*O'Neill v. Billing*, 2 I. C. R. 80. (R.)

#### RESIDUARY LEGATEES AND DEVISEES.

See RESIDUE, IV—PRACTICE, PARTIES—WILL.

#### RESIGNATION BONDS.

See ECCLESIASTICAL PERSONS, &c., IV.

#### RESTORING CAUSE, &c.

See PRACTICE, CAUSE, ADJOURNING, &c.

#### RESTRAINT ON MARRIAGE.

See MARRIAGE, IV.

#### TESTS.

See EVIDENCE, TESTS.

#### WILLS.

See WILLS.

#### RETENTION.

- *Of Suit*. See PRACTICE, CAUSE, ADJOURNING, &c.
- *Right of*, &c. See EXECUTORS, IV.

#### RE-TRANSFER.

See RE-CONVEYANCE—SECURITY, V.

#### RETURN.

- *Of Subpoena*. See PRACTICE, SUBPOENA.
- *To Attachment*. See PRACTICE, ATTACHMENT.

#### REVENUE.

See JURISDICTION, V.

#### REVERSAL OF DECREE.

See PRACTICE, DECREE.

#### REVERSAL OF FINES.

See FINES, VI.

#### REVERSION AND REVERSIONER.

See REMAINDER, &c.—REMAINDERMAN, &c.—PLEADING, PARTIES.

#### REVIEW.

- *Supplemental Bill in the Nature of Bill of Review and Revivor*. See PLEADING, BILL.
- *Bill of*. See PLEADING, BILL—PRACTICE, BILL OF REVIEW.
- *Commission of*. See PRACTICE, XXV.
- *Costs respecting*. See PRACTICE, COSTS.
- *Of Report*. See PRACTICE, MASTER, REFERENCE TO, &c.

#### REVIVING SEQUESTRATION AGAINST HEIR.

See PRACTICE, SEQUESTRATION.

#### REVOCATION.

- *Powers of*. See POWERS, VIII.
  - *Of Will*. See WILL, VIII.
- See ARBITRATION.

#### RIGHT.

- *Of Common*. See COMMON.
- *To Retain*. See EXECUTOR, IV—RETENTION.
- *Ignorance of*. See FRAUD, III.

#### RIGHTS, DECLARATION OF.

1. The Court will not declare future rights which may not ever arise: it leaves them to

be determined when they come into possession.—*Murray v. Moyers*, 16 I. C. R. 520. (R.)

#### ROMAN CATHOLICS.

See PAPISTS.

#### RUNNING WITH LAND.

— *Covenant*. See COVENANT, IX.

#### SAILORS AND SEAMEN.

See SHIP.

#### SALE.

See PRACTICE, LXXXVI, SALES.

- *Of Bankrupt's Property, and of Securities in the hands of his Creditors*. See BANKRUPTCY, X.
- *Generally*. See MARKET—MARKET OVERT—PARTICULARS OF SALE.
- *Of Incumbrances and Securities*. See MORTGAGE, VII—SECURITIES, IV.
- *Power of*. See POWER, VII.
- *Injunction to Stay*. See PRACTICE, INJUNCTION.

#### SALE, BILL OF.

See PLEADING, BILL OF SALE.

#### SALES JUDICIAL, OR BY THE COURT.

- *Generally*. See PRACTICE, LXXXII, SALES JUDICIAL.
- *Costs on*. See PRACTICE, COSTS.

#### SATISFACTION GENERALLY.

- *Of Agreement*. See AGREEMENT, VII.
- *Of Annuity*. See ANNUITY, VIII.
- *Of Bond, presumed*. See BOND, VI.
- *Of Covenant*. See COVENANT, III.
- *Of Custom of London*. See CUSTOM, II.
- *Of Debt*. See DEBT, II.
- *Of Distributive Share*. See DISTRIBUTION, III.
- *Of Dower*. See DOWER, IV.
- *Of Legacy*. See LEGACY, II.
- *Of Mortgage*. See MORTGAGE, IX.
- *Of Debt by Portions*. See PORTION, IX.
- *Of Legacy by Portions*. See *Ibid*.
- *Of Portion*. See PORTION, XI.
- *Presumption of, generally*. See PRESUMPTION, II.
- *Of Settlement*. See SETTLEMENT, VII.
- *Of Trusts*. See TRUSTS, XII.

#### SCANDAL.

- *In Answer: what constitutes*. See PLEADING, ANSWER.
- *In Bill; what*. See PLEADING, BILL.
- *Reference for*. See PRACTICE, ANSWER—PRACTICE, MASTER, REFERENCE TO, &c.

#### SCHEDULE TO ANSWER.

See PLEADING, ANSWER—PRACTICE, ANSWER.

#### SCHEME.

See CHARITY.

#### SCIRE FACIAS.

See RECOGNIZANCE.

1. It is not the practice, on the Petty-bag side of the Court of Ch., that the *sci. fa.* on a recognizance should set out the condition thereof; although it would be more correct to do so. The Court refused to alter the practice.

An averment of facts, showing the jurisdiction of the officer before whom the recognizance is taken, is necessary in a *sci. fa.*, although the statement be omitted in the recognizance itself; but the position in the *sci. fa.* of the averment is unimportant, and its being intermixed with the statement of the body of the recognizance, out of which it had been omitted, was held not to be a ground for a plea of *nul tiel record*.

A *sci. fa.* on a recognizance conditioned for a tenant's paying his rent, in the usual form, stated that the conuzors, describing them as of the county of C., came before B., "who then and there was a Master Extraordinary in and for said county, and duly authorised in that behalf, and then and there acknowledged themselves to be bound," &c., concluding "as by the said recognizance of record may appear," and did not set out the condition of the recognizance. The defts. pleaded *nul tiel record*. Held, that the omission of the condition of the recognizance in the *sci. fa.* was a variance; but that, as the practice appeared to be uniformly to omit the condition, the Court would sustain that practice, and not allow the objection to prevail.

That the introduction into the *sci. fa.* of the allegation, that B. was a Master Extraordinary for the county of C., was no variance, not being a statement of the record, but an independent averment upon which issue might be taken.—*Reg. v. Hurley*, 2 Dr. & War. 433; nom. *Reg. v. Hortley*, 1 Con. & L. 473; 4 I. E. R. 637. (C.)

2. A *sci. fa.* on a recognizance stated that on the 28th April 1838, J. of L., in the county of G., came before R., "who then and there was one of the Masters Extraordinary of the High Court of Ch. in Ireland, in and for the said county of G., and duly authorised in that behalf, and acknowledged himself to be indebted to us in the sum of £230." Held, upon demurrer, that it was not sufficiently averred in the *sci. fa.* that the recognizance was taken within the jurisdiction of the Master Extraordinary.

The jurisdiction of the person taking the recognizance must be stated, and it must appear on the *sci. fa.* that the recognizance was taken within that jurisdiction.—*Reg. v. Lynch*, 1 Jon. & L. 462. (C.)

1. A *sci. fa.* on a recognizance stated that "on, &c., at Ballinasloe, in the county of Galway, M. F., J. L., and T. L., came before J. R., who then and there was one of the Masters Extraordinary, &c., and then and there jointly and severally acknowledged themselves to be indebted." The record of the recognizance did not contain the words in italics, but at foot of it were these words, "Taken and acknowledged before me, at Ballinasloe, in the county of Galway, &c." *Held*, on a plea of *nul tiel record*, that the variance was fatal.—*The Queen v. Lynch*, 7 I. E. R. 268; 2 Jon. & L. 103. (C.)

2. A *sci. fa.* on a judgment is not a mere continuation of a former suit, but creates a new right. In 1813 a judgment was obtained. In 1828 it was revived by *sci. fa.* In 1838 a bill was filed in the Court of Exch. in Ir. against the debtor's representatives. The bill prayed an account, and that the principal and interest due on foot of the judgment might be satisfied out of the debtor's real or personal estate. To this bill a plea of the 3 & 4 W. 4, c. 27, s. 40, was filed. *Held*, that the *sci. fa.* had created new rights, and that the plea of the Statute of Limitation did not bar the suit.—*Farrell v. Gleeson*, 11 Cl. & F. 720.—[Affg. decree below: not reported.]

3. A. and B., claiming by title paramount to a judgment creditor, were served with a *sci. fa.* as tenants of the lands of the conuzor; and, having neglected to plead thereto, were not allowed to show cause against the appointment of a receiver on foot of the judgment.—*Johnson v. M'Donnell*, 2 I. Jur. 59. (R.)

4. The condition of a recognizance was, "that by order of this Court, in a cause wherein J. was ptf., and G. deft., J. and B. should jointly and severally pay the deft., his executors, administrators, or assigns, or his or their solicitor, all and every such sum, not exceeding in the whole £702, with interest from a day past, as should or might be, from time to time, during or at the termination of the said cause, ordered to be paid by the ptf. to the deft., or his executors, administrators, or assigns, or his or their solicitor; and that J. and B. should enter into a recognizance in £14,000, to secure this sum." *Sci. fa.* on the recognizance.—Plea, that "the above sum, or the interest, or any part thereof, was not ordered to be paid by the ptf. to the deft., his executor, &c., according to the intent and meaning of the said recognizance and condition. Replication, stating orders for costs and neglect to pay same." *Held*, on general demurrer, that the condition of the recognizance was confined to orders to pay the principle sum and interest, and did not include or relate to costs in the cause.—*Reg. v. Brydge*, 2 I. Jur. 97. (C.)

5. A *sci. fa.* on a recognizance stated, that on, &c., at D. in the county of the city of D., B. of, &c., came before E., who then and there was one of the Masters of the High Court of Ch., in Ireland, and on, &c., C. and F., described

respectively as resident in the county of Galway, came before J., who then and there was one of the Masters Extraordinary of the High Court of Ch., and jointly and severally acknowledged, &c. The recognizance on record omitted, in each instance, the words "then and there," and did not state by the memorandum at the foot, where either recognizance was taken. *Held*, on plea of *nul tiel record* that the variance was fatal.—*Reg. v. Graydon*, 2 I. Jur. 139. (C.)

6. *Sci. fa.* on a joint and several recognizance, commanding the sheriff "to make known to A., one of the conuzors, that he be in our said Court of Chancery, on, &c., to show cause, if any he can, why, &c., execution should not be had against him, &c., according to the term and effect, &c." Plea *executio non*, because the recognizance was not acknowledged by A. *modo et forma*, concluding to the country. Special demurrer, that the plea was multifarious and double, and tendered no safe issue, and ought not to have concluded to the country. *Held*, that the plea was bad, and that the *sci. fa.* being confined to one of the several conuzors, was regular.—*Reg. v. Usher*, 2 I. Jur. 225. (C.)

7. Declaration in *sci. fa.* on a Crown bond, not setting out the condition of the recognizance. Plea, *nul tiel record*. Demurrer.

Judgment for the Crown.—*The Queen v. Hamilton*, 2 I. Jur. 252. (E.E.)

8. A plea to a *sci. fa.* by the Att.-General, on a recognizance acknowledged on giving security for a receiver, set forth the condition, and averred performance. In a replication traversing the plea, and assigning breaches of the condition, it is not ground of demurrer to omit, in assigning more than one breach, an averment that it is "according to the form of the statute;" and a special demurrer on this ground will be overruled with costs.—*Reg. v. Treston*, 2 I. Jur. 257. (C.)

9. A *sci. fa.* on a recognizance stated, that on, &c., to wit, at N. in the county of C., John M'Donnell of N., &c., came, &c., and acknowledged the recognizance. The recognizance on record did not contain the words "to wit, at N. in the county of C." Plea, *nul tiel record*. *Held*, that the words in the *sci. fa.*, although laid under a *scilicet*, constituted an averment upon which issue might be taken; and not being an averment of what was contained in the recognizance, the plea of *nul tiel record* could not be sustained on the ground of variance.—*Reg. v. M'Donnell*, 2 I. Jur. 279. (C.)

10. A *sci. fa.* stated that F. B., of C., with others, jointly and severally acknowledged a recognizance, and commanded the sheriff to make known to the said F. B., &c.—Plea by F. B., *executio non*, because at the time, &c., a certain other F. B., to wit, F. B. formerly of C., in said recognizance described as F. B. of C., with others, came before, &c., without this, that the same F. B., now appearing, is the same who acknowledged the recognizance.

On demurrer—*Held*, a good plea, not contradictory to the record; and that the debt was not concluded by the sheriff's return.—*The Queen v. Blake*, 2 I. Jur. 312. (C.)

1. When, after the 13 & 14 Vic., c. 51, a *sci. fa.*, at the Petty-bag side of the Court of Ch., upon a recognizance entered into by a surety for a tenant of lands, which were the subject of a suit at the Equity side of the Court of Exchequer, after reciting the recognizance, proceeded thus:—As by the said recognizance, which was, on, &c., in, &c., duly enrolled in her Majesty's said Court of Exchequer, and now remaining as of record in our said Court of Chancery, by virtue of the statute in that case made and provided, might appear; to which *sci. fa.* the debt. pleaded that the Court of Chancery ought not to have or take further cognizance of the action, because the recognizance was, on, &c., duly enrolled in the Court of Exchequer, whereby that Court then and there acquired, and still retained and possessed, full jurisdiction and authority to award execution against him for the said sum of, &c., according to the tenor and effect of the recognizance. The plea concluded with the following averment:—"That there is not any such record of the said supposed recognizance now remaining in her Majesty's said Court of Chancery, as in said writ of *sci. fa.* is above alleged; and this the said debt. is ready to verify; wherefore he prays judgment whether this Court can or will take further cognizance of the action aforesaid." Upon a motion at the Petty-bag side, to take this plea off the file as irregular, as not having been verified by affidavit, and as being false and frivolous, this Court refused to make any rule. Under the concluding part of the 13th sec. of the statute, such recognizances may, upon agreement between the Lord Chancellor and Lord Chief Baron, be delivered over to such persons as may be appointed by the M. R.

*Quere*—Whether recognizances so transferred become records of, and capable of being sued upon in the Court of Chancery; unless, perhaps, by the Crown, under its special privilege to select its Court?—*The Queen v. Jones*, 1 I. C. R. 524. (C.)

2. When a recognizance purports to have been taken before the Lord C. B. of the Court of Exch. in Ireland, the allegation in the *sci. fa.*, that it was taken before him "in the Court of Exchequer at Dublin," is no variance; and the place where it was taken is sufficiently set forth in the recognizance.—*The Queen v. O'Callaghan*, 6 I. Jur. N. S. 335. (C.)

#### SCOTLAND.

3. When a question arises, in consequence of estates in Scotland being devised to a specified person, the Court will not adjudicate thereon until it has ascertained, by a reference to the Master, whether the estates did pass by the Scotch Law.—*M'Call v. M'C.*, 2 Con. & L. 184. (C.)

#### SEAL AND SEAL-DAY.

See PRACTICE, SEAL AND SEAL-DAY.

#### SEALING.

- *Fiat or Commission.* See BANKRUPTCY, VI.
- *Writ.* See PRACTICE, WRIT—PRACTICE, SUBPENA.

#### SECOND COMMISSION, OR FIAT.

See BANKRUPTCY, VI.

#### SECURITY.

- *For Annuity.* See ANNUITY, IV.
- *Delivery up and Sale of.* See BANKRUPTCY, X, XII—DEEDS, VII.
- *Generally.* See BANKRUPTCY, XII.
- *For Contingent Legacy.* See LEGACY, IX.
- *Substitution of: Accepting one Partner as Debtor in lieu of all.* See PARTNERSHIP, VIII.
- *For Costs.* See PRACTICE, COSTS.
- *By Receiver.* See PRACTICE, RECEIVER.
- *Priority of.* See PRIORITY OF SECURITY. See BANKRUPTCY, XIII.
- *When Ordered, generally: what is sufficient.* See LEGACY, IX—PORTIONS—PRACTICE, COSTS.
- *Extent and Extension of.* See PRIORITY OF SECURITY.
- *Waiver and Loss of.* See PRINCIPAL AND SURETY, IV.
- *Sale and Assignment of.* See ESTATE, CHARGES ON—MORTGAGE.
- *Redemption and Re-transfer of.* See MORTGAGE.
- *Collateral.* See PRINCIPAL AND SURETY, IV.
- *Effect of.* See PRIORITY OF SECURITIES.

#### SEISIN.

See LIVERY OF SEISIN—POSSESSION—ADVERSE POSSESSION.

#### SEPARATE.

- *Maintenance.* See HUSBAND AND WIFE, V.
- *Estate.* See HUSBAND AND WIFE, III.
- *Or Joint Fiat.* See BANKRUPTCY, VI.
- *Or Joint Debt.* See *ibid.*
- *Creditors': Liability of Partnership Assets to.* See PARTNERSHIP, IV.
- *Answers.* See PRACTICE, ANSWER.
- *Report.* See PRACTICE, MASTER, REFERENCE TO, &c.

#### SEPARATION.

See HUSBAND AND WIFE.

#### SEQUESTRATOR.

See PRACTICE, SEQUESTRATION.

**SEQUESTRATION.**

See PRACTICE, SEQUESTRATION.

**SERJEANT-AT-ARMS.**

See PRACTICE, PROCESS—PRACTICE, ATTACHMENT.

**SERVANT.**

— *Undue Advantages or Purchases by.* See FRAUD, VII—MASTER AND SERVANT.

**SERVICE.**

- *Of Petition to stay Certificate.* See BANKRUPTCY, XVI.
- *Of Bankruptcy Petitions generally.* See *ibid*, XVII.
- *Of Attachment.* See PRACTICE, ATTACHMENT.
- *Affidavit of.* See PRACTICE, EVIDENCE.
- *Of Decree.* See PRACTICE, DECREE.
- *Of Injunction.* See PRACTICE, INJUNCTION.
- *Of Order.* See PRACTICE, ORDER.
- *Substituted.* See PRACTICE, SERVICE SUBSTITUTED—SOLICITOR, V.
- *Of Sequestration.* See PRACTICE, SEQUESTRATION.
- *Of Subpœna.* See PRACTICE, SUBPœNA.

**SET-OFF.**

- *In Bankruptcy.* See BANKRUPTCY, XIV.
- *Of Costs.* See PRACTICE, COSTS.

1. An order having been obtained in 1847 superseding a commission of bankruptcy against B., with costs to be paid by the petitioning creditors, before they were paid, B. was, in 1849, discharged under the Insolvent Act. *Held*, that the assignee, one of the petitioning creditors, took, as ordered in 1847, subject to the lien of the solicitor who obtained the order, and could not be permitted to set off against that lien a debt due to himself by the insolvent when those costs were incurred.—*Ex parte Orr*; *In re Petticrew*, 1 I. C. R. 102. (C.)

2. In a suit to raise the amount of a charge on lands, a sum, paid under a mistake by the tenant in tail of the lands to the owner of the charge, and paid on account of other demands, cannot be claimed as a set-off.

A. was tenant in tail of lands subject to a charge of £5000 in favour of B., who was entitled to a charge of £3000 upon other lands of which A. was owner. From a misrecital in the deeds this charge of £3000 was supposed to be valid; and A., until he discovered his error, paid B. the interest thereon. B. then instituted a suit to raise the £5000, and A. claimed to set off the amount of interest which he had paid by mistake against the amount reported due to B. on foot of the charge of £5000. *Held*, that A. had no right to such set-off in that suit, the charge of £5000 being a charge upon the lands, and A. not being personally liable thereto; and that, the set-off

claim being only in the nature of a simple contract demand, he should proceed at law to recover it.

Also that the recital in the Master's order to the effect that the respondent was not entitled to recover back the £428. 18s. 0d. should be omitted from that order; the Master being without authority to make such a declaration in that suit.—*Fitzgerald v. F.*, 1 I. Jur. N. S. 39. (R.)

**SETTING ASIDE.**

- *Agreement.* See AGREEMENT, X.
- *Annuity.* See ANNUITY, II.
- *Sale by Court.* See PRACTICE, SALES JUDICIAL.

**SETTING DOWN.**

- *Cause.* See PRACTICE, XLV.
- *Demurrer.* See PRACTICE, DEMURRER.
- *Exceptions to Report.* See PRACTICE, MASTER, REFERENCE TO, &c.
- *Bankruptcy Petition.* See BANKRUPTCY, XVII.
- *Plea.* See PRACTICE, PLEA.

**SETTING UP LEGAL DEFENCES OR BARS: INJUNCTION AGAINST.**

- See PRACTICE, INJUNCTION.

**SETTING OUT TITHES.**

- See TITHES, IV.

**SETTLED ACCOUNT.**

- See ACCOUNT, II.

**SETTLEMENT AND SIGNATURE OF MASTER'S REPORT.**

- See PRACTICE, MASTER, REFERENCE TO, &c.

**SETTLEMENT.**

- *Of Poor.* See STATUTE, CONSTRUCTION OF, II.
- *After Marriage.* See SETTLEMENT ON MARRIAGE, II.

**SETTLEMENT ON MARRIAGE.**

- *Proof for in Bankruptcy.* See BANKRUPTCY, XIII.
  - *Its Effect on Wife's Chose in Action.* See HUSBAND AND WIFE, III.
- See AGREEMENT, VII.—DEEDS, VI—MARRIAGE, V.

**I. CONSTRUCTION OF.**

1. *What Estate passes by.*
2. *What Interest created by.*
3. *Who take under.*
4. *What passes under, or is comprised in it.*
5. *Generally.*

## II. VALIDITY OF.

1. *Whether void, as being Fraudulent, Voluntary, or otherwise.*
2. *Settlement after Marriage in respect of Wife's Equitable Property claimed by her Husband.*
3. *Post-nuptial Settlement, when Voluntary: when for good or Valuable Consideration.*
4. *Constituted by Letter.*
5. *Made in pursuance of Articles: Variance between them and the Settlement.*

## III. OF FUTURE PROPERTY.

## IV. EFFECT OF HUSBAND'S BANKRUPTCY OR INSOLVENCY.

## V. WHERE AN INFANT IS A PARTY TO.

## VI. AGREEMENTS, &amp;c., AT VARIANCE WITH, OR FRAUDULENT AS BEING AGAINST THE SETTLEMENT.

## VII. SATISFACTION AND PERFORMANCE OF.

## VIII. CARRYING INTO EXECUTION OF BY THE COURT.

1. *In pursuance of Articles or Covenant, and generally.*
2. *In pursuance of Trusts for that purpose.*
3. *In the case of Wards of Court.*

## IX. REFORMING AND RECTIFYING MISTAKES IN.

## X. WHEN A SETTLEMENT IS PRESUMED TO HAVE BEEN MADE.

## XI. RESPECTING CHILDREN'S PORTIONS OR MAINTENANCE.

[See SATISFACTION AND MAINTENANCE.]

1. *In general: when Vested.*
2. *How and when Reversible.*

## XII. WIFE'S RIGHTS AND POWERS UNDER SETTLEMENT: HOW THEY MAY BE LOST OR WAIVED.

## XIII. IN BAR OF DOWER, THIRDS, &amp;c.

## I. CONSTRUCTION OF SETTLEMENT.

1. *What Estate passes by.*
2. *What Interest created by.*
3. *Who take under.*
4. *What passes under, or is comprised in it.*
5. *Generally.*

## I. 1. Construction of Settlement: what Estate passes by.

1. By post-nuptial articles of 1760, J. covenanted, in pursuance of ante-nuptial articles, and for other valuable considerations, to settle his estate to his own use for life; remainder to trustees to preserve, &c.; and at J.'s death (subject to a jointure) to the use of H., his son, and his assigns, for life; and, after his death, to the "heirs male of his body;" in default of such issue, "to T., a second son, and his assigns, for life;" and, after his decease, to his issue male: remainder to the third, fourth, and other sons, and the heirs male of their respective bodies: remainders over. Power to J., H., T., or any of J.'s issue male, who should become seized under the

limitations, to make leases for three lives, or thirty-one years. Power to H., &c., when seized, to jointure to an amount not exceeding £150 per annum. *Held*, that H. took only a life estate.—*Brennan v. Fitzmaurice*, 2 L. E. R. 113. (E.E.)

2. By post-nuptial settlement premises were conveyed to trustees to the use of A. for life; remainder to trustees to preserve, &c.; remainder to the use of B. (A.'s eldest son), and his heirs; and for default thereof, to the use of the second, third, &c., and all and every the other sons of A., severally, in tail male, &c. B. died without issue. *Held*, that B., having been only a tenant in tail, under the limitations, on his decease without issue male, C., the second son, was entitled but to an estate in tail male, and did not take as B.'s heir-at-law.

In a deed, the extensive and ordinary signification of the word "heirs" will be limited when the intention of the parties to the deed is quite apparent.

By post-nuptial settlement premises were conveyed to trustees to the use of A., the husband, for life: remainder to trustees to preserve, &c.; remainder to the use of B. (A.'s eldest son), and his heirs; and, for default thereof, to the use of C., the second son, and all and every the other sons successively in tail male; remainder to the use of the daughters, share and share alike, as tenants in common in tail male; remainders over. B. died without issue. *Held*, that B. having been only tenant in tail under the limitations in the settlement on his decease without issue male, C., the second son, was only entitled to an estate in tail male, and did not take as B.'s heir-at-law.—*Wall v. Wright*, 1 Dr. & Wal. 1. (C.)

3. A. was seised for life of lands, and B. in remainder in fee-simple therein. By articles executed in 1771, before the marriage of B. with L., to which A. was a party, it was agreed that A. and B. should, within six months after the marriage, settle and assure the lands, so as to secure a jointure for L., "and so that immediately after the death of B. (subject to the provisions made for jointure), the lands should go to and be vested in the issue of B. by L.; and that such issue should also be entitled to a further sum of £1000, to be charged upon all the estate, real and personal, of B., but in such shares and proportions as B., by deed or will attested by three witnesses, should direct or appoint; and, failing such appointment, in equal shares." *Held*, that the word "issue" meant children, and that the articles were to be carried into execution by giving all the children estates in common in fee.

But when the articles are very ambiguous, and there has been a great lapse of time, the Court will be slow to put a construction upon them, which would affect the rights of a purchaser, which it would have adopted without hesitation as between the parties themselves.—*Thompson v. Simpson*, 1 Dr. & War. 459, 491. (C.)

4. By post-nuptial articles, J., having then two living sons, H. & T., and one daughter,

M., covenanted with trustees to settle specified fee-simple lands as counsel should direct, to his own use for life: remainder to trustees to preserve, &c.: remainder to the use of H., and to permit him to take the rents, &c., for life: remainder to the heir male of the body of H., and to permit him to take, &c., for life: like remainder to T.; remainder to T.'s issue male: remainders to J.'s unborn sons in tail male in strict settlement: remainders over. *Held*, that H. took only a life estate.

*Seemle*—That a limitation to trustees to preserve, &c., not confined to the life of a tenant for life, will not be cut down to that life, if there are contingent remainders which may require protection during a longer period.—*Rochfort v. Fitzmaurice*, 4 I. E. R. 375; 2 Dr. & War. 1; 1 Con. & L. 158. (C.)

1. By marriage settlement, lands were settled upon the husband for life, remainder to the issue of the marriage in such shares as the husband should by will appoint; in default of appointment, to the issue, share and share alike. *Held*, that the children of the marriage, as they respectively came *in esse*, took immediate vested interests in the lands, liable to be divested by the husband's exercise of the power of appointment.—*Heron v. Stokes*, 1 Con. & L. 270; 2 Dr. & War. 89; 4 I. E. R. 284. (C.)

2. An intended wife being seised of a remainder in fee, which would vest in her immediately on her father's death, if he died without having had other issue, it was settled on the intended husband for life, on her death, "if she ever became entitled thereto, but not otherwise." *Held*, that the husband's life estate vested in him, although the wife predeceased her father.—*Wallace v. W.*, 2 Dr. & War. 452; 1 Con. & L. 491. (C.)

3. By settlement of the 3rd July 1801, freehold lands were settled by T. on his eldest son, G., and his issue, in strict settlement, with an ultimate remainder to H., second son of the settlor, in fee. By the same settlement other lands, partly freehold and partly chattel, were settled on T. for life, and from and after the decease of T., to "the several uses, intents, and purposes, as are hereinbefore declared," respecting the first set of lands, and subject to which those lands were in the previous part limited to the use of G., "to and for the use and benefit of the said H., subject to the provisions hereinbefore made for the issue of the marriage." *Held*, that the second set of lands were limited to the same uses as the first, and that H. took an estate in fee in the lands.—*Garde v. G.*, 3 Dr. & War. 435; 2 Con. & L. 175. (C.)

4. By settlement, lands were limited to the use of the settlor, for life; remainder, subject to a term, to the use of his three daughters, for their lives, as tenants in common; remainder to trustees, during the life of each daughter, to preserve contingent remainders; remainder, as to the share of each daughter at her death, to her first and only sons suc-

cessively in tail male; remainder, in case of the death of any one or more of the daughters without issue male, to the survivor or survivors during her and their respective life and lives; remainder, in like manner as the original share, to the first and other sons of such surviving daughter or daughters in tail male; remainder, in case all the daughters should die without issue male, as to the share of each, to her daughters as tenants in common in tail; and if one or two of the daughters should die without issue, then the share or shares of such daughter or daughters should go to the daughters of the survivor or survivors, as tenants in common in tail general. *Held*, that the limitation in case of the failure of issue generally of any of the daughters, to the daughters of the survivor or survivors, was a good contingent remainder.

That the words "survivor or survivors" were to be construed as if they were "other or others," and that the limitation to the daughters of the settlor's daughters was not defeated by the death of one of them in the life of another who afterwards died without issue.

The objection of remoteness does not apply to a contingent remainder.—*Cole v. Sevell*, 6 I. E. R. 66; 4 Dr. & War. 1; 2 Con. & L. 344. (C.)

5. By deed of family settlement in 1794, lands in D. were settled upon A. for life; remainder to B. for life; remainder to C. for life; remainder to his first and other sons in tail. E. was C.'s eldest son.

By deed of family settlement in 1818, lands in L., including a terminable lease, were conveyed to trustees for 1000 years, subject thereto as to the freeholds for A. for life; remainder to C. for life; remainder to E. for life; remainder to his first and other sons in tail. The chattels were to be held on analogous trusts. The trusts of the term were—first, to pay scheduled debts; and, subject thereto, until the expiration of the lease of S., or the end of 99 years from the date of the deed, if seven persons therein named should so long live, whichever should first happen, to raise a sum of £3500 per annum, and accumulate it by way of compound interest, and at the end of the trust for accumulation, to invest the proceeds in lands, to be settled to the like uses as the freeholds. The deed provided that if the lease of S. expired before the end of the 99 years, one moiety of the accumulations should accumulate till the end of the 99 years; and that if, at the expiration of the lease of S., or at any time thereafter and before the end of the 99 years, the person who, for the time being, should be entitled to the lands in L., should be also, under the limitations of the deed of 1794, entitled to the lands in D., the trustees immediately thereupon should raise £2000 per an., and accumulate that, and the whole produce of the accumulations till the end of the 99 years. The deed further empowered A., B., and C. to revoke all the uses and trusts therein, except those of the 1000 years' term, and the trusts for paying debts; and to limit new uses and trusts.



By deed of 1819, executed on the marriage of C. with V., the uses of the deed of 1818 were varied, by introducing prior to the limitations of the deed of 1818, except the trusts of the 1000 years' term, and the trust for paying debts, a term of 1200 years to raise £20,000 for a specified purpose; a trust to raise a jointure of £1000 per annum for V.; and a term to raise portions for younger children. A. died; B. died without issue; C. and E. joined in suffering a recovery of D. Eventually this property was, by deed of 1846, to which C. and E. were parties, limited to raise debts incurred by them; subject thereto to provide an annuity of £3000 per annum for E.; subject thereto for C. for life; remainder to E. for life; remainder to his first and other sons in tail; remainders over. The S. lease expired in the year 1853, in the life of C. and E. *Held*, that the jointure and portions provided by the deed of 1819 were charges upon the accumulations provided by the deed of 1818.

That notwithstanding the re-settlement of D., by the deed of 1846, C. was, at the time of the expiry of the S. lease, seized of D., by virtue of the deed of 1794, and that the trust for raising £2000, and for accumulating the produce of the accumulations, took effect. — *Londonderry v. L.*, 4 I. C. R. 361. (C.)

1. Under a deed executed while he was unmarried, A. had an estate for life in lands, and a power to charge them with any sum, not exceeding the yearly sum of £600, as a jointure for his wife. He married twice; and by will devised the lands to his second wife for life, subject to a rentcharge of £300, to be paid to his only daughter by his first marriage, who was entitiled to the lands under the deed. If his daughter died without lawful issue, he devised the entire rents of the lands to his wife for life; and, if his daughter survived his wife, he devised the entire lands to her for life, and then to her heirs for ever. *Held*, that the power authorised an appointment in favour of the second wife.

That the will was in equity a valid appointment in her favour of such annual sum, not exceeding £600 a-year, as the net rental of the lands would amount to over £300 a-year. — *Barron v. Constable*, 7 I. C. R. 467; 3 I. Jur. N. S. 312. (R.)

2. Marriage articles recited that the father of the lady, who had attained age, had agreed to give her a portion, and that the gentleman, B., had agreed to settle properties to secure a jointure; and, for that purpose, to convey them, if their sale to him was confirmed, or otherwise to assign their purchase-money, then lodged in Court, to trustees, to secure the jointure for her; that B. had purchased the lands under a decree, and had lodged the purchase-money; and that title was in process of being made out. B. covenanted with the trustees, in consideration of the marriage and marriage portion, that he and his heirs would convey the lands (when the title thereto should be perfected, and they had been conveyed to him and his heirs), to the trustees, to hold to his use for life, and after his decease to the

use that the wife should, during her life, receive a jointure; and, subject to such jointure, and to a term to secure its payment, to the use of B. and his heirs; and if the sale should not be completed, and if the sum lodged in Court should become payable to him, it was covenanted that it should be received and taken by the trustees upon trust to invest it in the funds or in lands, in trust as to the interest or rents, for B. for life, and after his decease to secure a jointure for the wife, and subject to such jointure for B. and his executors; B. covenanted with the trustees that, if the lands or the purchase-money should not, by the interest thereof, produce the amount of the jointure, all his other property, and all the property thereafter to be acquired by him, should be charged with payment of the deficiency. *Held*, that the articles barred the wife of her dower. — *In re Dwyers*, 13 I. C. R. 431. (R.)

3. E., wife of T., being seized of fee-simple lands, E. and T. conveyed them, by fine and deed leading its uses to a trustee and his heirs, to the use of E. and T., and the survivor, for life; remainder to enable E., by will, to devise the lands among the issue of E. and T. in such shares as she should appoint, "it being however expressly declared that E. is to have power thereby only to devise such shares and proportions in strict settlement upon such child or children, and their lawful issue, whether male or female; but that if such child should die without having lawful issue, who should attain the age of twenty-one years, or be married, that then and in such case, the said lands should be devised go to and among the surviving children and their issue, who should attain the age of twenty-one years, in such shares and proportions as E. should by will appoint;" in default of appointment, to the children, and such of their lawful issue as should attain the age of twenty-one years, or be married, share and share alike.

The deed further provided, that if E. made no will, T. might, by will, "give devise, and bequeath the said town and lands to and among their issue, in the manner aforesaid, in such shares and proportions as he should thereby direct, limit, and appoint;" in default of appointment, to go equally among the children, and their lawful issue, for ever. *Held*, that T., could not appoint estates greater than life estates to his children. T. had power to appoint life estates to his children *in esse* at the date of the deed, with remainders to their issue in strict settlement. — *Bell v. B.*, 13 I. C. R. 517. (C.A.)

4. A marriage settlement contained a limitation of the husband's estate to the daughters of the husband, as tenants in common in fee-simple. *Held*, that such limitation, so far as it extended to the daughters of a future marriage, did not come within the doctrine of *Clayton v. Lord Wilton*, 3 Madd. 302, because its avoidance, as to such daughters, could not prejudice its validity, so far as it affected the daughters of the marriage; and that, as

regards the former class, it could not, in the absence of special reasons, be deemed to have been stipulated for by the husband, whose estate was being settled, nor by the wife. *Held*, therefore, that, as to those daughters, it was voluntary; and would be void as against a purchaser for value.—*In re Cullin's Estate*, 14 I. C. R. 506; 9 I. Jur. N. S. 117. (L.E.C.)

### I. 2. What Interest is created by Settlement.

1. By marriage articles £6000 were vested in trust after the death of T., the husband, and of the wife, for the child or children of the marriage (other than an only son or a son for whom another provision was made), in such shares, &c., and subject to such restrictions and provisos in respect of such of them as should be females to prevent their marrying without consent, as T. should appoint, and in default of appointment to such child or children equally; the share of a son to be paid at twenty-one, and of a daughter at twenty-one or marriage; in default of issue, save an only son, in trust for him; in default of issue of the marriage, in trust for the executors or administrators of T. T. died without making any appointment. *Held*, that the younger children took vested interests; and that the share of a daughter, who died under twenty and unmarried, was transmitted to her personal representative, and did not go to her surviving sister.—*Hynes v. Redington*, 7 I. E. R. 405; 1 Jon. & L. 589. (C.)

2. A father, tenant for life, with power to charge £500 for younger children; and his son, tenant in tail; re-settled the estate, to the use that the son should receive a rentcharge of £100 for their lives and that of the survivor, with powers of distress and entry for non-payment; then to the use of the father for life, with power to charge an additional £1000 for younger children; then to the son in tail. *Held*, that although if it was the intent to give the annuity priority over the £1000, equity would not allow a legal merger to destroy it; yet, on the true construction, it was not intended that it should exist after the father's death, though granted for the son's life; and that the general rule, giving priority in family settlements to charges for younger children should prevail.—*Mills v. M.*, 9 I. E. R. 299; 3 Jon. & L. 242. (C.)

3. By ante-nuptial settlement, moneys, the property of the wife, were settled in trust to pay the interest to her during life; and in the event of her death in the life of her husband, then, as to the principal, in trust as she should appoint; in the event of her dying without appointing and without issue surviving her, then "in trust for the persons legally entitled thereto as the next-of-kin to the wife," free from the control or debts of the husband. The wife died in the life of the husband, without leaving any issue surviving. She was survived by a brother, a sister, and a niece (the only child of a deceased brother). *Held*, that the niece was entitled to one-third part of the moneys.—*Kidd v. Frasier*, 1 I. C. R. 518; 3 I. Jur. 365. (C.)

4. Moneys, the property of the wife, secured by judgments, were, by an ante-nuptial settlement assigned upon trust for her during life, and, if there was issue of the marriage, upon trusts for their benefit; and if no such issue, upon trust to permit the wife to dispose of the moneys to such persons as she, whether sole or married, or by any deed or writing, with or without power of revocation, to be by her sealed and delivered in the presence of, or attested by two or more witnesses, should appoint; or, in default of such appointment, gift, or devise, to her next-of-kin under the Statute of Distributions.

There was not any issue of the marriage. The surviving trustee received a portion of the moneys secured by the judgments, and paid a part thereof to the husband during his lifetime, and the remaining part to the wife after his death. No appointment by deed or writing was ever executed by the wife. *Held*, that the wife took only a life estate with a general power of appointment; and that, as she never had exercised that power with the solemnities specified in the settlement, the payments to her and to her husband were invalid; and that the trustee was bound to replace the fund for the benefit of the next-of-kin of the wife.—*Reid v. Thompson*, 2 I. C. R. 26. (C.)

5. Lands were conveyed, by marriage settlement, to trustees, to the use of A. for life, remainder to trustees for 100 years, remainder to B. (the husband) for life, remainder to trustees for 300 years, and subject to such term to the use of the first and other sons of B. in tail male; in default of such issue, to the use of the daughter and daughters of B. in tail, remainder to the first and other sons of C. (the wife), by any aftertaken husband; remainder to the use of A., with power (which he exercised) to dispose thereof by will or otherwise, at any time during his life. The trusts of the term for 300 years were, that if there should be one or more child or children of B. and C., other than an eldest or only son, the trustees should, in the life of B., with his consent, or else not until after his decease, by demise, &c., of the term, raise such sum and sums for the portion or portions of all and every such child or children (not being an eldest son), not exceeding in the whole £1000, as B. should by deed or will appoint, to be divided amongst them as B. should appoint; in default of appointment equally; the portion or portions to be paid to sons at twenty-one, and to daughters at twenty-one or days of marriage, which should first happen, with interest in the meantime from the death of B., if such respective times of payment should happen after his death; but if in his lifetime, within three months after his death, but not sooner, unless with the consent of B. There was issue a son, who died in his infancy, and a daughter, who married, and died in B.'s lifetime, under the age of twenty-one years. On her marriage, articles were executed by her and her husband, agreeing to settle the estate, and not noticing any claim to the portion. *Held*, that the portion was not vested

in the daughter at her death, and did not pass to her husband as her representative.

That the articles might be read in evidence in this Court, though they had not been mentioned in the schedule of evidence used before the Master, nor given in evidence at the Rolls.—*Simpson v. Frew*, 5 I. C. R. 17; 1 I. Jur. N. S. 222. (C.)

1. Money was settled upon trust to pay the principal among the issue of the marriage, with power of appointment in the parents; and, in default of appointment to pay these moneys, "amongst the said issue in equal shares and proportions, upon their respectively attaining age or marriage (if daughters)." The language being ambiguous—*Held*, that the whole object of the settlement being to provide for the children of the marriage, the Court, in order to effectuate that object ought not to give them vested interests in their portions.—*Richardson v. Goodman*, 3 I. Jur. 317. (C.)

2. A wife's lands were conveyed by settlement for 999 years, on trust, during so many years of the term as she should live, to pay the rents to her or her appointees, and, subject to a prior charge of £10,000 to pay her husband M., during the residue of the term, for so many years as he should live after her death, an annuity of £1000, and to pay the residue as she by deed or will should appoint; as to the residue of the term, after the death of her and M., on trust, if there should be younger children of the marriage, that the trustees should, by sale or mortgage of the residue of the term, and by the rents and profits in the meantime, raise £15,000 for their portions, payable with interest, as she should appoint; in default of the appointment, to sons at twenty-one, and to daughters, at twenty-one or marriage; and should, out of the rents in the meantime, and until the portions became payable, raise for maintenance such sums as she should appoint, not exceeding interest at 5 per cent. on the respective portions; if no appointment, sums not exceeding such interest. She appointed the surplus rents, after the £10,000 charge and £1000 annuity, and some legacies, to her eldest son, and died, leaving M.; her son, and one daughter, surviving. The daughter married L. On bill filed by her and L., it was decided [12 I. E. R. 298. (C.)] that L. and his wife were not entitled to have principal or interest on the portion raised during the lifetime of M. After the death of M., L. and wife instituted a suit to raise the portions, with interest from the date of the marriage of L. and wife, when the portion vested absolutely. *Held*, that they were entitled to interest from the period when the portion vested absolutely.—*Lloyd v. Mussey*, 10 I. C. R. 240; 5 I. Jur. N. S. 119. (C.A.)

### I. 3. Who take under Settlement.

3. Money, the property of the intended husband, was vested in trustees, in trust, during the joint lives of husband and wife, to pay him the interest; after his death, to permit her to receive it for life, subject, however, to

such control and limitations as he should by will appoint amongst their issue, living or likely to come forth; in default of such issue; or of such will, to the wife for life: after her death, as she should appoint amongst such of the issue as should be then living; in default of appointment, equally; if no issue was living at the wife's death, over. The husband and several children of the marriage, survived the wife. *Held*, that the husband was not then entitled to that trust fund for his own benefit.—*Smith v. Doolan*, 2 Jon. & L. 747. (C.)

4. The execution of a power to appoint a jointure and portions for children by deed, supported in equity though executed by will.

By marriage articles a provision was made for the intended wife and the children. A power was given to the husband to appoint a jointure for any wife or wives he might marry, and to appoint portions for younger children. *Held*, that the power to appoint jointure and portions was confined to the children of a second or subsequent marriage.—*Mills v. M.*, 8 I. E. R. 192. (C.)

5. By settlement, executed in 1800, on his first marriage, A. was seized of an estate for life in lands; remainder to his first and other sons in tail; with power to charge the lands with £2000 for such purposes as he should think fit, and with £1000 for his child or children by any after-taken wife. He also became entitled, by subsequent event, to two sums of £500 and £1000, charged on the lands by the same deed. There was no issue of the first marriage. By settlement, executed in 1809, on his second marriage, he charged the lands with £2000 and £1000 under the powers, and assigned the sums of £2000, £500, and £1000, in trust, if there should be two or more younger children or daughters, to be divided amongst them, after the death of their father and mother, as he should by deed or will appoint; in default of appointment, equally; and if no issue of the marriage, or issue one only son, or one or more daughter or daughters, or one or more younger children who should die before the time of payment of the portions, then as to the £2000, £1000, and £500, in trust, for A., his executors, &c. There was issue of the second marriage two sons and a daughter (B., C., and D.). The eldest son, B., joined A. in suffering a recovery of the estate; and, by deed of 1834, it was conveyed, subject to a term, to the use of A. for life; remainder to the use of B. for life; remainder to the first and other sons of B. in tail; remainder to C., the second son, for life; remainder to the first and other sons of C. in tail; remainder over. The trusts of the term were to raise, by sale or mortgage, £12,500, to be disposed of as A. and B., or the survivor, should appoint. It was raised. A. appointed £250 of the £500, £1000, and £2000, to D., and the residue to C. Afterwards, B. died without issue, whereupon C. became entitled, subject to the charge of £12,500, to a life estate in part of the lands; the remainder having been sold to pay incumbrances. *Held*, that the appointment out

of the sums of the £500, £1000, and £2000, did not become void by C. becoming an elder son entitled to the lands under the deed of 1834.

*Spencer v. S.*, 8 Sim. 87, and *Peacock v. Pares*, 2 Keen, 689, observed on.—*Tennison v. Moore*, 13 I. E. R. 424. (R.)

1. By an ante-nuptial settlement, moneys, the property of the wife, were settled in trust, to pay the interest to her during her life; and in the event of her death in the life of her husband, then, as to the principal, in trust, as she should appoint; and in the event of her dying without appointing, and without issue surviving her, then "in trust for the persons legally entitled thereto as the next-of-kin of the wife," free from the control or debts of the husband. The wife died in the life of the husband, without leaving any issue surviving. She was survived by a brother, a sister, and a niece (the only child of a deceased brother). *Held*, that the niece was entitled to one-third part of the moneys.—*Kidd v. Frasier*, 1 I. C. R. 578; 3 I. Jur. 365. (C.)

2. A fund was, by marriage settlement, vested in trust, in the first place, to pay the interest to the husband for life; after his death, to the wife, if she survived him, for life; after the death of both, to "assign, transfer, and set over" the sum amongst the issue of the marriage, in such shares and at such times as the husband should by will or deed appoint; in default of appointment, to "assign, transfer, and set over" that sum amongst the issue of the marriage, share and share alike; but, if no issue of the marriage living at the decease of the survivor of the husband and wife, then "to assign, transfer, and set over" to the husband, his executors, &c. There were four children; three died in the husband's lifetime, unmarried and without issue; one having attained twenty-one, the others under age. The husband, who survived the wife, while two of the children were alive, appointed by deed a part of the fund to a son, who alone survived him, and directed that the remainder should go and be held in all respects as the entire fund would have gone if no appointment had been made thereof. *Held*, that the word "issue" was not confined to children, but meant all descendants.

That the issue took vested interests, in equal shares, on their births, subject to the amount of the shares being varied by the husband's appointment, and subject to his right to appoint in favour of surviving issue, to the exclusion of the representatives of the issue who had died before the appointment; and that the unappointed part of the fund was divisible equally among a son, who survived the father, and the representatives of three children, who died in the life of the father, whether they had attained twenty-one or not.—*In re Howard's Trusts*, 7 I. C. R. 344. (R.)

I. 4. *What passes under, or is comprised in.*

3. A marriage settlement provided that a deficiency in a jointure should be charged on

X. and Y.; and declared that, until the death of A. (tenant for life of Y.) this should be borne exclusively out of X., and no part out of Y.; but, after A.'s death, X. should be released from all future payments of it, and it should be borne out of Y., and not out of X. It appearing from the entire settlement that the intention was, to secure the jointure, at all events, the deficiency was held charged on both X. and Y. at the same time. This declaration was confined so as only to affect the arrangement between the two estates themselves.—*Sullivan v. S.*, 7 I. E. R. 453; 1 Jon. & L. 678. (C.)—[*See* 8 I. E. R. 685; 2 Jon. & L. 769. (C.)]

4. A tenant in tail is not bound to keep down interest on charges; nor is a tenant for life bound to pay interest accrued during the life of a former tenant for life. By a marriage settlement, incumbered lands, of which the husband was tenant in tail, and a sum of stock, were vested in trustees, and the husband was made tenant for life; and an arrear of interest due at the date of the settlement was, under a power in the settlement, paid off with a portion of the stock.—*Held*, that the husband was not bound to replace the stock so applied.—*Kennedy v. Daly*, 7 I. C. R. 445. (R.)

5. A., having power, by deed or will, to appoint the lands of D. (held with other lands for lives renewable for ever, and subject to a proportional rent of £19), to the use of such child or children of his marriage, in such shares, &c., or the whole, to one of such children, for such estates, and with such conditions, &c., and limitations over, for the benefit of some or one of such children, and subject to such charges for the other or others of such children as he should appoint, purchased the reversion of D.; and afterwards, by settlement, on the marriage of B., his eldest son, reciting that he was seized in fee of D., and that it had been agreed that an annuity, to be thereby granted and charged on D., should be assigned upon the trusts of the settlement, granted an annuity of £100, to be charged on D. for 100 years; upon trust, after the decease of the survivor of A. and his wife, to pay it to B. for life; and after his decease, to C. (B.'s intended wife), so long as there should be issue of the marriage, and she should remain a widow; and after the decease of the survivor, or if C. survived B., and there should have been no issue of the marriage, or she should marry again, in trust, for the executors, &c., of A. By will, A., reciting his power, devised all his right to D. to his three sons, in trust, by sale, &c., to raise a sum for his younger children. *Held*, that the settlement was an execution of the power, and that the annuity was charged on the entire interest in D., and not on the reversion only.

That the settlement operated as an appointment to B., and a settlement by him on C.; who was, therefore, though not an object of the power, entitled to the annuity after B.'s death.—*Irwin v. I.*, 10 I. C. R. 29. (B.)

## I. 5. Generally.

1. R., seized of an undivided moiety, conveyed it, on his marriage in 1775, to trustees for himself for life; remainder to his first and every other son in tail; remainder to himself in fee. The settlement empowered R. to lease for three lives. Having afterwards bought the remaining undivided moiety, R. leased the whole, in 1785, to T., for three lives renewable for ever. In 1797, on the marriage of his eldest son, G., by a deed to which R. and G. were parties, all the lands were settled to R.'s use for life; then to G.'s use for life; remainder to the use of such of G.'s sons as G. should appoint to. By this deed, R. covenanted against all incumbrances "save and except the leases heretofore *bona fide* made by R." G. covenanted for further assurance and quiet enjoyment against all persons "except the lessees in such leases as aforesaid." G. executed the power of appointment in favour of his son, W.; and died in R.'s life. On R.'s death, W. filed a bill to set aside the lease of the moiety settled in 1775, as being contrary to the leasing power. But—*Held*, that W., claiming and deriving benefits under the re-settlement, which referred to the lease made by R., was bound by that lease; and could not set it aside.—*Steele v. Mitchell*, 8 I. E. R. 1; 1 Dr. & Wal. 568. (C.)

2. A reversionary term, expectant upon the estate for life of the settlor, was vested in trustees, to secure children's portions, payable after the death of the tenant for life (the settlor). The deed provided that it should be lawful for the settlor and the trustees in his life to raise and levy, by sale or mortgage, or other disposition of the term, the portions, or any part thereof, in the settlor's life. *Held*, that this provision entitled the settlor to charge such portions in his life, payable with interest from the date of his so charging.—*Whaley v. Morgan*, 2 Dr. & Wal. 330. (C.)

3. By deeds of settlement and appointment £15,000 were charged for three daughters, and appointed to them in equal shares, payable at 21 years, or day of marriage, with interest from their father's death. A subsequent deed of re-settlement created a term of 500 years upon trust (amongst other trusts) to raise if all the daughters respectively attained age, or married, £6000; and to pay each of them £2000 in addition to the portions provided by the previous deeds, with a proviso that if any daughter died under 21, and before marriage, that the £6000, or any part thereof, should not be raised. *Held*, that interest on the additional portions was payable only from the time when the youngest daughter attained age; the deed having, in every other instance in which it was intended that interest should be given, expressly provided for its payment. In construing family deeds, the intention to give interest being plain, the Court must effectuate it, even though there are not express words to that effect.

An intention, apparent on the face of a particular clause, that sums given by addition

to portions already provided shall bear interest, may be controlled by the general intention apparent on the whole instrument.—*Clayton v. Earl of Glenall*, 1 Dr. & War. 1; 1 Con. & L. 311. (C.)—[Affg. Fl. & K. 151. (R.)]

4. There is no difference between executory trusts, whether created by marriage articles, or by a voluntary settlement, or by will. In the latter cases there is more difficulty in arriving at the conclusion that a particular trust is executory; for, in the first case, the nature of the instrument establishes the fact, whereas, in the latter, it must be collected from the nature of the dispositions in the instruments.—*Rochford v. Fitzmaurice*, 4 I. E. R. 375; 2 Dr. & War. 1; 1 Con. & L. 158. (C.)

5. P., seized for life of B., with a jointuring power to the extent of one-third of the clear rents and profits thereof; and being also seized of W. in fee; by marriage articles, reciting that he was seized of B., but not specifying his estate therein, agreed to charge, and thereby charged B. with a jointure of £500 per annum for his intended wife, M., with the usual power of distress. The articles further provided that, if the distress on B. proved ineffectual, M. should enter into and distrain W. for the arrears of jointure.

M. survived P., who devised W. to D. The jointure being in arrear, a distress on B. proved ineffectual. The amount of the jointure considerably exceeded one-third of the clear yearly value of B. *Held*, that W. was liable for the difference between that one-third and the amount (£500) of the jointure.—*Locke v. Darley*, 2 Dr. & War. 256; 1 Con. & L. 407. (C.)

6. In B.'s marriage settlement, A. covenanted that if "there shall not be any issue male of the marriage, or that all such issue male shall happen to die under the age of 21 years, or that if there shall be three or more daughters of the marriage," then A. would pay an additional portion of £1000 among B.'s daughters at 21 years or marriage, as B. should appoint; in default of appointment, "among such daughters, in case there shall be three or more such daughters, share and share alike." *Held*, that A. was chargeable only if one of the first two events and the last happened together; the last "or" should be construed "and."

*Semble*—The gift in default of appointment would not vest unless the three daughters attained age, or married.—*White v. Supple*, 2 Dr. & War. 421; 1 Con. & L. 525. (C.)

7. Under an agreement executed before the intended marriage, "that in case one or either of the parties survives the other, the survivor shall, in case of issue, leave the said issue two-thirds of whatever property may remain, retaining one-third, or, to be more specific, that if the husband survived, he should settle two-thirds of the property he may possess; and if the wife survived, she should settle and hand over two-thirds of any pro-

perty remaining at the time." *Held*, that the wife surviving was entitled to one-third of all the property, and was bound to hand over two-thirds immediately to the children.

If the husband had survived, his obligation would have been confined to a disposition by will.—*M'Donnell v. M'D.*, 2 Con. & L. 481; 4 Dr. & War. 376. (C.)

1. Bank stock was vested upon trust to pay F. an annuity for life out of the proceeds; to invest the residue of the proceeds; and, after F.'s decease, to divide the stock, and the savings of the proceeds into five equal shares: one share to be transferred to each of five persons named.

During F.'s life, one-fifth of the stock was, upon the marriage of one of those five persons, settled. *Held*, that from the parties' intention gathered from the nature of the instrument, and upon its true construction, one-fifth of the accretions by way of *bonus* subsequently added to the original principal, and also one-fifth of the surplus dividends, were subject to the trusts of the settlement.—*Plunkett v. Mansfield*, 2 Jon. & L. 344. (C.)

2. By marriage settlement, reciting that the lady was entitled to an annuity charged on the estate of her son by a former marriage, and that the rents were inadequate to meet it, she assigned the annuity and arrears and future payments thereof, on trust to receive so much as the rents would answer for the benefit of herself and husband, and to hold the arrears then due and thereafter to become due, in consequence of the rents being insufficient to answer it, on trust, if her son should attain twenty-one, &c., in her lifetime, to release them; but if he should die before her under age, &c., that the arrears due and to become due, should form a fund subject to the appointment of the wife. It was declared that in the meantime, and until the arrears should become either absolutely vested in the son, or subject to the wife's appointment, the trustees should not require payment of them. The son attained twenty-one. The rents afterwards became sufficient to pay the annuity and leave a surplus. *Held*, that though the case was not directly within the deed, the arrears were not raiseable as against a mortgagee of the son.

The conveyance under the former English Insolvent Acts to the provisional assignee is within the general Registry Act, nor is the registration of it dispensed with by the registration of the conveyance by the provisional to the creditor's assignee.—*Battersby v. Rochfort*, 8 I. E. R. 284; 2 Jon. & L. 431. (C.)—[The Lord Ch., doubting his construction of the deed, directed a re-hearing, upon which he reversed this decision: 9 I. E. R. 191; 2 Jon. & L. 451. (C.)]—[*Affid.*: 2 H. L. Cas. 388; 14 Jur. 229.]

3. A wife's lands were conveyed by her settlement to trustees for 999 years, on trust, during so many years of the term as she, A., should live, to pay the rents to her or her appointees, and, subject to a prior charge of £10,000, to pay the husband, H., during the

residue of the term, for so many years as he should live, after her death, an annuity of £1000, and to pay the residue as she by deed or will should appoint. As to the residue of the term after the death of A. and H., on trust, if there should be younger children of the marriage, by sale or mortgage of the residue of the term, and by the rents and profits in the meantime, to raise £10,000 for their portions, payable with interest, as A. should appoint; in default of appointment, to sons at twenty-one, and to daughters at twenty-one or marriage; and should by the rents in the meantime, and until the portions should be payable, raise such sums as she should appoint for maintenance, not exceeding interest on the respective portions. A. appointed the surplus rents (after the £10,000 charge and £1000 annuity and some legacies) to her son, the deft., and died. *Held*, that during H.'s life, the portions could not be raised by a sale of the term either in possession or expectancy on his death.—[*Affg.* Rolls decision: 11 I. E. R. 429.]

That no appointment having been made to provide for the interest, it too was only raiseable along with the principal, and not by a receiver in the meantime.—[*Reversing* Rolls decision: 11 I. E. R. 429.]—*Lloyd v. Massey*, 12 I. E. R. 298. (C.)—[*See* *infra*, I. 2.; s. c. 10 I. C. R. 240; 5 I. Jur. N. S. 119. (C.A.)]

4. An ante-nuptial settlement recited that the intended wife was entitled to *chooses in action*: and that, the intended husband being in trade, it was considered more beneficial for the parties that he should not for the present make any settlement of any part of his property. The *chooses in action* were then conveyed in trust to pay the interest, &c., arising from them, to the husband for life, and after his death, to assign them to the wife if she survived him; but if she died in his life, to assign them to him; if he secured to her at any time thereafter an annuity of £250 during her life, then in trust to assign the *chooses in action* to him, such annuity to be taken by the wife in lieu and bar of dower and thirds, or claim to any share of his personal estate under the Statute of Distributions. The husband subsequently acquired by purchase the lands of T. in f.f., and died without having secured to the wife the annuity of £250. *Held*, that she was entitled to dower out of T.

The husband devised all his estate and interest in the house and lands of T. (subject to the charges after mentioned) to his eldest son, A. for life; and, on A.'s decease, to all his sons in such shares as he (A.) should appoint; in default of appointment, in equal shares among such sons. There were similar limitations to the testator's son, B., and his sons; and C. and his sons; and over, in each case subject as before. Then followed a power to A., when he should be in possession of T., to grant to any wife £500 a-year for her jointure, and in bar, or without bar of her dower, and to create a term to secure it. There was also a power for A. to charge his lands with £5000 for his daughters, in a certain event, and to create a term for that purpose. The testator declared that

it should be lawful for the devisees, "according as they or any of them shall be in possession of the estate of T., to demise or lease all and singular, or any part" thereof, for any term not exceeding twenty-one years. After creating a charge of £3000 on the house, lands, and furniture, &c., at T., for his daughter, and bequeathing to his wife, "in addition to the sums already settled on her," an annuity of £50 during her life, and charging that annuity and his private debts (not trade debts) on the house, lands, furniture, &c., at T., and directing his son A. to pay the head rent of the lands, he concluded his will by saying, "I hereby ratify and confirm the settlement made on my wife." *Held*, that the widow must elect between her dower and the annuity of £50.—*Robinson v. Wilson*, 13 I. E. R. 168. (C.)

1. Lands were conveyed by marriage settlement to trustees, to the use of A., for life, remainder to trustees for 100 years; remainder to B. (the husband) for life, remainder to trustees for 300 years; and, subject to such term to the use of the first and other sons of B. in tail male; in default of such issue, to the use of the daughter and daughters of B. in tail; remainder to the first and other sons of C. (the wife) by any after-taken husband; remainder to the use of A., with power (which he exercised) to dispose thereof by will or otherwise, at any time during his life. The trusts of the term for 300 years were, that if there should be one or more child or children of B. and C., other than an eldest or only son, the trustees should, in the life of B., with his consent, or else not until after his decease, by demise, &c., of that term, raise such sum and sums for the portion or portions of all and every such child or children (not being an eldest son) not exceeding in the whole the sum of £1000, as B. should by deed or will appoint, to be divided amongst them as B. should appoint; in default of appointment equally; the portion or portions to be paid to sons at twenty-one, and to daughters at twenty-one or days of marriage, which should first happen; with interest in the meantime from the death of B., if such respective times of payment should happen after his death; but if in his lifetime, within three months after his death, but not sooner, unless with the consent of B. There was issue a son, who died in his infancy; and a daughter, who married, and died in B.'s lifetime. *Held*, that the portion vested in the daughter, although she died in her father's lifetime, and although the term to secure it was in remainder after his life estate.

That she answered the description of a child, other than an eldest or only son, although she was an only child at her death; and was entitled to the portion, although the estate on which the portion was charged, was vested in her in remainder after her father's death, as such remainder was not absolutely vested in her, but was liable to be divested if her father had a son. — *Simpson v. Frew*, 4 I. C. R. 428. (R.)

2. Ante-nuptial articles provided that if there should be one or more child or children

of the marriage besides an eldest or only son, the said younger child or children should have £2000; but if there should be no son and an only daughter, such daughter to have the £2000; and if there should be two or more daughters, and no son, such two or more daughters to have and be entitled to £3000, said sums to be payable to the younger child or children as the father should appoint; in default of appointment, share and share alike, on their respectively attaining age, or preferment in marriage. There were five children, three of whom died under age and unmarried. The father died without exercising the power. *Held*, that the surviving younger child, who attained age and married, was entitled to the whole £2000.—*In re Dowling's Trusts*, 2 I. Jur. N. S. 427. (C.A.)—[Affirming Rolls decision: *ibid*, 318.]

3. E., by ante-nuptial articles under seal, covenanted to purchase lands and to charge them with a jointure for his wife. He also professed to charge all property, of which he should during the coverture be seized, with the jointure. Those articles were registered. He afterwards purchased the lands of U., but did not execute any conveyance for the purpose of charging them with the jointure; and subsequently mortgaged them to J., who had notice of the articles by deposit of title deeds. No conveyance having been executed to S. *Held*, that the jointure was to be paid in priority to the equitable mortgage.

*Quere*—Whether *Gubbins v. G.*, 1 Dru. & Wal. 161, n., ever was decided, or would now be treated as a binding authority?—*Creed v. Carey*, 7 I. C. R. 295; 3 I. Jur. N. S. 128. (C.A.)

4. When under one settlement there is a tenant in tail in possession and a tenant in remainder, the former is protector of the settlement as to the latter; and when the former is a lunatic the Lord Chancellor, as protector of the settlement, can consent to a disentailing deed by the latter.—*In re Mahony*, 8 I. Jur. N. S. 43. (C.)

## II. VALIDITY OF SETTLEMENT.

1. *Whether Void, as being Fraudulent, Voluntary, or otherwise.*
2. *Post-nuptial; respecting Wife's equitable Property claimed by the Husband.*
3. *Post-nuptial; when Voluntary; when for Value.*
4. *Constituted by Letter.*
5. *Made in pursuance of Articles; Variance between them and the Settlement.*

### II. 1. *Whether Settlement is Void, as being Fraudulent, Voluntary, or otherwise.*

5. A settlement made by a banker on his son's marriage, and purporting to provide for the issue of the marriage, is within the Irish Bankers Act (33 G. 2, c. 14), s. 3; and the limitations in favour of the unborn children are void.

*Semble*—That the case of a jointure settled on the wife of a son on his marriage is not within that sec.—*Spearing v. Delacour*, 1 Dr. & Wal. 591. (C.)

1. When a party has a right to appoint an estate to one of his children, who joins his father in settling the estate upon the son's children, although these grandchildren are not objects of the power, the Court, nevertheless, holds such a dealing as an appointment of the estate to the child; and a subsequent disposition of it by him in favour of his own children.—*Thompson v. Simpson*, 1 Dr. & War. 459. (C.)

2. A., on the marriage of his son, B., settled, among other estates, one of which he had been, but was not then, in possession, and respecting which he was then engaged in litigation. He was ultimately declared not entitled thereto. By the settlement, A. covenanted generally with F., the lady's father, for title to all the lands; and he and B. covenanted with the trustees for title and quiet possession, notwithstanding any acts done by A. or B. The settlement provided that, if A. should purchase the head rents and inheritance of any of the settled estates which were held for lives, his purchase should be subject to the trusts of the settlement, but that he should have power to charge with the purchase-money the estate so purchased. A. did so purchase; and he charged the estate with the purchase-money in favour of his daughter, D., without valuable consideration. *Held*, that this appointment was as valid against general creditors as the settlement of any other part of his property would have been, and would, therefore, prevail against them unless A. had at the time been indebted to the extent of insolvency; and that the claimants under the settlement, in respect of the breach of the covenants therein contained, were general creditors.—*Martyn v. Macnamara*, 4 Dr. & War. 411; 2 Con. & L. 541. (C.)

3. When a voidable estate is created by settlement, and the person by whom it is voidable is a party to, and derives benefit under, the settlement, Chancery will interfere to prevent him from doing any act to avoid it.

That in such case the entry of the person having power to render void the estate, is, in the absence of evidence to the contrary, to be deemed an act of confirmation, and not an avoidance.—*Massey v. Batwell*, 5 I. E. R. 382; 4 Dr. & War. 56; 2 Con. & L. 413. (C.)

4. The consideration of marriage will not operate to support limitations to collaterals, in a marriage settlement; which, therefore, as against subsequent purchasers for value, are voluntary.—*Stackpole v. S.*, 6 I. E. R. 18; 2 Con. & L. 489. (C.)

5. A father, C., tenant for life, with remainders to his son, D., joined D. in executing a post-nuptial settlement, whereby C. & D. assigned the lands to a trustee in trust for C. for life, subject to an annuity for D.; after C.'s death, in trust for D., subject to a jointure

(charged by the pre-existing deed), and charged with portions for C.'s younger children. Afterwards, C. and D. joined in a mortgage which did not notice this settlement. The mortgage contained covenants for title, but not against incumbrances. *Held*, that, as regarded the provisions for younger children, the settlement was not voluntary or void as against the mortgagee, nor revocable by C. and D.; and, even if revocable, was not revoked by the mortgage.—*Bennett v. Bernard*, 10 I. E. R. 584. (C.)—[Re-argued and partly reversed, 12 I. E. R. 229. (C.)]

6. S., being seized in fee of K., X., and other lands, by deed of Feb., reciting that he had charged his unsettled estates with £2000 for his daughter, conveyed K. and X. to B., his eldest son, for life, remainder to his issue in tail, in consideration of which B. covenanted to pay all S.'s debts and incumbrances. By deed of the 12th of June between S., B., and W. (another son of S.), reciting that S. intended to convey K. to W., he conveyed X. to B. and his issue, as in the former deed. Both deeds recited other provisions made for W. and other children in lieu of charges on estates settled on B. in remainder. By deed of the 13th of June, between S., B., and W., S. conveyed, and B. confirmed, K. to W. for life, remainder to his issue in tail. B. paid off the debts and charges. On the death of S., W. went into possession of K., and so continued until his death. In a suit by the son of B.—*Held*, that the deed of Feb. was for value, which extended to the issue of B.; that the deed of the 13th of June was voluntary, no consideration moving from W. to S.; that even if both deeds were voluntary, the deed of Feb. should prevail; and that neither S., nor B., nor both of them, could revoke it by a subsequent voluntary settlement.

The futility of a defence resting on an unproved inconsistent prior conveyance, though evidenced by admissions in an answer to another suit, observed on.

Expenditure on the estate claimed, with ptf.'s knowledge, but chiefly in his minority.—*Held*, no defence.—*Scott v. S.*, 11 I. E. R. 487. (C.)—[See 13 I. E. R. 212; 4 H. Lds. Cas. 1065.]

7. In an ante-nuptial settlement conferring considerable benefits upon the husband in the property of the wife, to which it chiefly related, which settlement recited that it was made by the wife "in consideration of the marriage and of the provision thereafter made and provided for her by the husband," he covenanted "that whatever estates and property, whether real or personal, and wherever situate, or either or both, should in the event of his decease, if the wife should survive him, be charged and chargeable with, and subject to, the payment of an annuity or yearly rent-charge to be paid and payable to her and her assigns during so many years as she should live, besides and in addition to the provision hereby made and intended for her."

With the exception of a contingent reversionary interest in a policy of assurance for



£3000 on the life of the husband, which policy was subject to a debt of £2000 and interest thereon at £1 per cent., there was not any provision made out of his property for her beside the annuity. At the period of the marriage he was engaged in trade, and was seized of real estate. Subsequently he acquired other real estate, and afterwards became bankrupt. *Held*, that the annuity was well charged upon the real estate of which he was seized at the marriage, and upon the real estate which he subsequently acquired.

The draft of the above settlement did not contain the covenant as to the annuity. On the draft was endorsed a memorandum, in the handwriting of the husband, stating that the solicitor who prepared that draft "had omitted to insert a clause subjecting whatever property he (the husband) might die possessed of to a yearly rentcharge of £250 for the benefit of his intended wife during her life, exclusive of such other advantage as she might be entitled to by the foregoing deed." On the death of the husband, a bill was filed (by a party claiming under a mortgage of both estates, and of a date puerne to the settlement) praying that the covenant might be reformed in conformity with the memorandum. The widow in her answer resisted the reformation, and denied that it ever was her understanding of the marriage contract that the operation of the covenant was to be limited to such property only as the husband might die possessed of. The parol evidence of three trustees of the settlement was to the same effect. One of them deposed that to him, both at and after the marriage, the husband had stated his intention that the estates which he then possessed, or should thereafter acquire, should be subject to the annuity. *Held*, that the bill should be dismissed, without costs; and a declaration inserted in the decree, that the annuity was well charged upon the estates of which the husband was seized both at and after marriage.—*White v. Anderson*, 1 I. C. R. 419. (C.)

## II. 2. *Post-nuptial Settlement; respecting Wife's Equitable Property claimed by the Husband.*

1. When a husband makes a post-nuptial settlement of property belonging to his wife on his wife and children, otherwise unprovided for, if it be such as a Court of Equity, on a bill filed by the wife for a settlement, would direct to be made, it is not voluntary within the 10 Car. 1. sess. 2, c. 8, s. 1.—*Ashe v. Lowe*, Hay. & J. 287. (E.E.)

2. By the decree of this Court, a *femme sole*, a subject of Great Britain was decreed entitled to a sum, to be realised by a sale of lands. Before the sum was realised, she intermarried abroad with a subject of the Austrian Empire, and continued to reside with her husband in that empire. The sum being realised, and in Court, an application on behalf of the husband and wife, that the money should be paid out to the attorney for the husband and wife, on a warrant executed abroad by them, and on an affidavit, stating that, by the laws of the

Austrian Empire, the sum would be at the absolute disposal of the wife, was granted: the Court not requiring that the husband should thereout make any settlement on the wife, or that any commission for her separate examination should issue.—*Hutchinson v. Cathcart*, 8 I. E. R. 394. (E.E.)

## II. 3. *Post-nuptial Settlement: when Voluntary: when for Value.*

3. A's wife claimed an annuity on his estates under a voluntary deed, or had a right to dower. She concurred in a sale of some of his estates to a stranger, and joined in a covenant to levy a fine. She was induced to do so by other estates of her husband being settled by articles under which ptf., her grandson, claimed. They recited other considerations, but there was not proof of any. No fine was levied in pursuance of the covenant, but the purchaser was never disturbed. *Held*, that there was a sufficient consideration to sustain the articles as against a subsequent purchaser for value.—*Fitzmaurice v. Sadler*, 9 I. E. R. 595. (C.)

4. A. father, tenant for life, remainder to his son, joined him in executing a post-nuptial settlement by which father and son assigned the lands, in trust for the father for life, subject to an annuity for the son; and after the father's death in trust for the son, subject to a jointure (charged by a pre-existing deed), and charged with a sum for portions of the younger children of the father. The father and son afterwards joined in a mortgage, which did not notice this settlement. It contained covenants for title, but not against incumbrances. *Held*, that the settlement, as regarded the provision for the younger children, was not voluntary or void as against the mortgagee, nor revocable by the father and son; and even if revocable, was not revoked by the mortgage.

The doctrine, that creditors or parties proving their demands under a decree are entitled to consider the suit as theirs from the commencement, so as to prevent the effect of the Statute of Limitations, is not confined to suits purporting to be on behalf of creditors generally, but extends to an ordinary mortgagee's suit for foreclosure and sale, in favour of prior creditors proving charges on the mortgaged lands.—*Bennett v. Bernard*, 10 I. E. R. 584. (C.) —[Re-argued and partly reversed: 12 I. E. R. 229. (C.)]

5. F., seized of the M. and D. estates, by a post-nuptial settlement, in 1807, conveyed D. to the use of himself in fee, free from his wife's dower; and conveyed M. to the use of himself for life; remainder to provide a jointure for his wife in lieu of dower; remainders over in strict settlement. F. covenanted that his wife would levy a fine to the uses of the deed. She signed it, but died without having ever levied a fine, and without having ever been called on to do so. *Held*, that the deed could be supported, as not merely voluntary, against subsequent purchasers for value from F.

Very informal documents *held*, in favour of a child, to amount to the exercise of a power of appointment.—*Blake v. French*, 5 I. C. R. 246; 1 I. Jur. N. S. 60. (C.)

1. A husband and wife were living separate, in consequence of adultery by the husband, and proceedings were about to be taken against him in the Consistorial Court, for a divorce and alimony. The result of a negotiation was an agreement, carried out by two letters, signed by the husband. One was directed to the wife's father. By it the husband undertook to pay his wife £60 a-year, half-yearly, during the time they lived separate, and to pay her the one-fourth part of any gross sum he might enjoy from any permanent employment in his profession as an engineer. The other letter was directed to the husband's brother, on whose estate the husband had a charge, authorising him to pay the £60 a-year. *Held*, in a suit for specific performance by the wife and her father, that the agreement was in the nature of a family arrangement, and for sufficient consideration.

That as the husband and wife were separated at the time, the agreement was not contrary to the policy of the law, and might be enforced.

That the agreement bound the respondent, as a personal contract to pay a separate maintenance, which the Court would enforce by its decree, although there might be a remedy at Law.—*Bucknell v. B.*, 7 I. C. R. 130. (R.)

#### II. 4. *Constituted by Letter.*

2. The correction of a settlement entered into upon the evidence of a letter and conversations, refused.—*Milner v. M.*, 8 I. E. R. 488. (C.)

3. A., being about to be married to a minor, entitled to considerable property on marrying with consent, applied to his uncle B., who wrote to him that he had devised an estate to him. The letter being communicated to the lady's guardians, they resolved that the marriage should not take place until B. made a settlement; after which B. wrote a letter to A., saying that his sentiments respecting A. remained unalterable, but that he would never settle his property out of his power as long as he existed; that his will was made, and he was confident he should never alter it to A.'s disadvantage; that the estate should come to A. at his death, unless some unforeseen occurrence should take place; that he never had settled anything on his nephews, and for fear of provoking family jealousy, would not deviate from that rule; that he would have pleasure in hearing of A.'s union, and would regret retarding his happiness; and that his only motive for not complying with her guardians' wishes was the avoiding of jealousy: he desired this to be shown to the guardians, and that everything should be candid and explicit. The guardians assented to the match, by a resolution, referring to B.'s letters, his affection for A., and his having declined to make an immediate settlement. The marriage

was had. B. was a trustee in the marriage settlement, which recited A.'s expectations from him, but the contents of which he did not know. There were other letters, expressing B.'s good will and intention. He afterwards sometimes treated A. as the person to succeed him. *Held*, that no binding contract to devise to A. was made out; but that, if there was a contract, it was only conditional, and B. was the judge of what "unforeseen occurrence" might alter it; and that, therefore, B. might dispose by will of his estate as he pleased.

That no case of a representation to induce the guardians to consent to the marriage was made out, so as to bind B. to fulfil their expectations.—*Alvansell v. White*, 7 I. E. R. 413; 1 Jon. & L. 539. (C.)

4. A., hearing that a marriage, to which he had not assented, had been fixed between his daughter and B., signed and sealed a document, by which he agreed to settle, assign, and make over to his daughter, on the occasion of her marriage with B., a house, free of all rent, for his own term thereof, to the purpose that it should be settled on herself and her issue by B.; and to execute any further instrument or conveyance of it which counsel should advise to carry out the assignment of the premises to his daughter, as a marriage portion. That document was enclosed in a letter to B., in which A. expressed his ultimate intentions, as to the remainder of his property, to be, that, after the death of himself and his wife, part of it should go to his sons, and another part should be divided, share and share alike, among his three daughters, with such arrangements as should secure the property to the family, so that if one died without issue, that portion should not go to strangers, but pass to the other branches of the family. The letter reached B. on the morning of the marriage, which had been previously fixed, and which took place. B., being separated from his wife, filed a cause petition in the name of himself and his wife, for a specific performance of the agreement, by an assignment, in trust for A. for life, or until bankruptcy or insolvency; then to his wife, to her separate use; and, after their death, to the issue of the marriage; if no issue, to A. absolutely.

*Semble*—The agreement should be carried into effect, by settling the house to the separate use of A.'s daughter, for life; and, after her death, upon her issue, if any, or by settling it on her without any limitation to her separate use.

*Held*, that the letter would not be enforced as an addition to the agreement, or as itself containing a binding agreement.

That the letter would not be enforced as a representation, as the marriage did not take place on the faith of it; and there was a written contract executed by A.

The agreement was stated in the petition as an agreement that B. should have a life interest in the house. *Held*, that the document did not support the case made by the petition, which should therefore be dismissed.

That the interest of his wife was inconsistent with his, and that she should not have been joined as a co-petitioner.—*Kirwan v. Burchell*, 10 I. C. R. 63. (R.)

## II. 5. Made in pursuance of Articles: Variance between them and the Settlement.

1. By articles, executed in consideration of marriage, and of the wife's fortune, it was agreed that the trustees of a money fund should, after the husband's decease, pay the residue of the interest, and also the principal (subject to a jointure for the wife), to the issue of the marriage, or to any one or more of them, in exclusion of the others, in such shares as the husband should have, by deed or will, appointed; in default, to all the issue, in equal shares—to such of said issue as should be sons at 21, and to such of them as should be daughters at 21, or marriage. It was further agreed that power should be given to pay, towards the maintenance of any of said issue, any sum not exceeding one-half of the principal belonging to such child respectively; and, if there should be no issue, or if all such issue should die in the husband's lifetime, that then the entire of the trust fund should, subject to the jointure, vest in, and be assigned and go to the husband, his heirs, executors, &c., absolutely, for his and their sole use and benefit. It was further agreed that a regular deed of settlement should be executed, and that it should contain the several clauses and covenants in such cases usual and proper. *Held*, that the word "issue" in the articles should be read "children."

That the settlement ought to contain clauses vesting the sons' shares in them at 21, and vesting the daughters' shares in them at 21 or marriage; and should also contain clauses of accruer and survivorship of the shares of sons dying under 21, and of daughters dying under 21 without having married, in favour of the surviving or other children.

That the husband was entitled to the fund, either in the event of his surviving all his children, or of no child attaining a vested interest therein, and that the settlement ought to contain clauses accordingly.—*Roche v. R.*, 2 Jon. & L. 561. (C.)

2. A., an infant, by articles executed previously to her marriage, covenanted to settle her real estate after she came of age; and during her coverture executed a settlement in pursuance of the articles, but did not levy a fine. *Held*, that she was not bound either by the settlement or by the articles.—*Brown v. M'Clintock*, 7 I. E. R. 347. (C.)

3. By marriage articles, R., the intended husband, in consideration of the marriage and of the fortune of E., the intended wife, agreed to convey lands held under a lease for lives renewable for ever, to trustees, in trust for himself for life, and in the event of E. surviving him "to the use of the said E. and the child or children of the said intended marriage; and

if no child of the said intended marriage, then to the use of E., her heirs, executors, &c., for ever." *Held*, that a settlement in pursuance of the articles should give an estate for life to E., with remainder to the issue of the marriage.—*Rossiter v. R.*, 9 I. Jur. N. S. 373. (C.A.) —[*Rev.* 14 I. C. R. 247. (R.)]

## III. SETTLEMENT OF FUTURE PROPERTY.

4. The lands of S., held for lives renewable, were devised to A. for life; remainder to his children in strict settlement; remainder to testator's daughters, B. and C. in *quasi* tail; and if either B. or C. died without issue, to the surviving daughter in *quasi* tail.

On the marriage of E., eldest son of B., a settlement was executed, reciting that E., under his grandfather's will, was entitled to a contingent remainder in S., on failure of issue of A., subject only to such powers over it as should appear to be vested in A.; and covenanting on the part of E., to settle S. when vested in possession in him.

After the execution of the settlement, A. died without issue. After his decease, B. and C. barred their respective estates in *quasi* tail, and died. B.'s moiety of S. descended, and C.'s was devised to E., who sold them to a person affected with notice of the covenant. *Held*, as against the purchaser, that though the estates in existence at the execution of the settlement had been destroyed, the estates in the land which actually became vested in the settlor were bound by his covenant.

*Seem*—That "surviving daughter" must be taken to mean "other daughter."—*Osborne v. Smith*, 4 I. C. R. 58. (C.)

## IV. EFFECT OF HUSBAND'S BANKRUPTCY OR INSOLVENCY.

[See *In re Casey's Trusts*, 4 I. C. R. 247.]

## V. WHEN AN INFANT IS PARTY TO THE SETTLEMENT.

5. A., upon the marriage of his daughter, charged by deed in 1793 upon lands money, which thereby was assigned to trustees, to permit husband and wife to receive the interest during their lives, and after their decease to pay the principal amongst the children, as the parents or the survivor of them should appoint. There was not a clause empowering the trustees to give discharges. The surviving parent died in 1845. No payments appeared to have been made by the owner of the lands after 1826. *Held*, that the charge was not barred by the Statute of Limitations, there being no person capable of giving an effectual discharge for the principal until the death of the surviving parent.—*M'Carthy v. Davut*, 11 I. E. R. 29. (C.)

6. In a marriage settlement executed in 1812 the husband covenanted with the trustees that his heirs, executors, &c., would from his death pay his widow, if she survived him, an annuity of £40 a-year; and that they would pay the

trustees £400 for the children of the marriage. The husband became indebted to one of the trustees, who in 1828 entered up a judgment against him for £600; and also effected a policy of insurance for a similar amount upon the husband's life. The judgment was subsequently assigned to B., who purchased a judgment obtained against the husband in 1834 for £200, on which occasion a policy of insurance upon the husband's life had been effected. In 1860 the property comprised in the settlement of 1812 was sold in the L. E. Court. Upon settling the final schedule of incumbrances, a Judge declared that the jointure, and the £400 for the children, were entitled to priority over the judgment of 1828; and that the judgment of 1834 had been satisfied by payment of the amount reserved by the second policy. *Held*, upon appeal (reversing the decision below), that both judgments should have precedence of the jointure and of the £400; that the provision in the settlement of 1812 for the widow and children was only to affect such property as the settlor should leave after payment of his just debts; that the trustee was not, as a trustee, disqualified from dealing with the settlor, even though such dealing might have the effect of injuring the provision for the widow and children; and that when such transactions have, with full knowledge of the state of facts, been acquiesced in by *c. q. trusts* for a long time, it would be dangerous and against public policy to let them be re-opened.—*In re M'Kenna's Estate*, 13 I. C. R. 239. (C.A.)

#### VI. AGREEMENTS, &C., AT VARIANCE WITH, OR FRAUDULENT AS BEING AGAINST THE SETTLEMENT.

#### VII. SATISFACTION AND PERFORMANCE OF THE SETTLEMENT.

1. A marriage settlement conveyed freeholds on trust for the issue male, in such shares as the father should appoint. By indenture, reciting the settlement, he conveyed to a trustee, for the eldest son and his issue, other lands, in consideration of his releasing all his rights under the settlement. *Held*, that the father was entitled to that share of the settled property to which the son had been entitled in default of appointment.—*Barron v. B.*, 2 Jones, 798. (E.E.)

2. In 1790, upon the marriage of K., lands were settled to the use of K. for life, remainder to trustees for 500 years, remainder to the issue male of K. The trusts of the term were to raise, if there were two or more daughters and no issue male, £6000 for their portions, to be paid in such shares as K. should appoint; if no appointment, share and share alike. The settlement provided that if K. advanced any of the daughters in his lifetime, such advancement should, according to its amount, be deemed a satisfaction of the portion, unless K. should, by writing under his hand, declare the contrary. There were issue, three daugh-

ters only, E., I., and S.; but no son. In 1813 K. contracted to sell the estates; and to protect the purchaser against the contingency of there being issue male, £71,000 of the purchase-money was permitted to remain a charge upon the lands. In 1821, K., on the marriage of E., assigned £50,000, part of the unpaid purchase-money, to the trustees of the settlement, as her portion, not to be paid, however, until K.'s death. In 1826, on the marriage of another daughter, S., K. covenanted that he would appoint and assure that £26,000, part of his personal estate, should, within three months after his death, be transferred to the trustees of the settlement of I. In 1836, K., by will, directed that in performance of this covenant £20,000 should be paid to the trustees of the settlement of I., out of the unpaid purchase-money, and if that proved deficient, then out of his residuary personal estate. He bequeathed to his executors £20,000, upon trust to pay the interest thereof to his remaining daughter, I., who was unmarried, for her separate use during her life. *Held*, that I. was to elect between the provision made for her by the will and by the settlement; and that, taking the latter, she was entitled to the whole £6000.—*Brownlow v. Earl of Meath*, 2 Dr. & Wal. 674; 2 I. E. R. 383. (C.)

3. A father, upon the marriage of his daughter, executed to the intended husband his bond, with warrant of attorney for confessing judgment thereon, conditioned for the payment of £800 by instalments. He afterwards bequeathed to his daughter £800. *Held*, that this legacy could not be considered as a satisfaction of the debt due to the husband.—*Hall v. Hill*, 1 Dr. & War. 94; 1 Con. & L. 120; 4 I. E. R. 27. (C.)

4. *Semble*—That a rentcharge may be a satisfaction for a portion in gross.—*Walcott v. Bloomfield*, 6 I. E. R. 227. (C.)

5. An attorney entitled to landed property, mortgaged it. The mortgage was not duly registered, and he, in about a year and a-half after the execution of the first mortgage, mortgaged the same property to another person, who did not know of the first mortgage. The second mortgage was duly registered, but the second mortgagee employed the mortgagor as his attorney in the transaction. *Held*, that the second mortgagee was affected with notice of the first mortgage, in consequence of his having employed the mortgagor as his attorney; and that his mortgage must, therefore, be postponed to the first.—*Marjoribanks v. Hovenden*, 6 I. E. R. 128; Dr. & Rep. temp. Sudgen, 11. (C.)

#### VIII. CARRYING INTO EXECUTION BY THE COURT.

1. *In pursuance of Articles or Covenant, generally.*
2. *In pursuance of Trusts for that purpose.*
3. *In case of Wards of Court.*

VIII. 1. *Executing generally, or in pursuance of Articles, by Court.*

1. A father, on his eldest son's marriage, settled lands, and covenanted to pay all the incumbrances affecting them. *Held*, that the Court would decree specific performance without an enquiry whether any or what damage had been sustained, incumbrancers having actually instituted suits, and the lands being in danger of being sold.—*Vereker v. Lord Gort*, 1 I. E. R. 1. (R.)

2. On the marriage of H. with L., he covenanted to convey specified lands, on trust that they should go to and be vested in his issue by L.; and that such issue should be entitled to the further sum of £10,000, to be charged on all other the real and personal estates of H., not therein comprised, but in such shares as H. should by deed or will appoint; in default, as L., if she survived H., should by deed or will appoint; failing appointment, equally. *Held*, that a Court of Equity would execute the articles by giving successive powers of appointment to H. and L.; and, in default of such appointment, a limitation to the children of the marriage as tenants in common in fee.—*Thompson v. Simpson*, 1 Dr. & War. 459. (C.)

3. The only difference between the construction of executory trusts in a marriage settlement and a voluntary settlement or will is, that in the former the nature of the instrument affords a presumption that the intention is for a strict settlement; whereas in the latter case, that intention must appear on the face of the instrument.

*Semble*—A limitation to trustees to preserve, &c., not confined to the lifetime of a tenant for life, will not be cut down to that life, if there are contingent remainders which may, during a longer period, require protection.—*Rockfort v. Fitzmaurice*, 4 I. E. R. 376; 2 Dr. & War. 1; 1 Con. & L. 158. (C.)

4. The Court has not jurisdiction to compel a male ward, with whom a marriage has been solemnized without its consent, on his attaining age, to execute a settlement of his estate so as to exclude his wife from all participation therein.—*Re Murray*, 5 I. E. R. 266; 3 Dr. & War. 88; 2 Con. & L. 136. (C.)

5. In settlements, when the husband and wife are living together, and the case is not one of contempt, it is not the course to settle any part on the wife to her separate use by way of pin-money, unless the property be large. Such a provision refused when the sum to be settled was under £1400.—*Harpur v. Ball*, 8 I. E. R. 404, 500; 2 Jon. & L. 599. (C.)

6. Vesting clauses to sons at twenty-one, and daughters at twenty-one or marriage, are proper to be introduced in a settlement in pursuance of articles directing "usual and proper clauses." So are clauses of survivorship and accruer, if the intent appears to be that no part of the property shall go over, unless all goes over.—*Roche v. R.*, 8 I. E. R. 714. (C.)

7. The wife of A. claimed an annuity on his estates under a voluntary deed, or had a right to dower. She concurred in a sale of some of his estates to a stranger, and joined in a covenant to levy a fine; and was induced to do so by other estates of her husband being settled by articles under which the ptf. (her grandson) claimed; the articles recited other considerations, but there was no proof of any. No fine was ever levied in pursuance of the covenant, but the purchaser was never disturbed. The articles were upheld, as for sufficient consideration, against a subsequent purchaser for value.—*Fitzmaurice v. Sadler*, 9 I. E. R. 595. (C.)

8. By marriage articles the intended husband agreed, in consideration of the marriage and the intended wife's fortune, to convey lands in trust for himself for life; and, if she survived him, to the use of the intended wife, and the child or children of the intended marriage; if no children of the marriage, then to the use of the wife, her heirs, &c. *Held*, that a settlement in pursuance of the articles should give to the wife an estate for life, remainder to her children.—*Rossiter v. R.*, 14 I. C. R. 247. (R.)—[*Revd.*: 9 I. Jur. N. S. 373. (C.A.)]

VIII. 2. *In pursuance of Trusts for that purpose.*

9. A. and B., father and son, in 1818 executed a settlement on B.'s marriage. They, the lady, her father, and certain trustees were the parties to this deed. Freeholds were conveyed on trust for A., for life, remainder to B., and were exonerated from debts due by A., which were made charges on leasehold premises expressly specified. These premises were vested on trust (*inter alia*) to keep down the interest of A.'s debts affecting any of the settled estates, and the trustees were empowered, "with the desire and consent" of A. and B., and notwithstanding any of the trusts therein contained, to sell those leaseholds to pay the debts and incumbrances. In 1824, A. and B. executed another deed, which recited that of 1818; appointed new trustees; added new debts; and made provision for paying all. The trustees never acted in discharge of the trust, and the deeds were not communicated to the creditors; but B., who, by an arrangement with A. had possession and management of the estates, paid the interest on the debts. After the deaths of A. and B., B.'s son entered into possession of the estates. A bond creditor, C., whose name and claim were set forth in the schedule to the deed of 1818, filed a bill to carry the trusts thereof into execution. *Held* (by the Ld. Ch. of Ir.), that C.'s debt "was within the trust contained in the indenture for the payment of the scheduled debts."

On appeal, the H. L. affirmed that decree.—*Synnot v. Simpson*, 5 H. L. Cas. 121.

VIII. 3. *Carrying Settlement into Execution in the case of Wards of Court.*

## IX. REFORMING &amp; RECTIFYING MISTAKES IN.

1. A marriage settlement conveyed lands to A. (the intended husband), his heirs, and assigns; and, if A. died, leaving one son or more sons of the body of his intended wife to be begotten, the elder of them, and the heirs male of his body was always to be preferred before the younger; with full liberty to A. "to make such reasonable provision as he should think fit," for the younger child or children. If A. died, leaving no son, but one or more daughters, then to her or them, on respectively attaining age, their heirs and assigns, share and share alike. Four sons and four daughters were born. A., by will, in pursuance of that power, charged the lands with £1500, to be divided amongst the younger children as therein directed. The first taker disputed A.'s right to charge in favour of daughters, one of whom filed a bill to raise her portion of the £1500. *Held*, that the power was well exercised; and that, since it was evidently intended by the settlement to provide for daughters as well as sons, the Court would effectuate that intention, and support the appointment, by transposing the clause creating the power, and that containing the limitations to the daughters in the event of there not being a son; whereby the words "such younger children" would include both sons and daughters.—*Fenton v. F.*, 1 Dr. & Wal. 66. (C.)

2. When a marriage settlement made by the husband's father was defective on its face, in omitting any limitation after the life estate of the husband and a jointure to the wife, whereby the reversion would descend to X., the elder brother of the husband, a correction of the settlement was refused as against a judgment creditor of X., though sought as soon as the omission was discovered; the evidence of the intended limitations consisting of a letter and memorandum from the lady's father, and conversations with the settlor after the date of the settlement; the draft being lost, and the solicitor who prepared it being unable to account for the omission.—*Milner v. M.*, 8 I. E. R. 488. (C.)

3. A., seized of a life estate, with remainder in tail to B. in lands, entered into a voluntary agreement with B. to re-settle the lands, and that A. should be made tenant for life of one portion, X., as of his former estate, with remainder in tail therein to B. By mistake, X. was limited by the settlement (which was executed thus) to B., for life only, with remainder to his heirs male in strict settlement. The mistake was discovered after A.'s death, but before the birth of any issue of B., who filed a bill to have the mistake corrected. *Held*, that the Court could not bind the rights of the unborn issue, so as to divest them of any legal estates thereunder, or amend the deed, but only declare the rights of the parties according to their original intention and contract.—*Richards v. Fitzgerald*, 9 I. E. R. 486. (E.E.)

4. By marriage settlement, lands of the husband were, by mistake, and contrary to

the parties' intention, settled upon the issue of the marriage.

Form of decree to rectify the settlement, the contingent limitations to the unborn issue not being capable of destruction.—*Hamil v. White*, 3 Jon. & L. 695. (C.)

5. The draft of a marriage settlement did not contain a covenant as to an annuity of £250 which was to be settled on the intended wife, but on the draft was endorsed a memorandum in the handwriting of the husband, stating that the solicitor who prepared that draft "had omitted to insert a clause subjecting whatever property he (the husband) might die possessed of to a yearly rentcharge of £250 for the benefit of his intended wife during her life, exclusive of such other advantages as she might be entitled to by the foregoing deed." On the death of the husband, a bill was filed (by a party claiming under a mortgage of both estates, and of a date *prieus* to the settlement), praying that the covenant might be reformed in conformity with the memorandum. The widow, in her answer, resisted the reformation, and denied that it ever was her understanding of the marriage contract that the operation of the covenant was to be limited to such property only as the husband might die possessed of. The parol evidence of three trustees of the settlement was to the same effect; one of them deposed that to him, both at and after the marriage, the husband had stated his intention that the estates which he then possessed, or should thereafter acquire, should be subject to the annuity of £250. *Held*, that the bill should be dismissed, without costs, and that a declaration should be inserted in the decree that the annuity was well charged upon the estates of which the husband was seized both at and after the marriage.—*White v. Anderson*, 1 I. C. R. 419. (C.)

## X. WHEN A SETTLEMENT IS PRESUMED TO HAVE BEEN MADE.

XI. RESPECTING CHILDREN'S PORTION OR MAINTENANCE. *See* PORTIONS—ESTATE, CHARGES ON—SATISFACTION AND MAINTENANCE.

1. *In general; when Vested.*
2. *How and when Raisable.*

XI. 1. *In general; when Vested.*

6. Under a settlement made upon his father's marriage in 1783, A. was entitled to a younger child's portion. He filed a bill, in 1825, to raise it; praying an account of all prior incumbrances. The inheritrix set up prior articles, executed in 1765 on the marriage of ptf.'s uncle (ptf.'s father's elder brother), which were registered in 1767. In 1829, ptf. amended his bill by bringing before the Court B. and her husband, the only persons beneficially entitled under these articles. B. having answered, a decree was pronounced in 1834, granting the prayer; and the usual reference was made. Before the Master, B.

and her husband claimed, in right of her charge under the articles of 1765, the principal thereby charged, with 68 years interest. Upon exceptions to the report—*Held*, that the memorial of the articles of 1765 was good secondary evidence of those articles, possession having been shown to have gone along with them; and that execution of the memorial by the grantee satisfied the statute: that B.'s charge under the articles of 1765 was not affected by the 8 & 4 W. 4, c. 27, which is prospective, not retrospective: that the account of interest on foot of this charge should be confined to the time when the bill was filed: that, according to the settled practice of the Court, ptfs. were entitled to costs only according to the priority of their demands.—*Peyton v. M'Dermott*, 1 Dr. & Wal. 198. (C.)

1. By marriage settlement, reciting the intended marriage, and that the father of the lady, "for the purpose of securing a provision for her, by way of jointure, in case she should survive her intended husband, and of providing for the issue of the marriage, had agreed to secure a sum of £4800 as her portion, in the manner hereinafter mentioned;" the father, in pursuance of that agreement, conveyed lands of which he was seized in fee, subject to a mortgage, to trustees for 99 years, to raise £1000 part of the £4800, and pay it to the intended husband for his own use; and to allow him to receive the interest on £1300, further part of the £4800, for his life; and if his intended wife should survive him, to let her receive the interest during her life; and then to pay the principal to the executors or administrators of the intended husband. If there should be any child or children of the marriage, the trustees were then directed to raise £2500, residue of the £4800, and pay it to the children, if more than one, in such shares and at such times as the intended husband should appoint; in default of the appointment, to pay it to them in equal shares if more than one; and if but one, the whole to such one at twenty-one or marriage; subject, to a life interest in that sum, thereby given to the intended husband. It was declared that if there should be no issue of the marriage, the £2500 should not be raised. There was only one child of the marriage. He died a few days after his birth, in the life of his father. *Held*, upon the construction of the settlement, that the child took a vested interest in the £2500 on his birth; and that his personal representative was entitled to have it raised out of the estate.

The right to interest on this sum was limited to the year 1825, when the sum was first claimed; but interest on the £1000 and £1300 was allowed:—on the £1000, from the filing, in 1800, of the original bill; on the latter, from the time when the right to that sum accrued.—*Reilly v. Fitzgerald*, 6 I. E. R. 335; Dr. Rep. temp. Sugden, 122. (C.)

2. Rights of children under marriage articles to annuities, charged on leaseholds for lives, and on a term of years.—*Richardson v. Nixon*, 7 I. E. R. 620; 2 Jon. & L. 250. (C.)

3. V. devised lands to P. on trust, to convey them to his three sons in such shares as P. should appoint; in default of appointment; V. gave the lands to them equally, as tenants in common. In 1786, P., in execution of the trust, conveyed part of the lands to the use, that if S. (one of the sons) married with P.'s consent, but not otherwise, any wife, who survived S., should receive for jointure an annuity (not exceeding a specified sum) as S. should appoint; and to the further use, that S., if he married with such consent, but not otherwise, might by deed or will charge the lands with £500 for portions for his younger children, payable in such shares as S. should appoint. In 1788, S. married with consent; and reciting his power, covenanted that his trustee should, if one or more younger children of that marriage survived him, raise £500 out of the lands; that sum to be divided in such shares amongst them as S. should by will appoint; for want of appointment, equally. There were three younger children of that marriage. S. married a second wife, and charged the lands with an annuity for her jointure. The second wife, four children of the second marriage, and the three younger children of the first marriage, survived S., who, by will, in 1842, appointed 1s. to each child of the first marriage, and the residue among the others. *Held*, that P.'s consent was necessary only to any marriage of S. which should happen during P.'s life; that the children of the second marriage were objects of the power; that the settlement of 1788 amounted to a contract, that so far as S. could bind his power, the children of the first marriage should take the fund equally amongst them, if he did not apportion it amongst them in other shares: that, upon issue born of the second marriage, S.'s power to appoint was gone: and that the children of both marriages were entitled, as one class, to the fund amongst them equally.—*Greene v. G.*, 8 I. E. R. 473; 2 Jon. & L. 529. (C.)

4. A., having power to charge £500, and appoint it among his younger children, by articles on his first marriage, charged it for the benefit of the younger children thereof; and married again. There were younger children of both marriages. By will, A. appointed nominal shares to the children of the first marriage, and the bulk to those of the second. *Held*, that the power included all younger children; that therefore the articles became invalid, on the second marriage, as an appointment, and that the power might be re-exercised: but that the articles were a contract to exercise it substantially for the benefit of the younger children of the first marriage, and controlled the power; that the testamentary appointment also was therefore invalid; and that the fund should be divided equally amongst the younger children of both marriages, as a class. The costs of raising the family charge, but not of the suit to raise it, were given out of the estate.—*Alleyne v. A.*, 8 I. E. R. 493; 2 Jon. & L. 544. (C.)

5. A father (tenant for life, with power to

charge £500 for younger children), and his son (tenant in tail), re-settled the estate, to the use that the son should receive a rent-charge for their lives and that of the survivor, with powers of distress and entry for non-payment; then to the use of the father for life, with power to charge an additional £1000 for younger children; then to the son in tail. *Held*, that although, if it was the intent to give the annuity priority over the £1000, equity would not allow a legal merger to destroy it; yet, on the true construction it was not intended that it should exist after the father's death, though granted for the son's life; and that therefore the general rule, giving priority in family settlements to charges for younger children should prevail.—*Mills v. M.*, 9 I. E. R. 299; 3 Jon. & L. 242. (C.)

## XI. 2. How and when Raiseable.

1. By marriage articles, under seal, made between W., the intended husband, and M., his father, of the one part, and H., the intended wife, and T., her father, of the other part; M. covenanted that he would, at his death, leave and devise to W., his heirs, executors, &c., all such property, real and personal, as he should then be possessed of and entitled to, charged only with a jointure for his wife, and with pecuniary legacies not exceeding £1000. It was further agreed that H., if she survived her intended husband, should have and receive a jointure, charged and chargeable upon all and singular the property, real and personal, of both M. and W. That the eldest son of the marriage should have and become entitled to a perpetual annuity of £400 a-year, to issue out of and be charged upon all the real and personal estates which M., or W., or either of them, should be seized or possessed of or entitled to; subject, nevertheless, to such jointure as should be appointed for the wife of M., and to the jointure provided for H.; and subject to a further £2000 as a provision for the younger children of the intended marriage. *Held*, that the £2000 was not charged upon the rentcharge of £400 a-year; and that the proper fund for the payment of the £400 a-year and the £2000, was the residue of the real and personal estate of which M. and W., respectively, should die seized, after payment thereof of all their debts, whether by judgment, specialty, or simple contract.—*Ennis v. Smith*, Jon. & Ca. 400. (E.E.)

2. By deeds of settlement and appointment £15,000 were provided as portions for daughters, to bear interest from the death of the father. By a subsequent re-settlement, a sum of £6000 was provided for the daughters, in addition to the portions already secured for them; but there was no mention made of interest on this £6000. In the same deed provision was expressly made for payment of interest upon other sums thereby directed to be raised. *Held* (affirming the judgment of the M. R., 1 Fl. & K. 151, that interest was not payable

upon that £6000.—*Clayton v. Glengall*, 1 Dr. & War. 1; 1 Con. & L. 311. (C.)

3. Testator having, by marriage settlement, a power of appointment and distribution over £5000, by will appointed same payable with interest from his death. He gave a further £3000 to be divided equally among his children, "subject to the same limitations, in all respects, as the said sum of £5000." Both sums were charged upon the same lands. *Held*, that the £3000 was not to bear interest.—*Bredin v. B.*, 1 Dr. & War. 494. (C.)

4. By marriage settlement, a term of 500 years was limited to secure £4000 for younger children, to be paid in such shares and at such times as the settlor should appoint; in default of appointment, share and share alike; to be paid to the sons at twenty-one, and to the daughters at that age, or day of marriage. The trustees were empowered, after the decease of the settlor, to raise the interest of the portions at £6 per cent., and apply it for the maintenance of the children. At the death of the settlor some of the children had attained their age, and others were infants. *Held*, that as the portions were payable to such of the children as were of age, the whole sum should be raised.

That the portions of the minors should be invested, and transferred to their separate credit, with liberty to them to apply on their coming of age or marrying.—*Leech v. L.*, 2 Dr. & War. 568. (C.)

5. By settlement on the marriage of J., lands to which his father, K., was entitled absolutely, were conveyed, upon trust to permit K., and his heirs and assigns, to take the rents until the death of J.; then to secure a jointure of £300 a-year for the intended wife of J., notwithstanding that K. might be living. There was a power to raise £4000 for younger children of the marriage, to be paid to the sons at twenty-one, and to the daughters at twenty-one or marriage, "if such respective times of payment happen after the death of J.; but if before, then within three months after the death of J., and not before, unless with the consent of K., if living, and if dead, of J. K., having died, and having devised the lands to his son A., J. appointed £3960 to a child, who had attained twenty-one. *Held*, that the appointee could, with J.'s consent, raise the portion in J.'s life.—*Kiely v. K.*, 2 Con. & L. 334; 4 Dr. & War. 38; 5 I. E. R. 435. (C.)

6. A marriage settlement created a term of years upon trust to raise a sum, not exceeding £2000, for portions for younger children of that marriage. In default of appointment by the settlor, that sum was to be divided equally amongst such younger children, and to be payable to sons on attaining age, and to daughters at eighteen or marriage, whichever should first happen: proviso—that, if any younger child died under age and unmarried its share should go to the survivors; if but



"one younger child, son or daughter, the same should have and be entitled to the sum of £1000, and no more; and that, in that event, the sum of £1000, and no more, should be raised." There were two younger children. Both survived their parents, but one died under the age of eleven years. The representative of the survivor filed a bill claiming the whole £2000. *Held*, that, in the events which had happened, £1000 only was raiseable.—*Clarke v. Jessop*, Dr. Rep. temp. Sugden, 301. (C.)

1. By marriage settlement the real estate of the husband was limited to him for life; at his death to trustees for a term of years; and subject thereto to the first and other sons of the marriage in tail male; remainder to the husband in fee. The trusts of the term were declared to be for raising portions for younger children of the marriage "in case there should be one or more child or children of the marriage, besides an eldest or only son." There were two daughters only, and no son, issue of the marriage. On the marriage of one of the daughters the father settled upon her, and her husband, and her children, an annuity of greater value than her share of the portions under his own marriage settlement, and charged that annuity upon the estate which had been subject to that settlement. Upon the marriage of the second daughter he made for her a pecuniary provision, which was declared to be in satisfaction of her portion under the settlement; and by will devised the estate which had been settled to his two daughters, in the same manner as it would have come to them if he had died intestate. *Held*, upon the construction of the settlement, that the portions were not raiseable in the events that had happened, there being no son of the marriage.

When children are entitled to portions, and the estate descends among them, none of them are entitled to claim their portions against the others.—*Walcott v. Bloomfield*, 6 I. E. R. 227. (C.)

2. Lands were settled to the use of A. and B., his wife, for their lives, and the life of the survivor of them; and, after the death of the survivor, to the use of the trustee, for 300 years, upon trust, if there should be (which happened) no children of A. and B. living at the death of A. other than X. and an eldest son, to raise £5000 as the portion of X., to be paid to her on attaining twenty-one or marriage, with interest in the meantime at the rate of £5 per cent., for her maintenance, &c.; but, if there should be any children of A. and B. living at the decease of A., other than an eldest son and X., to raise £10,000 (including the first-mentioned £5000) as portions for all the children of A. and B. (except as aforesaid) as A. and B., or the survivor, should by deed or will appoint; in default of such appointment, among all such children equally, at twenty-one or marriage; with interest from the decease of the survivor of A. and B. in the meantime; and until their portions should

become payable, for their maintenance and education. A. died, leaving B. surviving. *Held*, that X. was entitled to have her portion raised, by sale of the reversionary term of 300 years, with interest from the time of A's death.—*In re Ayward's Estate*, 13 I. C. R. 472. (L.E.C.)

## XII. WIFE'S RIGHTS AND POWERS UNDER A SETTLEMENT: HOW THEY MAY BE LOST OR WAIVED.

3. By marriage articles, the husband was entitled to the wife's personal estate; he covenanting to secure her a jointure. Thirty years afterwards it appeared that, by reason of his want of property, the covenant had not been performed, and that it was not likely to be performed. A legacy bequeathed to the wife, and decreed in an administration suit to be paid to her and her husband, was in Court. On a bill filed by her—*Held*, that the articles were illusory, and that the money in Court should be transferred to her suit, and settled so as to secure a provision for her and her children.—*Irvine v. I.*, 5 I. E. R. 373. (R.)

4. A., an infant, by ante-nuptial articles, covenanted to settle her real estate. After attaining age, and during coverture, she, in pursuance of the covenant, executed a settlement, but did not levy a fine. *Held*, that she was not bound either by the settlement, or by the articles.—*Brown v. M'Clintock*, 7 I. E. R. 347. (C.)

5. Marriage articles, containing a bare covenant that, if the husband should die in the wife's lifetime, without leaving issue, she should be entitled to one-half of whatever real or personal estate he should die seized or possessed of, and containing no provision in the event of his dying leaving issue. *Held*, from the general intent apparent on them, that they barred the widow of dower out of the remaining moiety of the husband's estates.

The effect of election against a will is, to give the property, which was devised to the party electing, to the devisees disappointed by the election. It never goes as if undisposed of by the will.—*Hamilton v. Jackson*, 8 I. E. R. 195; 2 Jon. & L. 295. (C.)

6. By marriage articles, money was vested, in trust, to permit the wife, during the joint lives of herself and her husband, to receive the interest to her separate use; and, after the death of the husband, in trust for her and her assigns during her life, if she survived him; and, after the death of the wife, as to one moiety, upon specified trusts, and as to the other moiety, in trust, for the sole absolute use of the wife, to be disposed of by her in such manner as she might appoint by any deed during her coverture, or by any will to be duly executed by her, notwithstanding her coverture. *Held*, that the wife could not dispose of her entire estate in the latter

moiety of the fund, in the husband's lifetime; and therefore no valid release could be given for it.—*Nixon v. N.*, 8 I. E. R. 254; 2 Jon. & L. 416. (C.)

1. A marriage settlement recited an agreement by the father of the intended wife, to grant the husband, as a marriage portion, annuities to be issuing out of distinct lands held on terminable leases. *Testatum*: that, in consideration of the marriage, and to grant a marriage portion to the husband, and to secure a jointure for the wife, if she survived, the settlor conveyed the lands, on trust, to suffer the husband, during the lives of himself and his wife, to receive to his use, out of the lands, *nominatum*, the several recited annuities; after his death, to suffer the children to receive them, in such shares as husband or wife should appoint; in default of appointment, equally; if the wife survived the husband, and none of their issue were then alive, to permit her to receive those annuities during life, with power to distrain for them: proviso, that, if she survived her husband, and there were children living at his death, the trustees should pay her, for life, out of all the lands, or suffer her to receive, out of the rents thereof, an annuity of £150, in bar of dower, with power to distrain for it. *Held*, that that annuity was in addition to the annuities granted to the trustees, and mentioned in the recitals, and was not payable out of them.—*Blair v. Nugent*, 3 Jon. & L. 668. (C.)

### XIII. IN BAR OF DOWER, THIRDS, &c.

2. When property was, by an ante-nuptial settlement, settled upon a wife, "as and for her jointure, in full lieu, bar, and satisfaction of any dower or thirds, at common law, out of all or any of the estates, real, personal, or freehold, of which G. (the husband) now is, or at any time hereafter shall become possessed or entitled to"—*Held*, to bar the wife's right to any part of the personal estate of the husband dying intestate.—*Gurly v. G.*, 2 Dr. & Wal. 463. (C.)—[*Affid.*: 8 Cl. & F. 743.]

3. Lands, the property of A., held under leases for lives renewable for ever, and for long terms, were, upon the marriage of A. with B., conveyed, upon trust, to receive the rents, &c., and pay them to A., for life, so long as he should continue solvent, and able to support B., and no longer; and from his death, or his becoming insolvent, failing in his trade, or being unable suitably and competently to support B., to pay the rents to B. for her life, and for her own sole and separate use. *Held*, that this settlement did not bar B. of her right to dower out of fee-simple estates acquired by A. since his marriage.—*Fyan v. Henry*, 2 Dr. & Wal. 556. (C.)

4. In marriage articles, a covenant by the husband to provide a jointure of £200 sterling per an., to be levied on the lands of D. and B., though the jointure be paid, will not bar

the wife's right to her distributive share of the personal estate.—*Creagh v. C.*, 8 I. E. R. 68. (C.)

5. By marriage settlement, £400, the wife's fortune, was given to the husband. Some terminable interest was conveyed by his father to trustees, to pay the wife, if she survived, a jointure of £10 per an. The husband covenanted that, if these properties should fail or be deficient, all the real and personal estate of which he should die seized, &c., should be vested in the trustees, to raise £400, or buy an annuity of £40 for the wife. *Held*, sufficient to bar her right to dower.—*Killen v. Campbell*, 10 I. E. R. 461. (C.)

6. A marriage settlement contained a clause that the provision thereby made and intended for the wife, in the event of her viduity, should be accepted, in full lieu of dower or thirds, to which she might be entitled at common law, or otherwise howsoever. *Held*, that she was barred of her share of her husband's personal estate under the Statute of Distributions.—*In re Burgess's Trusts*, 11 I. C. R. 164; 6 I. Jur. N. S. 12. (R.)

### SETTLEMENT.

#### — Of Family Disputes, and Family Arrangements.

7. In 1800, E. married the sister of his deceased wife, and had sons and daughters by her. His nephew, N., entitled in remainder to estates expectant on E.'s death without issue male, threatened to institute a suit to invalidate E.'s second marriage. To avert this suit, a compromise was entered into. Thereby N., for value, covenanted not to disturb the marriage. E. acted on that deed until his death in 1838. In 1840, ptf., E.'s executor and eldest son by the second marriage, filed a bill to have it set aside as against public policy. *Held*, that the bill should be dismissed, with costs.

When parties cannot be restored to their original rights, it requires a very strong case to induce the Court to interfere.

Family arrangements, to terminate litigation, especially on questions of legitimacy, are much favoured by the Court.—*Westby v. W.*, 4 I. E. R. 585; 2 Dr. & War. 502; 1 Con. & L. 537. (C.)

8. Securities obtained from the ptf. for his wife, as a compromise of doubtful rights, but under the threat and apprehension of arrest, and without adequate consideration or advice, set aside.—*Scott v. S.*, 11 I. E. R. 74. (C.)

9. The Court is not bound to make an order for sale under the I. E. Act, if it would not decree a sale in a plenary suit.

By deed between father and son, for large consideration from the son, his object being to preserve B. in the family, the lands of A. and B. were conveyed to a trustee in trust to sell A., in the first instance, to pay incumbrances and debts of the father; and as to

B., subject to so much of the debts and incumbrances as should remain unpaid by the sale of A., in trust to raise a sum to pay them, and subject thereto to the father for life, remainder to the son in fee. The Court refused to make an order for the sale of B. on the father's petition, a part of A. remaining unsold.—*Ex parte Kennedy*, 111 E. R. 171. (R.)

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#### SEVERANCE.

*See ESTATE, VI.*

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#### SEWERS.

*See CANALS, &c.*

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#### SHANNON NAVIGATION.

*See DRAINING AND DRAINAGE.*

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#### SHARES, AND SHAREHOLDERS.

*See JOINT-STOCK COMPANIES.*

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#### SHERIFF.

[As to his duty in summoning a jury for trial of an issue in the Court of Ch., *see* 21 & 22 Vic., c. 27, s. 3; Sheriffs Act, 5 & 6 W. 4, c. 55.]

1. A sheriff, refusing to try to execute an attachment issued to compel an appearance in an equity suit, will be attached.—*Morgan v. Copeland*, 1 Jones, 248. (E.E.)

2. A deed of deputation, whereby a high sheriff appoints a sub-sheriff, and which provides that the first £2400 received by the sub-sheriff for fees in the office shall be paid to the high sheriff; the surplus, if any, to the amount of £800 to the sub-sheriff as a salary; and the further surplus, if any, to the high sheriff, is not illegal, or in violation of the 12 G. 1, c. 4.—*Drummond v. Ponder*, 1 I. E. R. 223. (C.)

3. A sheriff is entitled to full indemnity for all costs incurred by him in relation to a seizure under a *fi. fa.* issued out of this Court, including the costs of a motion to enlarge the return.—*Bowyer v. Blair*, Fl. & K. 586. (R.)

4. The recognizance of a tenant under the Court, and of his sureties, is not a debt due to the Crown. Upon the execution of a *levari* grounded on such recognizance, the sheriff is only entitled, under the equity of the 6 Anne, c. 7, to such fees as by that Act he should have upon the execution of a *ca. sa.*, or *fi. fa.*, at suit of a subject—i. e., to 1s. on the first £100, and 6d. on the residue of the sum levied by virtue of the writ, the 21 & 22 G. 3, c. 20, not applying to such an execution.

The *levari* having been marked for £944, the sheriff, on the 21st Dec. 1839, levied £319.

3s. on account; and on the 11th of June 1840 received the balance, £624. 17s., but did not pay over the amount until the 1st of May 1841. He had received from the debt. in execution £73. 10s. for his fees upon the execution; a further £50 for forbearance; and afterwards deducted from the sum levied £49. 14s., for fees upon the execution. The Court declared him entitled to £26. 2s., and no more, for fees, and ordered him, within ten days, to refund the £73. 10s. and the £50, and also the difference between £49. 14s. and £26. 2s., with interest at £6 per cent. from the time of the payments; and also to pay interest on the sum levied for the time he held it in his hands, and all the costs of the motion as between solicitor and client.

And he must further pay, as between solicitor and client, Mr. Creed's costs of this motion, and of all proceedings connected therewith. A sheriff or other officer of the Court may always be certain of its protection, so long as he acts in the proper discharge of his office; but when I find such officer abusing his authority for the purpose of oppression or fraud, I shall ever feel it my duty to visit him with the severest punishment of the Court.—*Creed v. C.*, 4 I. E. R. 299; Fl. & K. 396. (R.)

5. A sheriff is not entitled to poundage under the 12 G. 1, c. 4, for executing a writ of *levari* against a receiver and his sureties bound by recognizance in the Court of Ch.

The sheriff is not entitled to fees under 6 Anne, c. 7, as between party and party, when the execution has no sum certified under the 1st sec. of that Act.—*Reg. v. Phipps*, 2 I. Jur. 73. (C.)

6. The sheriff ought not to be made a party to a cause petition for an injunction to restrain a sale by him of chattels which, after seizure, have been found to be the property of the execution debtor.—*Jackson v. Rossiter*, 2 I. Jur. N. S. 411. (R.)

7. The debt. in an execution being the registered proprietor of shares in a ship, a *fi. fa.* was delivered to the sheriff. The creditor's solicitor, by direction of the sheriff, procured the certificate of registry from the ship, and delivered it to the sheriff, who retained it, and was registered at the Custom-house, under the Merchant Shipping Act, as owner of the shares. They were sold by him, and transferred to the purchaser by bill of sale, which was registered. *Held*, that the seizure was effectual, although the sheriff had not gone on board the ship; and that the property in the shares was regularly transferred by the bill of sale.—*Harley v. H.*, 11 I. C. R. 451. (R.)

8. When property is sold under a *fi. fa.*, with notice to the execution creditor, of an act of bankruptcy committed by the debtor, the assignees are entitled to damages, besides the produce of the sale. The execution creditor must pay the damages, together with

the costs, of which the sheriff must bear a portion.—*Re Nolan*, 6 I. Jur. N. S. 71. (B.)

1. The sheriff is not entitled to a fee of £3. 8s. for summoning a special jury for a trial in the Court of Pr.; and, having been paid that fee, under protest, by the ptf.'s attorney, was ordered to refund £2. 2s., with costs.—*Richardson v. R.*, 6 I. Jur. N. S. 247. (P.)

2. Money in the sheriff's hands, levied under an attachment for costs awarded by a decree, remains in *custodia legis*, and is not, without further order, the property of the party who has issued the attachment.

An attachment for costs was issued by A. and B. (A.'s solicitor) against C., who paid the amount to the sheriff, and lodged with him a sequestration for a larger amount against A. *Held*, that the sheriff was not justified in paying the amount received on the attachment against C. to the sequestrators, without the order of the Court.

Costs are decreed to be paid by C. to A. or B., his solicitor. An attachment is delivered to the sheriff. C. who has a demand against A. issues a sequestration for it, pays the costs to the sheriff, and lodges the sequestration with him. *Semble*—If the money be paid into Court, B.'s lien for costs will prevail over C.'s sequestration.—*Williams v. Reeves*, 12 I. C. R. 173. (R.)

3. A party, having sued out a writ of *fi. fa.*, declined to indemnify the sheriff against claims made to goods seized by him. The Court, therefore, extended the time for making a return to the writ, with liberty to the sheriff to apply to be discharged from making a return, if, before the extended period expired, the party did not give him an indemnity, or take proceedings to restrain actions by the claimants against the sheriff.—*Marshall v. Letterkenny Ry. Co.*, 17 I. C. R. 152. (R.)

#### SHIP AND SHIP OWNERS.

— *Injunction to stay Sailing of.* See PRACTICE, INJUNCTION—JURISDICTION, IV—PRIZE—STATUTES, CONSTRUCTION OF, II.—[See Merchant Shipping Act, 17 & 18 Vic., c. 104.]

##### I. IN GENERAL.

##### II. REGISTRY OF, AND REGISTRY ACTS.

##### III. SALE AND TRANSFER OF.

##### IV. MORTGAGE, HYPOTHECATION, LIEN, &c., ON SHIP'S FREIGHT OR CARGO.

#### III. SALE AND TRANSFER OF SHIPS, &c.

4. An execution debtor being the registered proprietor of shares in a ship, a *fi. fa.* was delivered to the sheriff. The creditor's solicitor, by the sheriff's direction, procured the certificate of registry from the ship, and delivered it to the sheriff, who retained it, and was registered at the Custom-house, under the Merchant Shipping Act, as owner of the shares. They were sold by him, and transferred to the purchaser by bill of sale, which

was registered. *Held*, that the seizure was effectual, although the sheriff had not gone on board the ship; and that the property in the shares was regularly transferred by the bill of sale.—*Harley v. H.*, 11 I. C. R. 451. (R.)

#### IV. MORTGAGE, HYPOTHECATION, LIEN, &c., ON SHIP'S FREIGHT, OR CARGO.

5. The mortgage of a ship, under the Merchant Shipping Act 1854, transferred the legal right to the freight. A mortgage of a ship was effected, with a power of sale, which was not to be exercised until the 11th of June 1858. The vessel was chartered on the 25th of March 1858, by the mortgagor, who on the 1st of May made an equitable assignment of the freight. The ship was sold under the power of sale. *Held*, that the purchaser was entitled to the freight.—*Dobbyn v. Comerford* 10 I. C. R. 327. (R.)

#### SHORT BILLS OF EXCHANGE.

See BANKRUPTCY, XI.

#### SHOWING CAUSE AGAINST ORDER.

See PRACTICE, ORDER.

#### SIGNATURE.

- *Of Bankrupt's Certificate.* See BANKRUPTCY, XVI.
- *To Answer.* See PRACTICE, ANSWER.
- *Of Plea.* See PRACTICE, PLEA.
- *Of Counsel.* See PRACTICE, SIGNATURE OF COUNSEL.

#### SIMONY AND SIMONICAL BONDS.

See ECCLESIASTICAL PERSONS, IV.

#### SIMPLE CONTRACT CREDITORS.

See DEBTOR AND CREDITOR, III.

#### SLAVES.

#### SMALL TITHES.

See TITHES, V.

#### SMUGGLING.

See ILLEGAL TRANSACTIONS.

#### SOLICITOR: SOLICITOR AND CLIENT.

- *To Fiat.* See BANKRUPTCY, X.
- *To Fiat: undue Advantages taken, or Purchases made by.* See FRAUD, VII.
- *Generally: undue Advantage taken by, over Client, or Purchases made by.* See FRAUD, VII.
- *Generally.* See PRACTICE, COSTS.

[See PRACTICE, COSTS—PRINCIPAL AND AGENT—STATUTE, CONSTRUCTION OF II.]

- I. CONSTITUTION OF CHARACTER OF SOLICITOR: ACTING AS SUCH.
- II. PARTNERSHIP WITH UNQUALIFIED PERSONS.
- III. STRIKING OFF THE ROLL.
- IV. SUMMARY JURISDICTION OVER: ADMISSION OF.
- V. RIGHTS, DUTIES, AND PRIVILEGES OF SOLICITOR, PERSONALLY, AND ON BEHALF OF CLIENTS—[RESPECTING HIS BILLS OF COSTS, see PRACTICE, COSTS—PRACTICE, PRIVILEGE FROM ARREST.]
- VI. SOLICITOR'S LIABILITIES: WHEN PERSONALLY LIABLE FOR COSTS, OR OTHERWISE.
- VII. THE CONSTITUTION OF RELATIONSHIP OF SOLICITOR AND CLIENT: HOW CLIENT IS BOUND BY SOLICITOR'S ACTS: WHEN SERVICE OF PROCESS ON THE SOLICITOR IS GOOD.
- VIII. SECURITIES TO, AND PURCHASES BY SOLICITOR FROM CLIENT: DEALINGS AND TRANSACTIONS BETWEEN THEM.
- IX. OF PROFESSIONAL CONFIDENCE.
- X. SOLICITOR'S LIEN.

1. *In General.*
2. *How affected by Retirement or Withdrawal, Discharge, &c.*
3. *Effect of taking a Security: how lien may be otherwise lost or extinguished.*

#### I. CONSTITUTION OF CHARACTER AS SOLICITOR: ACTING AS SUCH.

[See The Solicitors Act (12 & 18 Vic., c. 58); 29 & 30 Vic., c. 84.]

1. An attorney filed a bill in the name of the assignee of an insolvent, and obtained a decree to account. The nominal ptf. then applied to have the bill taken off the file, because the attorney had used his name without his knowledge or consent. At the bar, he only asked to be indemnified against costs, the suit being for the estate's benefit. The application was refused, with costs.—*Bell v. Dawson*, H. & J. 801. (E.E.)

2. An attorney, if not acting as such for his client on a particular occasion, may throw off that character, and exercise his independent rights.—*Austin v. Chambers*, 6 Cl. & F. 1.—[See also, 3 Dr. & War. 178; Dr. Rep. temp. Sug. 85. (C.)]

3. No person can be admitted an attorney who has not been bound. A. was admitted an attorney of this Court, having been bound for five years, but only served a few days; it appearing that he was fully qualified, and that inconvenience would otherwise result to the clients of his brother, who had been an attorney, and had recently died.—*In re Symes*, 7 I. E. R. 839. (E.E.)

4. The guardian in a minor matter may change his solicitor at his own discretion.—*In re Balls*, 10 I. E. R. 187. (C.)

5. A., having entered the Queen's Inns as a law student, and there kept five Terms, and afterwards, wishing to become an attorney, entered the office of a solicitor and served two Terms in his office prior to the execution of his indentures. Having served eighteen Terms afterwards, he applied, with the consent of the solicitor, to get credit for the five Terms kept by him as a law student, or for the two served in the office before the execution of his indentures, so as to make up the period of twenty Terms; and to be admitted an attorney of this Court. The application was refused.—*In re Tierney*, 10 I. E. R. 178. (E.E.)

6. Deft. in a cause, who is a solicitor, but has not taken out his license, is not entitled to sign his answer as solicitor.—*Wildridge v. Whithorne*, 2 I. Jur. 185. (C.)

7. A deft. in a cause, who is a solicitor, but has not taken out his license, is not entitled to sign an answer as solicitor.—*Wildridge v. Whithorne*, 2 I. Jur. 185. (R.)

#### II. PARTNERSHIP WITH UNQUALIFIED PERSONS.

##### III. STRIKING OFF THE ROLL.

8. A., agreeing to be bound to a solicitor paid to him the amount of the stamp-duty, Queen's Inns fees, &c., and shortly afterwards paid his apprentice fee, and made the usual affidavit before one of the Masters, under the impression that everything necessary to constitute him an apprentice had been performed. He served five years. The solicitor did not pay the stamp-duty or prepare any indenture of apprenticeship until after the five years had elapsed. *Held*, that A. had made a case to be admitted an attorney of this Court.

In granting the application the Court did not allow the conduct of its officer to pass unnoticed, but required him to show cause why he should not be struck off the roll.—*In re Power*, 10 I. E. R. 175. (E.E.)

#### IV. SUMMARY JURISDICTION OVER: ADMISSION OF.

9. An attorney who claims a lien for his costs on the title deeds of a freehold estate decreed to be sold, which lien was acquired before the institution of the suit, will be ordered to deposit them in Court, without prejudice to his lien, or to his making it available against the purchase-money of the lands; and, having established his claim, he is entitled to have it paid out of the purchase-money.

*Quære*—Is he so entitled to be paid in priority to the demand of a judgment creditor, whose judgment was acknowledged before the attorney acquired the lien?—*Little v. L.*, 2 Jones, 270. (E.E.)

1. The solicitor, C., of a deceased client, D., having acted as such for D.'s executrix and devisee, was restrained at their instance from acting as solicitor for a creditor, J., in whose name he had filed a bill to raise the amount of a judgment debt out of D.'s estate, though J. had been C.'s client before C. became concerned for D., and though C. contended that he had been discharged, and insisted that it was not in his power to communicate anything which could injure the estate; all the material facts and documents having been, as C. alleged, put in issue by a bill previously filed by another creditor of D. Upon inspecting the two bills, it appeared, however, that a document, which C. had recommended to be kept secret, was stated more fully in the bill filed by C., than in the other bill; and that that further statement must have been made from inspecting the document. *Held*, that the Court would not permit a solicitor to disclose any communications made to him as such, nor would it speculate about their materiality: that the obligation to keep such communications secret does not cease on the client's death.

*Semble*—There is not any substantial distinction between the cases of a discharged solicitor and of one who refuses to act.

The application to restrain a solicitor may be made by motion in the cause in respect whereof the injunction is sought, and need not be made by petition.—*Biggs v. Head*, S. & Sc. 335. (R.)

2. R. had acted as family or assistant solicitor for debts. in a cause, from 1793 to 1817, when he was discharged by the debt. F., who immediately after filed a bill to impeach securities given by him to R. for services as a solicitor. This suit was compromised, and, in 1819, R. became solicitor for G., an adverse debt. in the cause, and acted as such for nearly 18 months against F., to the knowledge of F.'s law and land agent. On F.'s application, G. was restrained from R., who was restrained from being concerned for G., or giving him any advice or assistance in that or any other cause against F., the matter of which came to R.'s knowledge as solicitor for F., or upon which he had been consulted by or communicated with by F. in his capacity as solicitor.

This injunction was granted, although G. insisted on F.'s long acquiescence, and that he would suffer serious injury if it were granted after such delay; and although R. stated in his affidavit, that he had not obtained any information, the disclosure of which would prejudice F., and that he had not betrayed and did not intend to betray any confidence, or violate any trust reposed in him.—*Hobhouse v. Hamilton*, S. & Sc. 359, n. (R.)

3. B. filed a bill for the guardian of a female infant, and acted as the infant's solicitor until the cause abated by her marriage, when her husband peremptorily refused to revive it. B. then ceased to act as solicitor in the cause, though his name remained as such on record. He prepared the infant's marriage settlement; and, after the marriage, acted as

the husband's solicitor, with a view to effect a loan to pay off all charges on the wife's estate. B. finally offered to take an assignment to himself of those charges, upon terms. The husband declined to accept the loan on the terms proposed. B. filed a bill in the name of C., a mortgagee, to foreclose a mortgage on the wife's estate. The statements therein greatly resembled those in the first bill, except that a charge was made directly contrary to counsel's opinion. C. had been a party to the first cause, in which his mortgage, disputed at first, was finally fully admitted. B. had been C.'s solicitor long before he became concerned for the husband and wife. At their instance, B. was restrained from acting as C.'s solicitor in the second cause, and C. was restrained from employing him.—*Brady v. Lawless*, S. & Sc. 365, n. (R.)

4. J. filed a bill in the name of W. and wife, and their children, charging gross breaches of trust by the trustees, C. and T., but chiefly by C. J. had been employed by W.'s wife, who told him that W. had gone to reside abroad, but the bill described W. as then of the city of Dublin. The wife having interfered with the proceedings in a manner which J. deemed improper, he intimated his indifference to being further employed as her solicitor; and he was accordingly changed. His costs were paid. Before any further step was taken, it was proposed to J. to become again solicitor for ptf's. He declined, and soon became solicitor for T., in whose name he served a notice calling upon ptf's. to give security for costs, because they resided in the United States. Ptf's. moved to restrain T. from employing J., and to restrain J. from acting for T. To oppose the motion, J. filed an affidavit stating (amongst other things), that he considered T.'s interests very like ptf.'s; and that there had not been any confidential communication made to him, nor was there any such in the case. He further relied upon being a discharged solicitor. *Held*, that the injunction should be granted.—*Waller v. Fowler*, S. & Sc. 369, n. (R.)

5. As a general rule, from which there will be no deviation unless under peculiar circumstances, the Court, in computing the period of apprenticeship to an attorney, will not allow credit for time elapsed before the payment of the stamp-duty upon the indentures.—*Ex parte Sterne*, 2 I. E. R. 378. (E.E.)

6. The Court will not, on motion, refuse to allow the usual fees payable on the swearing in of the attorneys to the Secondary, the Tipstaff, and the Deputy Crier. Those fees are now legally established.—*In re Price*, Long. & T. 584. (E.E.)

7. The Court will not exercise its discretion in relaxing the rule prescribed by the statute concerning the period of an attorney's apprenticeship, when the apprentice had been incapacitated by illness from serving five of the twenty Terms, though it be sworn that he had attended his master's office for three years before he was bound, and his master had consented to his being now sworn.

*Semble*—The Court will not take notice, in such cases, of the applicant's family affairs, except where a father has been an attorney, and there is danger of the business of the office being lost to the family.—*In re Dease*, Long. & T. 654. (E.E.)

1. *Prima facie* the Crier and the Tipstaff are entitled between them to the fee of one guinea upon the admission of attorneys, but the Court-keeper is not entitled to the fee of ten shillings and six pence. The Secondary is entitled to a fee of one guinea for swearing attorneys into office.—*In re Admission of Attorneys*, 4 I. E. R. 685. (R.E.)

2. The Court will not vacate the enrolment of an indenture of apprenticeship to an attorney, on the ground that the Benchers were deceived; and ought not to have admitted the party to become an apprentice.—*In re M'Colgan*, 5 I. E. R. 481. (E.E.)

3. The Court has jurisdiction, in a proper case, to vacate the enrolment of the indentures of apprenticeship of an attorney.

Neither the humbleness of the origin of the applicant, nor his having filled the office of a process-server of civil-bill process, nor his having been dismissed from that office for having violated a rule of the Assistant Barrister's Court, under the belief that it did not apply to him, nor his having on a particular occasion acted as bailiff in executing a *fi. fa.*, will disqualify him from becoming apprentice to an attorney; his character and conduct being in other respects unimpeached.—*In re M'Colgan*, 6 I. E. R. 207. (R.E.)

4. An apprentice to an attorney had not attended any of the Courts in Dublin during any Term in the fifth year of his apprenticeship; but after the fifth year, his master being then dead, attended the Courts for two Terms without having any master. His application for admission was refused.

*Semble*—Indentures cannot be assigned after five years from their date.

*Semble*—The sickness and accidents provided for in the 13 & 14 G. 3, c. 23, refer to the apprentice, and not to the master.

The Terms for attendance must be in the three years next preceding the application for admission.—*Ex parte Roberts*, 8 I. E. R. 507. (E.E.)

5. A., agreeing to be bound to a solicitor, paid him the amount of the stamp-duty, Queen's Inns fees, &c., and shortly afterwards paid his apprentice fee, and made the usual affidavit before one of the Masters, under the impression that every thing necessary to constitute him an apprentice had been performed. He served five years. The Solicitor did not pay the stamp-duty or prepare any indenture of apprenticeship until after the five years had elapsed. *Held*, that A. had made a case to be admitted an attorney of this Court.

In granting the application the Court did not allow the conduct of its officer to pass unnoticed, but required him to show cause why

he should not be struck off the roll.—*In re Power*, 10 I. E. R. 175. (E.E.)

6. This Court has not jurisdiction to order the personal representatives of a deceased solicitor to deliver up title deeds on which they claim a lien.—*Allen v. Jervoise*, 11 I. E. R. 583. (R.)

7. Any solicitor who nominates a solicitor's clerk or apprentice to the office of receiver will be suspended from practising in this Court.—*Geale v. Nugent*, 1 I. Jur. 319. (R.)

8. The Court has not discretion to dispense with the provisions respecting the period of a solicitor's apprenticeship, except, perhaps, in cases of fatality. Under the 1 & 2 G. 4, c. 48, s. 4, the Court refused to admit a graduate on a three years' apprenticeship, commenced more than four years after his degree had been obtained.—*In the Matter of A. B.*, 12 I. E. R. 237. (C.)

9. It is a matter of course to restore to the roll a solicitor who had been struck off at his own request, if no opposition be made by the Law Society, after notice served on them.—*In re M'Cormick*, 3 I. C. R. 491. (C.)

10. F. acted as managing clerk in town, of C., a country solicitor, and afterwards became C.'s apprentice. C. died before the completion of F.'s apprenticeship. The affidavits in the case stated that F. was fully competent to discharge the duties of a solicitor, and that the interests of the clients of C. would suffer much if deprived of F.'s aid. *Held*, that a sufficient ground for abridging his apprenticeship had not been shown, as the cases had not gone further than shortening the term for a member of a deceased attorney's family.—*In re Franklin*, 5 I. C. R. 261. (C.)

11. The apprentice of a deceased attorney ought not in general to be admitted an attorney, without serving the full statutory period, even though skilful and competent, and though many of the deceased master's clients may be desirous of obtaining his services as an attorney. Such indulgence has only been granted to the members of the family of the deceased attorney.—*Ex parte Carey*, 6 I. C. R. 152; 2 I. Jur. N. S. 165. (C.)

12. B., a graduate of Trinity College, was bound an apprentice to a solicitor. Before the term of apprenticeship expired, B.'s father died, leaving a widow and nine children, and a large arrear of business in his office. It was proved that B. was well acquainted with the business of a solicitor. An application that B. might be admitted a solicitor was granted; the Law Society not opposing the application, and the petitioner undertaking to carry on the business for the benefit of the family.—*Ex parte Booth*, 2 I. Jur. N. S. 281. (C.)

13. The Court has not jurisdiction to make any order respecting the admission, as a soli-

ctor, of a person who has not been bound.—*Ex parte Hilliard*, 71 C. R. 63. (C.)

**V. RIGHTS, DUTIES, AND PRIVILEGES OF SOLICITOR, PERSONALLY, AND ON BEHALF OF CLIENTS. RESPECTING HIS BILLS OF COSTS. See PRACTICE, COSTS. PRACTICE, PRIVILEGE FROM ARREST.**

1. A solicitor is privileged from arrest, *ex dono, morando, et redeundo* from Court, whilst in attendance on a motion or cause. The arresting party, being aware that the privilege exists, will be ordered to pay the costs of the solicitor's application to be discharged, besides any other costs which his detention has occasioned.—*Re O'Neill*, S. & Sc. 78. (R.)

2. A solicitor's privilege from arrest is not confined to those cases only in which his personal presence is indispensable.—*In re Keane*, S. & Sc. 81. (R.)

3. An attorney is not privileged from arrest in execution, when he comes to Court to perform an act for his client, which a clerk could do as well.—*Salmon v. Ledwich*; *Salmon v. Kiernan*, S. & Sc. 83. (E.E.)

4. An attorney, if not acting as such for his client on a particular occasion, may throw off that character, and exercise his independent rights.—*Austin v. Chambers*, 6 Cl. & F. 1.—[See also, 3 Dr. & War. 178; Dr. Rep. temp. Sug. 85. (C.)]

5. If a solicitor be *bona fide* attending a motion or other proceeding in Court for his client, he is privileged from arrest. But when he was merely looking in Court for his counsel to consult him respecting the course to be pursued in the cause—*Held*, that he was not privileged.—*Longfield v. Carpenter*, 1 I. E. R. 349. (C.)

6. B. devised his real estate, subject to his debts and legacies, to his only son, J., in tail; and died in 1773. In 1802, J. deposited the title deeds with his solicitor; and, before 1813, incurred costs to a large sum, in suffering a recovery, and in the causes of A., B., and C. (R.'s younger children), instituted to raise charges to which they were entitled under the will, &c. In 1813, M., a specialty creditor of R., on whose debt J. had paid interest until 1811, filed his bill against J., and against A., B., and C., &c., praying execution of the trust to pay debts, and that his demand might be deemed charged on R.'s real estate. J. suffered the bill to be taken *pro confesso* against him, and died insolvent before the final decree. Some time previously, J.'s solicitor became concerned in this cause for B.'s representatives, and now refused to bring in the deeds for a sale under the decree, until J.'s costs incurred between 1802 and 1813 should have been paid. A., B., and C. were reported in priority to M., for payment of whose demand the residue of the fund would be insufficient. *Held*, that these costs, if rendered necessary by the will, should have been claimed at the

hearing, and been provided for by the decree; and that, therefore, the claim could not now be entertained; that, since it did not appear that any of these costs had been incurred before the title deeds came into the solicitor's possession, and since he had full notice of the will when they were incurred, he was bound by the trust, and had not any lien on the deeds as against M., R.'s specialty creditor, who had proceeded with due diligence and *bona fide*.—*Morgan v. Scott*, 2 I. E. R. 128. (R.)

7. A solicitor, who withdraws from conducting a suit because his client will not furnish the funds necessary to carry it on, has not such a lien for costs already incurred as entitles him to withhold from his client, and that client's new solicitor, such of the client's papers as are necessary to prosecute the cause effectually.—*Rutledge v. R.*, 2 I. E. R. 290. (R.)

8. It is to be presumed that legal advisers, in discharge of their duty to their clients, investigate suspicious transactions; and, before approving them, satisfy themselves that it is for the client's benefit to confirm them. *De Montmorency v. Devereux*, 2 Dr. & Wal. 410; 7 Cl. & F. 188; West, 64; 4 Jur. 403.—[Affg. 1 Dr. & Wal. 119. (C.)]

9. Several children appeared, and proceeded jointly by one solicitor, for a sum to which they were entitled in equal shares; and incurred costs to a considerable amount. Two of them having died, and there being a continuing litigation respecting the persons entitled to their shares, the solicitor in the meantime allowed the surviving children to draw out their shares of the fund without any deduction for the costs for which they were jointly and severally liable. He now applied for payment out of the sum (namely, the shares of the two deceased children) in Court, of all the costs. *Held*, that, in the first instance, these two shares were liable for that portion only of the costs, which the dead children should have paid if the others had contributed equally; and that it was the solicitor's duty to have taken care that the costs were borne equally by the several younger children.—*Crone v. O'Dell*, 3 I. E. R. 12. (R.)

10. The Court will not allow a bill to be filed without a solicitor's name attached thereto.—*O'Shea v. —*, Fl. & K. 666. (R.)

11. As a general rule it is improper to introduce into counsel's briefs both the original and amended bills.—*Higgins v. Bateman*, 2 Dr. & War. 70. (C.)

12. It is the right as well of a *prochein ami* of an infant ptf., as of any other suitor, to change his solicitor when he pleases, and to enter the usual side-bar rule for that purpose.

The solicitor of a next friend must not have interests adverse to the minors, nor be professionally bound to support adverse interests. Subject to that restriction, a next



friend may employ what solicitor he pleases.—*Langford v. Little*, 5 I. E. R. 343. (R.)

1. The Court would not enforce the terms of a contract, between two solicitors whereby the one, who was solicitor for minors in a matter and several causes, agreed, without notice to the Court or the friends of the minors, to hand over to the other, and the other agreed to undertake, the business on behalf of the minors, to be conducted by the latter in the name of the former, on the terms of getting half the profits; although the latter had, in pursuance of the contract, conducted the business for a year, and made large expenditures; such contract being at variance with the interests of minors and the policy of the Court. Both parties to such a contract being *in pari delicto*, the Court would not act for either of them.—*Ex parte Leech*, 5 I. E. R. 371. (R.)

2. O., a party and a solicitor in the cause, having been in attendance at the Master's office on a summons, left the office, and was arrested on a *ca. sa.* near Carlisle-bridge, which was out of the direction of, and beyond his residence in Jervis-street. *Held*, that the deviation had deprived him of his privilege from arrest.

In such cases, the question always is:—Whether the party was, at the time of the arrest, *bona fide* engaged in the business which he was required to execute?—*Heron v. Stokes*, 6 I. E. R. 125.

3. A consent to dismiss the bill without costs was signed by one of the ptf. on behalf of himself and another ptf. of imbecile understanding, and also by the third ptf.; but not by or with the privity of their solicitor. It was signed by the defts. and their solicitors. On a motion to make the consent a rule of Court—*Held*, that the signature of the solicitor was not essential to the validity of the consent, as the clients might compromise their claims without his assistance or privity; not however prejudicing any rights which the solicitor might have.

That the signature on behalf of the imbecile ptf. was a nullity, as he was not competent to authorise the act; and that the consent could not be made a rule of Court.

If a bill cannot be dismissed against all the ptf., it cannot be dismissed against any of them.

*Semble*—If one of the ptf. desire it, and the defts. assent, the Court will allow the bill to be amended by striking out the ptf.'s name; and then the other ptf. can make him a deft.—*Brangan v. Gorges*, 7 I. E. R. 221. (R.)

4. The solicitor for any person exercising a control over the minors' estate will not be appointed guardian of their persons.—*In re Johnstons Minors*, 2 Jon. & L. 222. (C.)

5. The Court has not jurisdiction in directing the taxation of a solicitor's bill of costs, to order any account of dealings between the parties, in which the solicitor did not act as

such, even though he has given credit for such items in the bill of costs.—*Sneyd v. Conroy*, 8 I. E. R. 469. (R.)

6. Ptf.'s solicitor is entitled to give out briefs and fees to counsel upon the day on which he sets down the cause to be heard *pro confesso*.—*Ivie v. Gahan*, 9 I. E. R. 223.

7. A conditional order to appoint a receiver under the Sheriffs Act having been obtained in the Court of Exchequer, the solicitor for another judgment creditor, who had knowledge of the Exchequer order, presented to the Lord Chancellor a petition for a receiver, suppressing the fact of the Exchequer order. The Court dismissed the petition, and directed that the solicitor should not have the costs of the petition against his client.—*Daly v. D.*, 9 I. E. R. 461. (R.)

8. An order to appoint a receiver should state that the Court has been informed by the petitioner's solicitor that no order for a receiver, over any part of the lands of the respondent, has been made either in this Court or the Court of Exchequer, unless a special case is made to appoint a second receiver.—*Clarke petitioner, M'Mahon respondent*, 9 I. E. R. 462. (R.)

9. The solicitor of a mortgagee obtained the carriage of the sale of the estate of a lunatic very soon after the investigation of the title for the purposes of the mortgage. *Held*, that he was not entitled to the costs of preparing the abstract, or for any matter performed before the investigation of the title.—*In re Bell*, 1 I. Jur. 349. (C.)

10. A solicitor is eligible to the office of Commissioner Extraordinary, but he will not be preferred if another competent person be found.—*Anon.*, 2 I. Jur. 185. (C.)

11. A deft., by his answer, objected to an interrogatory, because by answering it he might subject himself to pains, &c.; and by a plea declined to answer a part of the same interrogatory, because the subject of it came to his knowledge as solicitor to the other deft. *Held*, that the answer, being equivalent to a demurrer, the case did not fall within the 66th G Rule, and that the answer overruled the plea.

A bill to set aside leases for fraud made the solicitor who had prepared them a deft., charging him with being a party to the fraud, praying costs against him, and interrogating him as to his being privy to the fraud, and as to transactions regarding the preparation of the leases. The solicitor pleaded that he knew nothing as to the matters save as the attorney of the other deft., and therefore was privileged from giving discovery. The plea did not deny the fraud or the facts stated in the bill as evidence of it. *Held*, that the ptf., being entitled to relief, was entitled to the discovery as, incidental to the relief.

The privilege of a solicitor is confined to confidential communications with his client,

and does not extend to his own acts, though done in the character of solicitor.

A solicitor may be made a party to a bill to set aside a deed for fraud if he be a party to the fraud, and costs are prayed against him.—*Kelly v. Jackson*, 13 I. E. R. 129. (R.)

1. A solicitor was arrested on the direct way from the Taxing Master's office, but it appeared that before his arrest he had deviated considerably from the direct way. *Held*, that he was not entitled to be discharged.—*Walsh v. Wilson*, 1 I. C. R. 610; 3 I. Jur. 275. (R.)

2. As a general rule, each party to a contract for the purchase of lands should employ a separate solicitor; the same solicitor should not act for both.—*Meara v. Rogers*, 3 I. Jur. N. S. 108. (R.)

3. The solicitor in a cause gave the papers to A. to draw costs, and died. A solicitor, to whom the conduct of the cause was given obtained the papers from A., without paying the costs due to the solicitor, or making any agreement with his personal representative. *Held*, that a cause petition was the proper mode to proceed against the new solicitor to compel him to produce the deeds and papers, for the purpose of allowing the costs of the first solicitor to be taxed; and that he was bound to produce them.—*Worrall v. White*, 3 I. Jur. 140. (C.)

4. The M. R. may, under special circumstances, appoint a solicitor receiver: 41st G. O., 1850.—*Cromie v. Peyton*, 5 I. Jur. 142. (R.)

5. The solicitor of an opposing creditor informed the insolvent's solicitor, on the morning of the hearing, of his intention to persist in his opposition. The case was called on in the momentary absence of the creditor's solicitor; and, no one being present to oppose, a discharge was pronounced by the Judge. The creditor's solicitor, coming in immediately after, asked for a re-hearing. *Held*, that a solicitor does not, by communicating with the solicitor on the other side, lay him under any obligation, or constitute him his agent, to convey such a communication to the Court; and that the Court cannot, in such a case, annul or review the adjudication under the 233rd sec. of the B. and I. Act, on the ground that it was improperly or fraudulently obtained.

The discharge pronounced by the Judge, under the 212th sec., is, in itself, a final and conclusive adjudication. It is not necessary to its completeness that the written order, and the warrant to the gaoler (under sec. 219) should be made out by the officer of the Court.

When such an adjudication has been pronounced by the lips of the Judge, he has no power to set it aside under the 236th sec., on the ground that the discharge was a mistake.—*In re Logan*, 9 I. C. R. 569; 5 I. Jur. N. S. 41. (B.)

6. A solicitor, on the day next but one before the testator's death, prepared a draft will under which he, as residuary legatee, took a large pecuniary benefit. On that day of its preparation, the testator executed the will in the presence of two witnesses brought by the solicitor to witness the testator's signature. The will's validity having been questioned in a contested suit—*Held*, that the solicitor's evidence was admissible on his own behalf, but should be received with great jealousy and caution.—*Keogh v. Barrington*, Dr. Rep. temp. Nap. 1. (C.A.)

7. In suits to administer real and personal estate, when there are no specific incumbrances affecting the real estate, the petitioner is entitled to his costs out of the fund, in priority to all the creditors.

*Semble*—When two matters are consolidated, duplicate costs for carrying on the proceedings in them should not be allowed.

Observations on the practice of solicitors acting for several parties who have conflicting interests.—*Farrell v. Murphy*, 10 I. C. R. 42. (R.)

8. It was sought to deprive an attorney of his costs in insolvency, on the ground that he had not paid his license when the business was done. *Held*, that the fact of his license not having been during that period registered in the Insolvent Court, is not evidence that he was not duly qualified as an attorney of the Superior Courts within the meaning of the Act; and that permission to prove that fact by supplemental affidavit or *viva voce* testimony would not be granted.—*Re Reynolds*, 6 I. Jur. N. S. 356. (B.)

9. The solicitor having the carriage of the proceedings cannot act as solicitor for the purchaser in a claim for compensation against the funds; his duty in the one capacity being inconsistent with his duty in the other: his duty in the former character being to protect the estate from claims for compensation, and all similar demands.—*In re O'Callaghan's Estate*, 7 I. Jur. N. S. 86. (L.E.C.)

10. The rule of the Prerogative Court, that Proctors should not in any proceeding refer to private conversations, &c., had between them, remains in force, and applies to solicitors.—*Goslin v. G.*, 7 I. Jur. N. S. 306. (P.)

11. When an administrator has recovered a chattel interest in lands, by a decree declaring his costs to be duly charged on the estate, his solicitor cannot file a petition in his own name to realise his own portion of those costs.—*In re M'Allister's Estate*, 16 I. C. R. 134. (L.E.C.)

12. The solicitor for the ptfs. in a mortgage suit—being, as the mortgagee's executor, a co-ptf.—was only allowed costs out of pocket.—*Macartney v. Dickey*, 16 I. C. R. 409. (K.)

13. A. devised real estate in trust for her husband for his life; and directed the trustees

to sell and convey the property absolutely to him for a named sum, applicable to the purposes of the will, provided that he declared, within one year after her death, that he accepted the proposal.

*Semble*—The right of pre-emption to the husband was a gift. The trustees, therefore, were not bound to make out title to him, nor were they entitled to receive, out of A.'s assets, and to the prejudice of the persons entitled to the residue, the costs of making out title.

Solicitors having been employed by the trustees to make out the title, the costs were allowed against the trustees, personally, on taxation, under the Solicitors Act (12 & 13 Vic., c. 58), ss. 3, 4.—*In re Davison & Torrens*, 17 I. C. R. 7. (R.)

1. When a solicitor resides in the country, and carries on his Dublin business by an agent, special charges for attendances in Dublin may be allowed on taxation between solicitor and client, if the client knows that a special sum larger than that ordinarily chargeable is charged, and if the case was such as required the solicitor's personal attendance in Dublin.

*Semble*—Such a special charge should not be allowed for attending at the hearing, and the consultation before it.

On taxation between solicitor and client, there is not any inflexible rule against allowing a consultation or refresher fee of more than two guineas, if the larger fee was paid with the client's knowledge and authority.—*Belfast Harbour Commissioners v. Lawther*, 17 I. C. R. 147. (R.)

2. Order to amend (by striking out a mistakenly inserted item) a bill of costs which had been referred, but not lodged, for taxation.—*In re Abbott & Moore*, 17 I. C. R. 200. (R.)

#### VI. SOLICITOR'S LIABILITIES: WHEN PERSONALLY LIABLE FOR COSTS.

3. An attorney, who makes a person even a formal party, without his express consent, is himself liable for the costs incurred by the ptf.—*Peed v. Cussen*, Hayes, 66. (E.E.)

4. *Semble*—Deft.'s attorney, having given a written undertaking to pay ptf. whatever the deficit might be on a sale of the mortgaged premises under the decree in a foreclosure suit, will be compelled to perform it, notwithstanding his client's death.—*Bailey v. Daniell*, Hay. & J. 586. (E.E.)

5. After a decree for a sale, the solicitor for one deft., a mortgagee, who had been paid, but had not re-conveyed, having the mortgage deed in his possession, being made a party by a supplemental bill, and having admitted by his answer that he held the deed, having a lien thereon for costs incurred by the mortgagee, his client; on motion against him by ptf.; *Held*, that he must bring in the

deed, without prejudice to his claim against his own client.—*Plumptre v. O'Dell*, 1 I. E. R. 118. (R.)

6. If the solicitor, upon whom has been served the subpoena to hear judgment, refuses to endorse on the original an admission of the service thereof, he will be ordered to pay the costs rendered necessary by his refusal.—*Ross v. Wood*, 2 Dr. & Wal. 490. (C.)

7. If, in the bill, ptf.'s attorney wilfully describes ptf. as resident within the jurisdiction, when in fact he resides out of it, he will be ordered to pay the costs of the motion to stay proceedings until security for costs be given.—*Knox v. O'Brien*, 3 I. E. R. 62. (E.E.)

8. A ptf.'s solicitor, by neglecting to examine the tenants' leases lodged in the Master's office, caused a misdescription in the rental; and thereby necessitated a reference to the Master, to enquire and report whether the purchaser was entitled to any, and what compensation? *Held*, that the solicitor was personally liable to the costs of the reference.—*Taylor v. Gorman*, Fl. & K. 567; 4 I. E. R. 550. (R.)

9. Ptf.'s solicitor ordered to pay the costs of the day, in consequence of his non-attendance in Court when the cause was called on.—*Courtney v. Stock*, 2 Dr. & War. 251; 1 Con. & L. 366. (C.)

10. The costs of a suit to set aside a deed for fraud will not be given against a solicitor who was a party to the fraud, and is a party to the suit in respect of other liabilities, unless the bill prays them against him.—*Roddy v. Williams*, 3 Jon. & L. 1. (C.)

11. Injunction against proceedings on a judgment granted, after premitting the opportunity of pleading at law, when the neglect to do so was accounted for by the creditor's solicitor having said that he would proceed no further, if the lands were not subject to the judgment.

*Semble*—It is good cause against the appointment of a receiver under the Judgment Acts, that the party against whom the judgment was obtained was only a trustee of the lands.—*O'Neill v. Browne*, 9 I. E. R. 131. (C.)

12. It is the duty of solicitors not to take office copies without being authenticated. When the copy of depositions proved to be very incorrect, but was taken and paid for before it was compared or attested, the solicitor was ordered to pay the costs of the day.—*Morgan v. Roe*, 12 I. E. R. 21. (C.)

13. If a married woman, having separate property, petition under the 12 & 13 Vic., c. 77, s. 38, as a *femme sole*, her attorney will be personally responsible for the costs of the proceedings.—*In re Knox*, 2 I. Jur. 147. (I. E. C.)

1. A petition for sale, presented by a person who has sought the benefit of the Acts for Relief of Insolvent Debtors in England, will be dismissed with costs, to be paid personally by the solicitor presenting such petition, when the facts connected with the insolvency are suppressed in the petition, although the insolvent has not been finally discharged under those Acts.—*In re Nesbitt*, 2 I. Jur. 252. (I.E. C.)

2. £500 was lodged to the credit of the cause; and £33 thereof had been directed to be paid to a third party. The owner's solicitor irregularly drew out the £500, and handed the whole sum to the owner. The Court directed the owner to pay the £33; and, in default, that the solicitor should make it good.—*In re Devereux's Estate*, 4 I. Jur. 16. (I.E.C.)

3. A., executrix and trustee of £400, lent it on unauthorised security. D., a solicitor, acted for A., in negotiating the loan. D. was aware of the nature of the fund, and that the loan was a breach of trust. The borrowers were D.'s clients. He omitted to disclose to A. facts within his knowledge, which showed that the loan was in danger of being lost. About one-fourth of the fund was received by D., for his own use, in part, as payment of money previously owed him by the borrowers; and in part as costs and commission in relation to the loan. The entire sum was lost by the insolvency of the borrower. *Held*, on a cause petition, filed by the c. q. t., that D., by his conduct, had incurred the liability of a trustee; and was bound to make good the fund.—*Alleyne v. Darcy*, 4 I. C. R. 199. (C.)

4. A solicitor who concurred with his client in obtaining payment to her of a sum, stated in the final schedule of incumbrances to be due to the representative of a deceased person, on an untrue representation to the officer of the Court that she was the party entitled, having, with knowledge of circumstances which should have led to enquiry, neglected to investigate his client's right, was ordered to replace the money, although no fraud or collusion was proved against him.—*In re Keogh*, 4 I. C. R. 288. (P.C.)

5. W., brother-in-law of L., a solicitor, having occasion to borrow £500, L. wrote to C., who had been his client, requesting a loan on the security of W.'s estate, which he described as of ample value. C. replied, "I can only lend the money on the condition of, first, a letter from you stating that you know Mr. W. to be good and valid security for £500; and, secondly, the bond to be witnessed by some respectable person with whom I am acquainted." L. answered; "I cannot have the least hesitation in undertaking that the security is good, and should not have mentioned it to you, but that I am perfectly satisfied on the subject." C. then sent the money to L., who forwarded it to W., and prepared a mortgage from W. to C., containing a covenant against incumbrances, save an annuity. There was also a collateral judgment to secure the

sum lent. On the mortgage being sent to C., he complained to L. of the deficiency of the security taken. L. wrote a further letter, stating the particulars of W.'s property, and alleging it to be worth £830 a-year. Eventually the property turned out to be insufficient to pay charges prior to C.'s mortgage and judgment. *Held*, that L. was bound to make good to C. the loss sustained by this investment.

A solicitor who makes to his client untrue representations, respecting a property on which the client is about to advance money, may be compelled to make good those representations, even though he may have been himself misled.—*Cleland v. Leech*, 5 I. C. R. 478; 1 I. Jur. N. S. 193. (C.)

6. When a solicitor puts forward a party to be appointed assignee; misdescribes him in a way calculated to mislead the Court; and thereby procures his appointment, he will be personally liable for the consequences. If a solicitor makes a payment to an assignee, with a view to rid himself of liability, and the assignee is directed to lodge the money, but dies before the order is complied with, it will be transferred to the solicitor, who must bring in the money. If he receives the proceeds of an insolvent estate, and undertakes to administer it, he will be treated as if he had been actually appointed assignee himself, and not merely as solicitor, and will be directed to pay the costs personally of creditors who bring the matter before the Court.—*In re Connery*, 5 I. Jur. N. S. 23. (B.)

7. A tenant, claiming a lease of lands part of this estate, and not being in possession, the Court refused to recognise the lease, stating that he must first, at law, recover possession. To an action of ejectment then brought, two other tenants then took defence, as to part of the lands. As to the residue, no defence was taken; for it the tenant marked judgment. On his motion, the Court allowed the lease as to that portion; but *held*, that omitting to defend the action was a breach of duty by the petitioner's solicitor, who would be liable for the loss sustained by the estate, if the creditors applied to that effect.—*In re Ronayne's Estate*, 6 I. Jur. N. S. 318. (L.E.C.)

#### VII. CONSTITUTION OF THE RELATIONSHIP OF SOLICITOR AND CLIENT: HOW CLIENT IS BOUND BY SOLICITOR'S ACTS: WHEN SERVICE OF PROCESS ON THE SOLICITOR IS GOOD.

8. Practice respecting applications by attorneys to be paid costs out of the funds decreed to their clients.—*Anon.*, 5 I. E. R. 38. (E.E.)

9. Taxation of costs between solicitor and client. Solicitor's fee for perusing and signing approbation of a draft deed submitted for his client's approbation, as an executing party.—*Westby v. Greene*, 5 I. E. R. 449. (R.)

10. The Court will not, on the application of the client, set aside an order made on a con-

sent signed by his solicitor, on the allegation that he acted without authority; there being no case of fraud or misrepresentation.—*Connally v. O'Reilly*, 11 I. E. R. 333. (R.)

1. V., solicitor for X., ptf. in a suit to raise a charge on lands, purchased in a trustee's name those lands at a sale under the decree conducted by him in a manner that showed great negligence, or a design to depreciate the property. The proceeds were insufficient to discharge V.'s demand for costs, without paying anything to X. Sixteen years afterwards, on a bill filed by X., and without any proof of the sale having been at under-value, it was declared void.

V., on his son's marriage, settled the estate, having himself, for all parties, prepared the settlement which recited the documents connected with the purchase. *Held*, that although, when a solicitor, a vendor, acts for the vendee, his knowledge is not always constructive notice; yet that doctrine was inapplicable to this case, and that the son, his wife, and his children were bound, as purchasers with notice.—*Atkins v. Delmege*, 12 I. E. R. 1. (C.)

2. When there are several co-ptfs., it is irregular for some of them, without the consent of all, to change their solicitor by side-bar order. In such a case a special motion should be made.—*Callaghan v. Blake*, 2 I. Jur. 54. (R.)

3. When a solicitor appears for several defts., his undertaking in favour of one shall not prejudice another.—*Dogherty v. D.*, 2 I. Jur. 110. (E.E.)

4. Actual notice to a solicitor is actual notice to his principal.—*Richards v. Brereton*, 5 I. Jur. 336. (C.)

5. A person who was properly an answering party in a cause, and is made a notice party, is not bound by the proceedings. A consent was signed by a solicitor, as solicitor on behalf of the ptf. He happened to be the general solicitor of a person so circumstanced. *Held*, that she was not bound by the consent, which did not purport to be signed on her behalf.—*O'Grady v. Brady*, 3 I. C. R. 439; 6 I. Jur. 321. (R.)

6. A client may at any time, during the progress of a suit in the L. E. Court, change his solicitor.—*In re Bracken's Estate*, 10 I. Jur. N. S. 165. (C.A.)

#### VIII. SECURITIES TO, AND PURCHASES BY SOLICITOR FROM CLIENT: DEALINGS AND TRANSACTIONS BETWEEN THEM.

7. In a suit against an attorney to set aside a conveyance made as a security for untaxed costs, the Court refused to order the deed to be lodged in Court.—*Carr v. Moulds*, H. & J. 714. (E.E.)

8. An attorney obtained from his client a conveyance of his real estate (out of which

his wife was dowable), in trust to pay himself and the client's other creditors; and also to secure future advances to be made by him to the client. The attorney afterwards became a party to a deed, prepared by himself, whereby his client's wife relinquished her dower, in consideration of a jointure to herself, and a charge on the lands for her younger children. The attorney did not communicate to her the existence of the former deed, or inform her of the effect of the borrowing clause therein. *Held*, that further advances made by him were not entitled, by virtue of the trust deed, to priority over the charge for the younger children; but that equity was administered for their benefit only.—*Brown v. Lynch*, 2 Jen. 706. (E.E.)

9. A.'s interest in leasehold lands having been set up for public sale, under writs of *fi. fa.*, C., his attorney (being the real ptf. in one of the writs, but not pressing the sale), attended; made the largest bidding; was declared the purchaser; and paid the purchase money, which was not more than enough to satisfy the writs prior to his own, and the expenses. A., alleging that C. had bid as his agent, and had purchased in trust for him, claimed the benefit of the purchase. C. denied A.'s allegations, but offered to give up the purchase, if A. would pay him the purchase-money and the other demands which C. had on him. A. was not able to raise the purchase-money then, and C. dealt with the lands as his own, for ten years. At the expiration of that time, A. filed a bill charging that C. had bid for and purchased the lands as his agent, and in trust for him; that C., at and after the sale, said so in conversations with friends of A.; and that they, on that understanding, did not bid. All those allegations were positively denied by C. in his answer. Conversations, such as those charged in the bill, were proved by S., a witness for A., to have taken place between S. and C.

On C.'s undertaking to release A. from all demands, the Lord Ch. of Ireland pronounced a decree dismissing the bill; and afterwards pronounced another decree varying the former one, and directing an issue to ascertain the value of A.'s interest in the lands at the time of the sale. On appeal—*Held*, that both those decrees were erroneous.

That an enquiry concerning such value was immaterial; and that, the material question being whether C., in bidding for and purchasing the property, was acting on A.'s behalf, C. might take an issue to try that question; but that C., if he declined to take that issue, should be declared a trustee for A.

That A.'s equity against C., if C. had, in the transaction of the purchase, acted on his behalf, was not affected by the lapse of ten years; there not being any acquiescence by A., and C. having been aware of his rights.

That an attorney, if not acting as such for his client on a particular occasion, may throw off that character, and exercise his rights as an independent man.

That evidence cannot be received of admissions made by a party, if they have not been properly put in issue by the pleadings, so as to give him an opportunity of contradicting them.—*Austin v. Chambers*, 6 Cl. & F. 1.

[This case is not reported in the Court below, but see it in subsequent stages: 3 Dr. & War. 178; Dr. Rep. temp. Sugden, 85. (C.)]

1. M., solicitor and agent of L., having been paid all his costs, &c., as such, lent L. £500 on bond. M. was to repay himself this sum out of £600, a fine for abuse, which he was to receive for L. M. received the £600, and retained £500 thereout. L. dying soon after, M. entered judgment on the bond, and assigned it for the full amount. The assignee claimed that amount out of L.'s estate. The trustee of L.'s will produced a letter from M. stating the agreement respecting the loan, and praying that M. should be ordered to pay over the £500 retained by him. M. denied the genuineness of the letter. An issue was directed. The jury found that it was in M.'s handwriting. *Held*, that M. should pay the amount of the bond, with all costs of the issue, petitions, &c.—*Bucke v. Murphy*, 8 I. E. R. 373; Fl. & K. 178. (R.)

2. L., solicitor and land-agent of W., engaged in redeeming annuities charged upon the estate of W., took an assignment of one of them for his own benefit for a sum less than that agreed upon by the deed of annuity for its re-purchase. *Held*, that L. was a trustee for W., for the re-purchase of the annuity.

A solicitor had procured a loan of money on mortgage for his client. The mortgage deed contained mutual stipulations that there should be no redemption and no foreclosure, provided the interest was regularly paid for five years. The solicitor afterwards took from his client a mortgage, which did not contain this provision. *Held*, that he was not entitled to proceed upon this mortgage within the five years.

In impeaching settled accounts between solicitor and client, it is sufficient to allege generally that the accounts are erroneous, without specifying the particular items.

Bonds and bills given by a client to his solicitor are not sufficient evidence of the debt. If the accounts have been opened, the consideration for them must be proved.—*Lawless v. Mansfield*, 1 Dr. & War. 557; 4 I. E. R. 118. (C.)—[See *Blagrove v. Routh*, 2 Kaye & J., 509; 8 De Gex, M. & G. 620.]

3. When an attorney applies to be paid his costs out of a fund allocated to his client, he ought to state in his affidavit that he distinctly informed his client of his intention so to apply.—*Redmond v. Gormley*, 4 I. E. R. 698. (E.E.)

4. The solicitor of a deceased tenant for life, under the will of J., was restrained on motion of the remainderman under the will, from acting for an annuitant claiming by title paramount, in whose name he had filed a bill against the sole trustee and executor of

the will, and his son; the remainderman alleging that the will was prepared by the trustee (law agent of the testator) not according to the testator's instructions; and further alleging that the trustee had, as such law agent, by gross misrepresentation and fraud, and without authority from the testator, procured from ptf. a release of the annuity, and praying that the release might be set aside, and the arrears of the annuity raised out of the testator's estate. It appearing that several of the statements in the bill were founded upon information confidentially acquired by the solicitor, as solicitor and agent of the deceased tenant for life, the Court declined to grant that part of the motion which sought to have the bill taken off the file.—*M'Kiernan v. Kernan*, 4 I. E. R. 255. (R.)

5. A client gave to his solicitor a mortgage to secure costs then incurred, and thereafter to be incurred, with interest thereon from the time of taxation. There were subsequent costs to a large amount. The solicitor died. On motion by the client that the personal representative of the late solicitor should be ordered to hand over the title-deeds, &c., to the new solicitor, the client offering to confirm the mortgage as to the subsequent costs,—*Held*, that a security for costs to be incurred is void, as being against public policy, and therefore incapable of confirmation after the subsequent costs have been incurred, although a valid security for such costs may then be given; that, in this case, the lien was not avoided; and the papers should not be taken by the client from the personal representative of his late solicitor (who preferred the lien to a new security), until the costs for which no valid security had been taken were paid.—*Willins v. Tandy*, 5 I. E. R. 1. (R.)

6. *Semble*—When a party, claiming by title paramount to the client, enforces the production of papers, the benefit thereby incidentally accruing to parties deriving under the client cannot be taken from them; and the solicitor's lien is lost.—*Blunden v. Desart*, 5 I. E. R. 221; 2 Dr. & War. 405; 2 Con. & L. 111. (C.)—[*Rev. v. 5 I. E. R. 52; Fl. & K. 572. (R.)*]

7. A deed executed by a client to his solicitor, in which the consideration is untruly stated, will not be permitted to stand.

The general proposition that a solicitor will not be permitted to take a security for costs to be incurred, is established beyond the reach of controversy.

*Semble*—That, if the security be taken for cash advances as well as for prospective costs, no distinction can be made in favour of the former.

*Quere*—Whether, when a security is given for past and future costs, it can be sustained as to the former, although void as to the latter?—*Uppington v. Bullen*, 2 Dr. & War. 184; 1 Con. & L. 291. (C.)

1. £700 being claimed for costs for business done for the client between 1808 and 1819, and a suit in respect of them instituted between the parties, they were, in 1840, taxed by agreement before the Master to £500. The client having discovered, amongst his own papers, and in his own handwriting, memoranda specifying sums given by him to the solicitor, for which credit had not been given,—*Held*, that, in 1842, the client was not entitled to have the costs re-taxed.

Although an agent or solicitor, acting at the time as such for the vendor, cannot buy for his own benefit, yet, when it was denied that he was employed in the sale by the client, and it was urged that, being himself a judgment creditor, he had a right to be present, and buy at the sale,—*Held*, that he might, at that particular time, throw off his former character of solicitor, and exercise the right which belonged to him in another character.—*Austin v. Chambers*, 3 Dr. & War. 178. (C).—[See 6 Cl. & F. 1; and Dr. Rep. temp. Sug. 85.]

2. A testator, A., shortly before his death, said to B., who had for several years acted as his land-agent, that he would make him a present of £300; and having been suddenly taken ill, desired B. to retain that sum out of a larger balance then in his hands. No third person was present at this declaration. On the following day, A. died. B. was a solicitor, and, together with his partner, acted as such, for A. There was a suit pending against A. in the Exchequer, at his death. After A.'s death, in 1831, B. acted as solicitor for the executors, and made out for them an account of A.'s assets, in which the £300 was treated as a gift by A. in his life to B. The inventory returned by the executors contained a similar account of that sum. In 1832, B. furnished an account to the executors, stating all the circumstances under which he claimed credit for the £300; taking credit for it against the balance in his hands; and stating that he retained the residue of the balance to meet the costs due to him and his partner, the amount of which he was then unable to ascertain. That account was retained by the executors, without objection. In 1839, they filed a bill against the agent, for an account of the sum due by him to A.'s estate. *Held*, that B. was not entitled to retain the £300 at the death of A., and that the executors had not, by acquiescence, precluded themselves from disputing his right to it.—*Walsh v. Studart*, 6 I. E. R. 161; 2 Con. & L. 423; 4 Dr. & War. 159. (C.)

3. In a question as to the carriage of a decree for a sale in two suits, when the solicitor in the first had taken an assignment of a charge, prior to the ptf's., which was in that cause reported at £1800, but in the second cause at £900 (explained by a difference in the accounts decreed)—*Held*, that the solicitor in the first cause having, by the assignment, an interest different from the ptf's., the carriage of the decree should be given to the

ptfs. in the second suit.—*Keons v. Maganoly*, 7 I. E. R. 603. (C.)

4. A solicitor may not deal with his client for a security for a debt due to him by a third person, without giving his client all his own information touching the debt, and the nature of the security.

The Court dismissed with costs a bill to enforce a security taken by a solicitor from his client on a sum charged upon the principal debtor's estate, and to recover which the client was then prosecuting a suit in Equity; the solicitor having omitted to disclose the circumstances connected with the estate, and particularly that he had other demands affecting it.—*Higgins v. Joyce*, 2 Jon. & L. 282. (C.)

5. Liberty given a client, V. to surcharge accounts settled between him and his solicitor, X., sixteen years before, and securities for the balances having been given; and to have the costs taxed; the relation of solicitor and client having continued up to a short period before the filing of the bill, and V. having been *inops concilii* when he settled the account. X. had sent it to V., with a letter desiring him to examine it attentively before signing it; but it having been settled on the basis of liability in, not gift by V., and containing items for costs due by, and advances made to third persons, which V. was not liable to, and against which it was X.'s duty to have protected V.—*Jones v. Moffett*, 3 Jon. & L. 636. (C.)

6. The heir-at-law, being also the personal representative of a deceased debtor, bought, for less than the sum due on foot thereof, an incumbrance on the estate. *Held*, that he was entitled to the full amount secured thereby, as against a subsequent incumbrancer, a solicitor, who had advised the purchase as a means of providing for the heir, but who had not disclosed that the purchase would enure to his own benefit.—*Bayly v. Wilkins*, 3 Jon. & L. 630. (C.)

7. When a trust deed did not authorise the solicitor to charge costs against his *c. q. t.*, securities obtained by him from the *c. q. t.*, for untaxed costs and advances, were set aside, and ordered to stand as securities for the sum really due, notwithstanding letters from the *c. q. t.* recognising the solicitor's right to charge those costs; the solicitor not having informed him that he was not entitled to any remuneration for his services in the trust, and the letters having been written under his influence. The rule, however, being hard, and the conduct of the *c. q. t.* exceptional, the relief was given without costs.—*Gomley v. Wood*, 9 I. E. R. 418; 3 Jon. & L. 678. (C.)

8. *Seemle*—It is not an objection to an equitable mortgage given for costs due, that they were not ascertained or delivered.—*Ex parte Bovill*, 2 Mont. & A. 382 n., observed on. *Bristow v. Warner*, 10 I. E. R. 246. (C.)

1. Plaintiff was solicitor for D., who at his death, owed ptf. costs. After D.'s death, ptf. became solicitor for D.'s executor, the deft., who, being indebted to ptf. for D.'s costs, and for further costs as executor, handed ptf. the title-deeds of leaseholds of D. (which had been left on special trusts), together with a letter making an equitable mortgage. Funds, which were applicable to pay the costs, were misapplied. *Held*, that the executor having committed a breach of trust in mortgaging, the solicitor dealing with him was affected by it, and could not recover without an enquiry into the state of the assets.

*Semble*—He was in no better condition than the executor himself occupied. — *Purcell v. Ruckley*, 12 I. E. R. 55. (C.)

2. A. having effected a policy of insurance, by deed of the 1st of Nov. 1827, assigned it to B., in trust for his wife and children. B. assigned the policy to C., for value, by a deed falsely reciting that A., by deed of the 1st of Nov. 1827, had assigned the policy to B. for her own benefit. C. died, having bequeathed the policy to D., who assigned it to E., a solicitor, who acted in that transaction for B., by deed of the 4th of Feb. 1843, in which D. covenanted that he had full power, and lawful and absolute authority to execute the assignment. The life insured died. E. having received the amount of the policy, a bill was filed against him by the children of A., and he was obliged to compromise the suit by paying money. D. died, and a claim having been made by E.'s executor against his assets, on foot of the covenant for title, a cause petition was filed to administer his estate. It stated that E. was D.'s solicitor; that it was his duty to have limited the covenant to the acts of D.; and that he was entitled to no greater benefit than if he had only imposed the proper and usual covenant on D.; but prayed no relief as to that statement, nor to make E.'s executrix a respondent. The usual order having been made by the Lord Chancellor, under the Ch. Reg. Act, s. 15, and E.'s executrix having filed a charge on foot of the covenant, which the Master disallowed, on the ground that E. was D.'s attorney, and ought not to have permitted him to enter into such a covenant—*Held*, on appeal, that the claim under the covenant being a legal claim, the Master had not jurisdiction to disallow it on that ground without a cross-petition.

*Semble*—Though E. had constructive notice of the trusts of the deed of the 1st of Nov. 1827, such notice could not qualify or control the covenant for title.

D. having directed that any claim on foot of any covenant should be paid out of a particular legacy, the legatees should be before the Court.—*Ex parte Collins*, 2 L. C. R. 618. (R.)

3. A solicitor purchased a leasehold interest from his client, and himself prepared the assignment, which contained no covenant to indemnify the vendor, but did contain the words "subject to the rent and covenants" in the lease. *Held*, that the executor of the

solicitor was bound to indemnify the vendor against the rent and covenants.—*Greenfield v. Bates*, 5 I. C. R. 219. (C.)

4. A solicitor, failing to obtain from a stranger a loan for his client, lent him, in the stranger's name, the money on mortgage; and used that name to obtain from his client priority for the loan over two jointures payable out of the estate, and concealed the fact that he himself was the lender. *Held*, that such a transaction, coupled with the absence of independent advice by a solicitor to a client, rendered the mortgage deeds voidable, so far as they acquired priority over the jointures.—*Radcliff v. Orme*, 5 I. Jur. N. S. 245. (C.A.)

5. A., who had been a ward of Court, within a few months after his discharge, being in embarrassed circumstances and sued by a creditor, confessed a judgment for £500 to B., a solicitor, his cousin-german and land agent, by whose advice he was entirely guided in the management of his affairs, although another attorney (employed through B.) defended A. against the creditor, and was also solicitor on record for A. in some proceedings in Ch. to which B. really attended. The judgment was soon after registered as a mortgage against A.'s estate. During subsequent proceedings by the creditor, A., under B.'s advice, made an affidavit stating that the judgment was given for full and valuable consideration received. In a suit by B.'s heir-at-law to set aside the judgment, alleging that it was given without consideration, in which it appeared to have been really intended merely to delay the creditor—*Held*, that the relation of solicitor and client had existed between A. and B. at the date of the judgment, and that the heir might have relief.

After the date of the judgment A. agreed to sell his estate, subject to its incumbrances, to B.; who was then in fact and on record A.'s solicitor; for £100, the value being considerably greater. After the sale was resolved upon, a solicitor, an intimate friend of B., was on his suggestion employed by A.; and went through the form of changing B. as A.'s solicitor, and on A.'s behalf examined the deed of conveyance, and submitted it to counsel, but did not in any other way advise or consult with A. *Held*, that A. had no sufficient and independent advice; and that the conveyance should be set aside, and was in no way the better for the relationship between the parties.

That A.'s letters to his mother could not be read to show the state of his mind or feelings towards B.—*Low v. Holmes*, 8 I. C. R. 58; Dr. Rep. temp. Napier, 290. (C.)

6. A., a solicitor, having a charge on real estate, caused a bill to raise the charge to be filed in his partner's name. A sale having been decreed, A., without obtaining the leave to the Court, purchased the lands in the name of B., to whom the conveyance was made. The fact that A. was the real purchaser was never disclosed to the Master or the parties in



the cause; and several orders were made, on applications in the name of B., calculated to lead the Court to believe that he was the real purchaser, though the whole of the purchase-money was paid by A. The Court, after the expiration of nineteen years, and after the death of A. and his partner, set aside the sale, although it was not proved to have been fraudulent or at an undervalue.

It is a settled rule of the Court that the ptf. or his solicitor cannot, without the leave of the Court, bid at a sale under the decree. Non-compliance with that rule will vitiate the sale.

If a solicitor or trustee secretly purchase in the name of another at a sale under the Court the sale is void.

When there has been concealment, a violation of a rule of the Court, or a void sale, *laches* or lapse of time will not preclude relief.

Form of decree setting aside a purchase by a solicitor, and directing accounts, when no fraud or undervalue was proved. — *Popham v. Exham*, 10 I. C. R. 440. (R.)

1. Four judgments affecting B.'s estate were purchased by A., his solicitor, for less than the amounts due thereon. Two of them were assigned to A. by a deed in which B. joined. A. bought the third shortly after B.'s death; and the fourth, while he had carriage of the proceedings in a suit to administer B.'s estate, sold in the L. E. Court. On settlement of the final schedule—*Held*, that A. could not stand thereon as a creditor in respect of the judgments for more than he paid, with interest, and the costs of the assignments.—*In re Johnstone's Estate*, 7 I. Jur. N. S. 36. (L.E.C.)

#### IX. OF PROFESSIONAL CONFIDENCE.

2. When a bill charges that a deft. was connected with the preparation and execution of fraudulent leases, and seeks a discovery of the matters alleged to be fraudulent, he cannot by a plea of professional confidence, protect himself from discovery.—*Kelly v. Jackson*, 1 I. Jur. 233. (R.)

3. A deft., by answer, objected to an interrogatory because by answering it he might subject himself to pains, &c.; and by a plea declined to answer part of the same interrogatory because the subject of it came to his knowledge in the character of solicitor to the other deft. *Held*, that the answer, being equivalent to a demurrer, did not fall within the 66th G. Rule; and that the answer overruled the plea.

A bill to set aside leases for fraud made the solicitor who had prepared them a deft., charging him with being a party to the fraud, praying costs against him, and interrogating him as to his being privy to the fraud, and as to transactions regarding the preparation of the leases. The solicitor pleaded that he knew nothing as to the matters save as the attorney of the other deft., and therefore was privileged from giving discovery. The plea did not deny the fraud or the facts stated in

the bill as evidence of it. *Held*, that the ptf., being entitled to relief, was entitled to the discovery as incidental to the relief.

The privilege of a solicitor is confined to confidential communications with his client, and does not extend to his own acts, though done in the character of solicitor.

A solicitor may be made a party to a bill to set aside a deed for fraud, if he be a party to the fraud, and costs are prayed against him.—*Kelly v. Jackson*, 13 I. E. R. 129. (R.)

4. The practice of a solicitor voluntarily making an affidavit revealing circumstances connected with the business of his former client, whereby that client may be rendered liable to an action, disapproved of.—*Barton v. Sampson*, 2 I. Jur. N. S. 361. (R.)

5. Confidential letters written before suit commenced, by one of the parties, to his solicitor in reference to the subject matter in dispute, are privileged; and cannot be given in evidence at the hearing by the opposite party.—*Phibbs v. O'Donel*, 8 I. Jur. N. S. 226. (C.)

6. A solicitor prepared for a father a deed of release, whereby two of that father's children (then of full age) acknowledged, contrary to the fact, the receipt of a large sum of money, portion of a larger sum charged on fee-simple lands, which the father afterwards sold. The children received no consideration. The solicitor, seeing that they had been grossly defrauded, requested their father to repair the fraud by charging other lands in their favour. The father died without doing so. A petition was instituted to set aside the release. *Held*, that the solicitor's conversations with the father touching the deed, were not privileged.—*De Burgh v. Chichester*, 11 I. Jur. N. S. 182. (C.)

#### X. SOLICITOR'S LIEN.

1. *In general.*

2. *How affected by Retirement or Withdrawal, Discharge, &c.*

3. *Effect of taking a Security; how Lien may be Lost or Extinguished.*

##### X. 1. Solicitor's Lien; generally.

7. The mortgagor's attorney, to whom, pending a foreclosure suit, the mortgagor has delivered the title deeds, in order to procure a loan of money, has not, as against the mortgagee, a lien on them for his costs in that transaction.—*Hutchinson v. Joyce*, 2 Jones, 122. (E.E.)

8. The Court will not make an order *ex directo*, that the costs of an attorney be paid out of a fund in Court, upon which he has a lien. He must wait until his client applies to be paid the fund, and then insist upon his lien. The reason for not giving the costs to the attorney upon his own motion is, that

there are not two litigant parties before the Court.—*Crosbie v. Molloy*, 2 Jones, 588. (E.E.)

1. A solicitor, having a lien upon a deed for his costs, will not be ordered to furnish them, or to deliver up the deed, without getting an express undertaking that his costs will be paid when taxed.—*M'Kenny v. Chambers*, Jon. & Ca. 105. (E.E.)

2. A., seized in *quasi fee* of an estate *pur autre vie*, conveyed it in mortgage in 1814. In 1824, A. obtained a renewal from the head landlord, and deposited the indenture of renewal with his solicitor. The renewed interest having been decreed to be a graft upon the former estate, and a bill filed to foreclose the mortgage—*Held*, that A.'s solicitor had no right to retain the indenture of renewal by virtue of a lien thereupon for costs incurred subsequent to 1814, as against the mortgagee.

A solicitor cannot by his lien have a better right to the client's title deeds, than the client himself had at the time when the costs were incurred.—*Smith v. Chichester*, 4 I. E. R. 580; 2 Dr. & War. 393; 1 Con. & L. 486. (C.)

8. A judgment was obtained against a client after the deposit of his title deeds with his solicitor, and costs had become due for professional services rendered to the client both before and after the entry of the judgment. *Held*, reversing the order of the M. R. (see *Blunden v. Desart*, Fl. & K. 572), that the solicitor's lien could not prevail against the judgment creditor for any portion of the costs incurred after the date of the judgment.

A solicitor's lien for his costs upon his client's deeds and papers, prevails generally for all costs, and is binding upon the representatives of the client.

The character of an incumbrance, the result of contract, does not belong to the solicitor's lien.

The solicitor's lien cannot prevail against a title to the deeds paramount to that of his client at the time when the costs were incurred.

A solicitor's lien may be lost by his taking another security, or by his proving the debt under a commission.

Although a solicitor may not take a security for future costs, he may acquire a legal lien over the papers for all costs incurred or to be incurred, and that without any special contract.

It requires a strong case to induce the Court to take the papers from a solicitor without payment to him of his demand.

This Court has authority to compel the production of the deeds, upon the money being brought into Court.

*Semble*—If a solicitor receives the deeds, *pendente lite*, his lien will not prevail against the rights which are the subject-matter of the suit.—*Blunden v. Desart*, 5 I. E. R. 221; 2 Dr. & War. 405, 423, 424; 2 Con. & L. 111. (C.)

4. A ptf. suing *in forma pauperis*, having obtained a final decree, entered a rule to change her solicitor. A motion by the solicitor, that

the rule should be reviewed, and the carriage of the decree restored to him, or that ptf. should pay to him the costs incurred; refused without prejudice to any lien he might have upon the fund.—*M'Ghee v. Mahon*, Fl. & K. 93. (R.)

5. Bonds in penalties, payable with interest, taken by an attorney from his client, *pendente lite*, for untaxed costs, shall only stand as securities for such sum as shall, upon taxation, appear to be due, without interest thereon.—*Fowler v. Moore*, 2 Jones, 415. (E.E.)

6. The ptf.'s attorney, having withdrawn from the conduct of the cause, was ordered to deliver up to the new attorney all such documents as upon inspection the latter should deem necessary for the conduct of the cause; the latter undertaking to receive them, subject to the lien of the former attorney, and to speed the cause, and to re-deliver them within ten days after the final decree, or immediately, if counsel should not advise a prosecution of the suit; and the ptf. consenting that the former attorney should have a lien for his costs upon any fund recovered in the suit.

*Semble*—An attorney, by refusing to go on with a suit, does not lose his lien either upon documents or the fund.—*Harman v. Strangways*, Jon. & Ca. 257. (E.E.)

7. A solicitor having, pursuant to an order of the Court, answered the matter of a petition against him, is not entitled to move that the petition be dismissed with costs, for want of prosecution, until one clear Term has elapsed after notice of the answering affidavit.—*Bucke v. Murphy*, 3 I. E. R. 373; Fl. & K. 173. (R.)

8. The decree in an administration suit declared the solicitor for the inheritor entitled to be paid his costs out of the surplus, if any. It afterwards appeared by the Master's report, that those costs had been incurred in contesting unfounded claims, and thereby increasing the fund for those beneficially entitled, and that the inheritor was insolvent. *Held*, that although the fund was deficient, the solicitor for the inheritor was entitled to be paid, without waiting until there should be a surplus fund.—*Grey v. Matthews*, Fl. & K. 309; 3 I. E. R. 530. (R.)

9. The attorney for the ptf. died during the progress of the suit, and a new attorney was appointed. More than six years afterwards, funds were brought into Court by the receiver in the cause. *Held*, that the personal representative of the deceased attorney had a lien on the funds for the costs of the suit due to the attorney at his decease.

The simple principle upon which this case (of a lien for costs) has been rested, is most satisfactory. It is upon the distinction well known to the law since the enactment of the Statute of Limitations, between the debt and the remedy for the recovery of it. The debt may survive though the remedy is gone. The lien is a benefit attached to the debt, not to

the remedy, it is an addition to the legal remedy; and, therefore, though the remedy be gone, so long as the debt exists, that which is attached to it remains; so long as the debt continues, the right to the lien continues. Upon that principle, the personal representative of the attorney is entitled in this case to the benefit of the lien for the recovery of his demand.

If a solicitor refuses to be any longer concerned for a client, because the client will not give him money for the prosecution of the suit, the solicitor has no lien on the fund; but if the client discharges his solicitor, the latter has a lien on the fund. Here the case is a middle one; for A. was discharged by the act of God, which prejudices no person. He cannot be considered as being in any default.—*Kellett v. Kelly*, 5 I. E. R. 34. (E.E.)

1. A solicitor's lien for costs incurred partly before and partly after the date of a judgment, confessed by the client to a third person, gives no priority to the solicitor over the judgment, even as to costs incurred after its date.—*Blunden v. Desart*, 5 I. E. R. 52; Fl. & K. 572. (R.)—[Rev'd.: 5 I. E. R. 221; 2 Dr. & War. 405; 2 Con. & L. 111. (C.)]

2. The owner of lands, subject to a mortgage of 1777, and to judgments confessed in and subsequent to 1820, deposited, in March 1819, the title deeds with his solicitor. In a suit instituted by the judgment creditors, it was decreed that those lands should be sold to pay off the mortgage; and that the title deeds should be lodged in the office, without prejudice to any lien which the solicitor might have thereon for costs. This was done. The lands were sold, and the deeds handed to the purchaser. *Held*, that the solicitor had no lien on the deeds, having no right to retain them, as against the mortgagee.

That his lien on the deeds was not transferred to the surplus funds of the sale, remaining after payment of the mortgage.—*Taylor v. Gorman*, 6 I. E. R. 330. (R.)—[Affirmed: 7 I. E. R. 259. (C.)]

3. An attorney, who had received money on account of costs, contended that a balance was still due, and threatened to file a bill for its recovery. Upon a reference obtained by the client on a petition praying, among other things, that the sum received by the attorney should be ascertained, and his costs taxed as between party and party; although the client was wrong as to the principle of the taxation, and also in praying repayment of the entire amount received by the attorney, and not merely of the balance overpaid—*Held*, that the attorney should pay all the costs of the reference and other proceedings in the matter, except the costs of so much of the petition and answering affidavit as were incidental to the principle of taxation.—*Armstrong v. Pollock*, 6 I. E. R. 663. (E.E.)

4. P'ts. in an ejectment at Law recovered against the defts. with costs, which they assigned to their attorney, p'tf. in the suit in

Equity, against the same defts. The assignment was not executed by all the parties. The bill in Equity was dismissed with costs, amounting to less than the costs at Law. *Held*, that the attorney was not entitled to set off the costs of dismissing the bill against so much of the costs of the action at Law, either in his character of attorney or of assignee of the p'tfs. at Law.

The solicitor's lien for costs is subordinate and to be postponed to the equities between the parties.—*Gwynn v. Krous*, 7 I. E. R. 274. (R.)

5. By settlement, £2500 were charged on an estate for lives renewable for ever, for the issue of the marriage, subject to appointment. Part was appointed to one of the children on her marriage, and then settled; the residue was never appointed. After the death of the first settlor, A., the solicitor of B., the other child of the marriage, acting under a power of attorney, obtained a renewal, and instituted a suit in his name to raise his portion of the unappointed charge; but did not prosecute it. On the death of B., A. obtained limited administration to him, and, with the parties entitled to the daughter's share of the charge, filed a bill to raise the charge, when a receiver was appointed and funds got in. The lands being sold in a creditor's suit, and the settlements lodged in the office by order, without prejudice to A.'s lien—*Held*, that A. had no lien for costs on the deeds, as B., through whom he got them, had no exclusive right to them; and that there could not be any lien transferred to the funds.—[Affirmed on appeal, 8 I. E. R. 223; 2 Jon. & L. 351. (C.)]

That A. was entitled out of the funds to the costs of procuring the renewal; and to the costs of the limited administration, out of the funds reported to B.'s representative; but that he was not entitled out of the funds in the cause to his costs of the suits instituted by him in B.'s lifetime, and as his administrator after his death.—*Molesworth v. Robbins*, 8 I. E. R. 1. (R.)

6. Form of enquiry in an incumbrancer's suit, when the deeds are in possession of a solicitor, a deft., who claims for costs a lien which is disputed.—*Walcott v. Graves*, 11 I. E. R. 396. (C.)

7. Bill filed to restrain execution for the full amount of a verdict and costs, and to get credit for money unavailable as a set-off at the trial below. *Held*, that the fact, that an amount, indisputably due, being unavailable as a legal set-off at the trial, formed a special equitable ground for relief, and warranted this Court's interference; but should not prejudice the solicitor's lien for costs.—*Mahony v. M.*, 2 I. Jur. 129. (C.)

8. A deft., by answer, stated that a deed was in the possession of the personal representative of a solicitor, who claimed a lien on it. The Court ordered him to produce it, with liberty to apply, if production or inspection of the deed was refused by the party who had it,

on payment of the costs due to him.—*Monsel v. Lindsay*, 13 I. E. R. 144. (R.)

1. When a solicitor, whom his client has ceased to employ, produces a deed of the client, upon which the solicitor claims a lien for antecedent costs, and thereby enables the client to recover a fund in a suit in which the solicitor has acted, his lien upon that fund is confined to the costs due to him in the suit in which the fund was so recovered.

H., solicitor of B., held possession of the title deeds of B.'s estate, and claimed a lien thereon for antecedent costs. H. then presented a petition, on behalf of B., for a sale of the estate in the L. E. Court. An order for sale having been made, B. changed her solicitor, and a Judge of the Court ordered that H. should lodge the title deeds, subject to lien. *Held*, that H.'s lien upon the fund realised in the L. E. Court was confined to his costs in that matter.—*In re Bayly's Estate; ex parte Humphrey*, 12 I. C. R. 315; 6 I. Jur. N. S. 25. (C.A.)

2. Lien for costs claimed by a solicitor, upon deeds lodged in Court; it not being intended to proceed with the petition for sale of lands. Notice of motion served by the solicitor for an order directing the Keeper of the Deeds to hand them back again. *Held*, that the proper course would have been, to have served notice of motion for an order declaring the solicitor entitled to a lien, and for liberty to file a claim, setting forth the particulars to be vouched before the Examiner; and, in the event of the sum found to be due not being paid, for an order to continue, and take the carriage of the proceedings.—*Re Kelly's Estate*, 9 I. Jur. N. S. 59. (L.E.C.)

3. A trader who, under the arrangement clauses, petitions the Court, obtains the usual protection, and procures an order for the assignee to receive and possess his estate, cannot, even by special arrangement with his attorney, lodge with, or transfer to him any portion of his assets, as security for his costs, so as to create a lien in the attorney's favour. An attorney who, in an arrangement matter, voluntarily hands over to the official assignee scrip or railway shares deposited with him by his client, the trader, will have no equitable claim on foot of them for costs due to him by his client. An attempt to establish a special lien, by special contract, on a trader's assets, of which the attorney has got possession, as security for his costs, those assets being bound by an order of the Court, procured by that attorney, must fail, since it would be against the rights and equities of the several creditors bound by the vesting order.

When proceedings are taken *bona fide*, without the Court's authority, or the assignee's sanction, the attorney is not entitled to any lien for costs; but, when the assignees concede the right of proving for them, the Court will sanction that course.—*Re North*, 10 I. Jur. N. S. 297. (B.)

X. 2. *How affected by Retirement or Withdrawal, Discharge, &c.*

4. This Court has not jurisdiction to order the personal representatives of a deceased solicitor to deliver up title-deeds on which they claim a lien.—*Allen v. Jervoise*, 11 I. E. R. 583. (R.)

5. Though a solicitor discharge himself, he will not be directed to deliver to his client the documents upon which he claims a lien, unless a necessity be shown for that course, or danger of loss.—*Limk. & Wat. Ry. Co. v. O'Ferrall*, 1 I. Jur. 198. (R.)

6. When a solicitor discharges himself, the Court will order him to hand over to his former client documents on which he has a lien, if a case of pressing necessity be made out. There is no distinction in this respect between documents necessary for the carrying on a suit, and documents unconnected with any suit.—*Wat. & Limk. Ry. Co. v. O'Farrell*, 2 I. Jur. 67. (R.)

X. 3. *Effect of Taking a Security: how Lien may be Lost or Extinguished.*

7. A solicitor, having a lien for costs on title-deeds, took from his client a bond, conditioned for their amount, with interest at £5 per c., which he regularly received for several years, and still retained the deeds. In a general creditor's suit, instituted afterwards, it appeared that the client's whole estate would be insufficient to pay creditors whose securities were prior to the bond, but should have been postponed to the lien. The solicitor deposed that he took the bond only as a collateral security, but never intended to give up his lien. *Held*, that, having taken a security for the costs, with interest, his lien was gone.

*Quare*—Would the mere taking a security for the costs, without more, extinguish the lien?—*Brownlow v. Keatinge*, 2 I. E. R. 243. (R.)

8. A solicitor, to whom a judgment had been assigned in trust for his client, afterwards assigned it to a trustee of the marriage settlement of his client's daughter. *Held*, that he had parted with his lien upon all documents relating to the judgment of those claiming under the settlement.

A parol unwitnessed gift by a client *in extremis*, in lieu of a promise made when in good health to his solicitor, though for a long time known to, and unobjected to by the representative of the client, will not be allowed to stand.—*Fitzgerald v. Bermingham*, 1 Con. & L. 405. (C.)

9. G.'s judgment creditors, of whom T., his solicitor, was one, joined in a trust deed, the effect of which was, that they should be paid without priority. T. claimed a lien for costs on G.'s title deeds. In a suit to carry the trust deed into execution, which included mortgage creditors, who were to be first paid,

and whose mortgage was prior to T.'s lien, the decree (under which G.'s priority was sold) ordered T. to bring in the title deeds, without prejudice to his lien. T. lodged them. The lien was prior to the claims of other judgment creditors. *Held*, that T. could not insist on his lien.—*Taylor v. Gorman*, 7 I. E. R. 259. (C.)—[Affg. 6 I. E. R. 330. (R.)]

1. An order having been made in 1847 superseding a commission of bankruptcy against a party, with costs, to be paid by the petitioning creditors, and before those costs were paid that party having been in 1849 discharged under the Act for the Relief of Insolvent Debtors—*Held*, that the assignee in the insolvency matter, one of the petitioning creditors in the bankruptcy matter, took the costs under the order of 1847, subject to the lien of the solicitor who had obtained that order; and that the assignee could not be allowed to set off as against that lien a debt due to himself by the insolvent when those costs were incurred.

Upon motion, the Court varied the order of 1847, by directing the petitioning creditors to pay the solicitor the amount of the taxed costs.—*In re Petticrew*, 1 I. C. R. 102. (C.)

2. A solicitor, filing a petition for sale in the L. E. Court, and lodging deeds in Court under an order to do so, but without intimating to his client that he retains his lien upon them, loses it thereby, although the words "subject to lien" are in the order.—*Humphrey v. Bayly*, 12 I. C. R. 315; 6 I. Jur. N. S. 25. (C.A.)

#### SPEAKING DEMURRER.

See PLEADING, DEMURRER.

#### SPECIAL

— *Case*. See BANKRUPTCY, XX.

[See also Ct. of Ch. Reg. (Ir.) Act 13 & 14 Vic., 89, s. 11; and Ch. Ir. Act, 1867; 30 & 31 Vic., c. 44, ss. 111-128.]

— *Injunction*. See PRACTICE, INJUNCTION.

#### SPECIALITY DEBTS AND CREDITORS.

See DEBTOR AND CREDITOR, III—PLEADING, PARTIES.

#### SPECIFIC.

— *Legacy*. See LEGACY, X.

— *Performance, Costs as to*. See PRACTICE, COSTS—AGREEMENT, VIII—COVENANT, I—SETTLEMENT, VII.

#### SPECIFICATION.

See PATENT.

#### SPEEDING CAUSE.

See PRACTICE, CAUSE, ADJOURNING, &c.

#### SPOILIATION OF DEEDS.

See DEEDS, IX.

#### STAMPS.

See STATUTES, 5 G. 4, c. 41; 6 G. 4, c. 16, s. 98.

3. A clause in an agreement providing, that if it should become necessary to stamp it and to pay any penalty for that purpose, the creditor might charge it against the debtor, is an evasion of the Stamp Acts, and the Court will not enforce it.—*Abbott v. Stratton*, 9 I. E. R. 233; 3 Jon. & L. 603. (C.)

#### STATE OF FACTS.

See PRACTICE, STATE OF FACTS.

#### STATED ACCOUNT.

See ACCOUNT, II.

#### STATUTE.

— *Of Mortmain*. See CHARITY, II.  
— *Of Distribution*. See DISTRIBUTION, IV.  
— *Of Frauds*.

1. *Generally*. See LIMITATIONS, STATUTE OF.

2. *When Answer of is proper Defence*. See PLEADING, ANSWER.

3. *Plea of*. See PLEADING, PLEA OF STATUTE OF FRAUDS.

— *Of Limitations*.

1. *Generally*. See LIMITATIONS, STATUTE OF.

2. *When Answer of is proper Defence*. See PLEADING, ANSWER.

3. *Plea of*. See PLEADING, PLEA OF STATUTE OF LIMITATIONS.

#### STATUTES, CONSTRUCTION OF.

See DISTRIBUTION, I, IV.—FRAUDS, VIII—LEGACY DUTY—LIMITATIONS, STATUTE OF—MORTGAGE, V—Nullum Tempus Act.

#### I. GENERALLY, AND PRIVATE ACTS.

1. *Generally*.

2. *Joint-stock Companies, Corporations, &c.*

3. *Private and Local Acts*.

#### II. IN CASES OF, AND RELATING TO.

1. *Accumulation*.

2. *Affirmations*.

3. *Annuity Act*.

4. *Appointments (Illusory)*.

5. *Arbitrations and Awards*.

6. *Attorneys*.

7. *Bank of Ireland*.

8. *Bankers*.

9. *Bankruptcy and Insolvency Acts.*
10. *Baths and Wash-houses Act.*
11. *Bills Pro Confesso: other Bills.*
12. *Bills of Exchange and Promissory Notes.*
13. *British Claims on France.*
14. *Champerty and Buying of Titles.*
15. *Chancery (Ir.) Reg. Act 1850.*
16. *Charge, and Charging Order.*
17. *Charities and Mortmain.*
18. *Church Temporalities Acts.*
19. *Clergy: Ecclesiastical Persons and Things.*
20. *Companies Clauses Consolidation Act.*
21. *Contempt.*
22. *Copyhold.*
23. *Copyright.*
24. *Costs.*
25. *Creditors.*
26. *De Donis.*
27. *Decrees, Enrolment, &c.*
28. *Dower.*
29. *Drainage, and Draining.*
30. *Ejectment Acts.*
31. *Equity Exchequer.*
32. *Estate de Provisione Viri.*
33. *Examiners: Commission.*
34. *Exchequer Bills.*
35. *Executors and Administrators: Distribution.*
36. *Factors Act.*
37. *Fines and Recoveries..*
38. *Forfeiture for Treason and Felony.*
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49. *Irish Tenantry Acts.*
50. *Judgments. See infra, 62.*
51. *Land Tax Redemption.*
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77. *Rents, Apportionment of.*
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90. *Treasurer of County.*
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92. *Uniformity..*
93. *Usury.*
94. *Wills.*
95. *Witnesses.*

# I. STATUTES, GENERALLY: PRIVATE ACTS.

1. *Generally.*
2. *Joint-stock Companies, Corporations, &c.*
3. *Private and Local Acts.*

## I. 1. *Statutes, generally.*

1. The 5 & 6 W. 4, c. 55, applies only to cases in which the creditor has not had the benefit of his execution. Therefore, when a judgment creditor filed an *elegit* bill, and got into possession of part of his debtor's estate by means of a receiver appointed under a decree in that suit, the Court would not appoint a receiver under this Act over other parts of the debtor's estate.—*Davidson v. Langford*, 2 Jon. 189. (E.E.)

2. *Semble*—A power to appoint amongst the objects "in such shares and proportions" as the apportioner thinks fit, will authorise the appointment of a remainder to one only of the objects. If such a power be executed by appointing the whole estate to one of the objects for life, with remainders over to persons not objects of the power, whereby an illusory share devolves, as in default of appointment, upon the other objects of the power, the case is not within the 1 W. 4, c. 46; and the whole appointment is bad.—*Barron v. B.*, 2 Jon. 226. (E.E.)

3. The 6 W. 4, c. 14, s. 126, has not been repealed by the 3 & 4 Vic. c. 105.

Creditors by simple contract are within the

proviso in 8 & 4 Vic., c. 105, s. 22, in favour of "purchasers, mortgagees, or creditors."

A prior statute may operate upon a subsequent one without express words.—*In re Perria*, 4 I. E. R. 89. (R).—[Affd.: 4 I. E. R. 362; 2 Dr. & War. 147; 1 Con. & L. 567. (C.)]

1. The 83 G. 2, c. 14, has not been repealed, either expressly or impliedly, by the 6 G. 4, c. 42

When there are two affirmative statutes made upon the same subject, as to all points in which they do not contradict one another, both shall stand.

General words in a later affirmative statute shall not be construed to revoke or alter a preceding statute when those words can have an operation without being so applied.—*Fawcett v. Hodges*, Fl. & K. 117; 3 I. E. R. 232. (R.)

2. A recognizance to the Crown is not within the 8 G. 1, c. 4.

The period, from which the twenty years specified in that Act are to be reckoned, is the issuing of the writ, not the day on which it bears teste.—*Reg. v. Bayly*, 4 I. E. R. 142; 1 Dr. & War. 213. (C.)

3. The first clause of the 48 G. 3, c. 47, s. 3, does not apply when the reversion first vests in a predecessor of G. 3.—*Tuthill v. Rogers*, 6 I. E. R. 429; 1 Jon. & L. 86. (C.)

4. Under the 5 & 6 Vic., c. 62, the Commissioners of Woods and Forests are bound to pay the costs of a reference to ascertain the rights of parties to the purchase-money of premises purchased under the Act, as expenses incidental to the purchase.—*In re Commissioners of Woods and Forests*, 7 I. E. R. 487. (R.)

5. A Roman Catholic entitled to real estate did not take the oath necessary under the statutes to qualify him to hold it; and was not in enjoyment of the lands, nor were proceedings taken to enforce his title until after the passing of the R. C. Relief Act (10 G. 4, c. 7). *Held*, that sec. 23 of that Act removed his former disability.

An objection to the ptf.'s title not noticed in the answer, but appearing from the ptf.'s own evidence, relied on at the hearing.—*O'Connell v. O'Callaghan*, 7 I. E. R. 596. (C.)

6. The 26 G. 3, c. 27, gave power to the Crown to grant letters patent to keep a theatre in D., and prohibited all persons from performing plays in D. for hire, under a penalty of £300 for each offence, to be recovered by action of debt, &c., by any person suing. Letters patent were granted to W., authorising him to establish a theatre, and perform plays in D., and containing a clause prohibiting all other persons from doing so, unless authorised. *Held*, that the patentee could not sustain a bill for an injunction to restrain unauthorised persons who opened a theatre and performed plays contrary to the statute and patent.

In such cases the right to bring an action

on the case and a bill for an injunction are concurrent.—*Calcraft v. West*, 8 I. E. R. 74. (C.)

7. The conveyance, under the former English Insolvent Acts to the provisional assignee, is within the general Registry Act, and its registration is not dispensed with by the registration of the conveyance by the provisional to the creditors' assignees.—*Battersby v. Rockfort*, 8 I. E. R. 284; 2 Jon. & L. 431. (C.)

8. The 6 & 7 Vic., c. 85, has not altered the practice in relation to the examination of a deft. by the ptf.; and the order cannot be obtained to examine a deft. whose answer has been replied to, unless the replication be withdrawn as against him.—*Walker v. Tilly*, 9 I. E. R. 261. (R.)

9. The Court has authority, under the 5 & 6 Vic., c. 105, to permit the assignee of a judgment creditor to continue in his own name the proceedings of his assignor under the Judgment Creditors Acts.—*Daly v. Blake*, 10 I. E. R. 36. (R.)

10. A tenant's recognizance was executed at the same time as his lease, but was not enrolled for four years after. The tenant in the meantime became insolvent, and incumbered his property. *Held*, that the neglect to enrol the recognizance when the lease was executed did not discharge the surety.—*Jephson v. Mansell*, 10 I. E. R. 132. (C.)

11. A lease of corporate property granted under circumstances similar to those in the *Attorney-General v. Ball*, supported in favour of a purchaser for value.

If a deft. in his answer relies generally on his right as a purchaser for value without notice, but does not specifically deny notice of a particular matter, *ex. gr.*, a private Act, with which he is charged in the bill, and which would invalidate his title, the ptf. not excepting to the answer is bound to prove notice.

A statute relating to the corporate property of a city, with the usual clause declaring that it shall be deemed a public Act, does not bind strangers with notice; and the mere probability of a purchaser knowing it, or precautions taken by him in a purchase of corporate property, will not fix him with constructive notice.—*Attorney-General v. Marrett*, 10 I. E. R. 167. (C.)

12. A deft. whose interest in the suit is so coincident with that of the ptf., that he might have been made a co-ptf., is nevertheless, under the 6 & 7 Vic., c. 85, a competent witness for the ptf.—*Kelly v. Bennisson*, 11 I. E. R. 605. (C.)

13. The Court has not power under the 28 G. 3, c. 85, to order the Master to execute a conveyance in the name of a *femme covert* who is out of the jurisdiction.—*Nugent v. Piers*, 12 I. E. R. 188. (R.)

1. A submission to arbitration made a rule of Court, by consent, in a cause, is within the 10 W. 3, c. 14 (*Ir.*).—[*Garde v. Garde*, 4 Law Rec. N. S. 115, followed.—*Dennis v. Deane*, 6 Law Rec. N. S. 378, doubted.]—*Goggin v. Downing*, 13 I. E. R. 60. (R.)

2. A suit by a simple contract creditor, to attach a rentcharge on the separate estate of a married woman, is within the 4 & 5 W. 4, c. 82 (Service of Process Act).—*Copperthwaite v. Tuite*, 13 I. E. R. 68. (R.)

3. The M. G. W. Railway Co. purchased, under an Act, the R. Canal, and all the property belonging to it. They afterwards contracted with the G. Canal Co. to purchase the G. Canal and its property; and that until an Act could be obtained for the purpose a lease should be made by the G. Canal Co. to the M. G. W. Railway Co., under the Canal Carriers Act, 8 & 9 Vic., c. 42. The agreement was adopted at a meeting of the G. Canal Co., and a draft lease approved of, which comprised not only the tolls and duties of the canal, but also all the real estate and personal property belonging to the G. Canal Co. *Held*, on a petition filed by two shareholders of the G. Canal Co. to restrain the Co. from executing the lease that although the lease *per se* was within the Canal Carriers Act, as it was part of the arrangement for the transfer of the canal and its property to the Railway Co., it was illegal; and the Court granted an injunction to prevent its execution.

The R. Canal and the G. Canal run parallel to each other for a short distance; and then diverge, and fall into the river Shannon, at some distance from each other. *Held*, that as they communicate with each other by water, they are within the Canal Carriers Act, so as to enable the G. Canal Co. under that Act to make a lease of their tolls and duties to the M. G. W. Railway Co., who had become proprietors of the G. Canal.

The Court will not consider the *quantum* of interest of shareholders in a company who seek for an injunction, nor whether their interest would entitle them to vote at a committee of the company; but when the petitioners had purchased two shares for a nominal consideration, after the agreement which they complained of had been entered into, and with full notice of it, and for the purpose of preventing its completion, the Court refused an injunction.—*M'Donnell and another v. The Grand Canal Co.*; and *M'Donnell v. Mid. Gt. W. Ry. Co.*, 3 I. C. R. 578; 5 I. Jur. 197, 198. (C.)

4. An attachment for £6. 17s. 7d., payable under an order of the Court of Ch., was issued in 1837, and renewed in 1848, but not afterwards, as it could not now be executed in consequence of the 11 & 12 Vic., c. 28. The Court gave liberty to issue a *fi. fa.* for the amount.—*Fenton v. F.*, 7 I. Jur. 26. (R.)

5. A., by will, after charging his real and personal estate, which consisted chiefly of slaves in Jamaica, with payment of his debts,

bequeathed to his executors £2000, in trust, to pay the interest thereon to his daughter (the petitioner) for life; after her death, the principal to go to her children; and directed that the principal and interest should be raised out of the yearly profits of the estate, and that the person for the time being in possession of the property should pay the charges. Subject to this and some other legacies, he devised his estate to his son T. and his assigns, for ever. T. entered into possession, and continued seized until his death, when he devised the property to his daughter, M., still subject to the above legacy. The respondent, having married M., became entitled to the estate in right of his wife, and wrote a letter to the petitioner on the subject of the legacy of £2000, containing the following language:—"The property owes you and your family £2000 currency; so long as I am in possession, you shall be paid your interest; and when the property yields it, the principal; as I wish never to pocket a farthing until everyone is paid." Under the 3 & 4 W. 4, c. 37 (the Slave Compensation Act), the respondent had previously put in his claim for compensation, as owner of the estate in right of his wife, but not in any other character. No counter claims were lodged on behalf of the petitioner, or any person representing her charge; and a large sum was awarded to him as compensation. A petition having been presented for the purposes of establishing the charge of £2000 upon the estate, and of rendering the compensation money liable in the hands of the respondent to this demand—*Held*, that the act of the Compensation Commissioners, in awarding this sum to the respondent, did not conclude the rights of the petitioner as against the sum granted to the respondent in lieu of the estate originally liable to that charge.

That the letter written by the respondent to the petitioner amounted to a declaration of trust in reference to the rents and profits of the estate; and therefore that the respondent was liable to satisfy the demand of the petitioner, as to the legacy of £2000, out of the sum awarded to him as compensation money.—*M'Kean v. Gray*, 7 I. Jur. 317. (C.)

6. Statutes are to be construed as mandatory and imperative when they prescribe acts to be done by private parties; but are only directory when they require public officers to do the acts, in which case the default or mistake of the officers will not destroy the parties' rights.—*Plunket v. Malley*, 8 I. Jur. N. S. 83. (M.O.)

## I. 2. Joint-stock Companies, Corporations, &c.

7. An Act contained a clause declaring it a Public Act. It related merely to the affairs of the L. Corporation. *Held*, a Private Act as to the public; but that members of the corporation, dealing with corporate property affected by the Act, had notice of, and were bound by it.—*Attorney-General v. Ball*, 10 I. E. R. 146. (C.)



1. A statute relating to the corporate property of a city, with the usual clause declaring that it shall be deemed a public act, does not bind strangers with notice. The mere probability of a purchaser knowing of it, or precautions taken by him in purchasing corporate property, will not fix him with constructive notice.—*Attorney-General v. Marrett*, 10 I. E. R. 167. (C.)

2. A Railway Company, having a limited power under their original Act to borrow money, borrowed from A., on the security of quarries, the property of the directors. They subsequently obtained a second and a third Act, the latter of which recited that the company had occasion for more extensive borrowing powers; and that they had not borrowed money under the borrowing clause in their original Act. *Held*, that the latter recital was not such a misrepresentation as affected A.'s security, A. having made further advances to the company after the date of their third Act.—*Hughes v. Belfast Harbour Commissioners*, 5 I. Jur. 35. (R.)

3. An affirmative statute, which creates a new right, does not of itself, and necessarily, destroy a pre-existing right created by another statute not therein referred to; but will destroy that pre-existing right, if the legislature's intention appears to have been that the new and old rights should not co-exist. Thus, the 6 G. 4, c. 42, repealed the 33 G. 2, c. 14 (*Ir.*), so far as regards Irish Joint-stock Banks, although the former contains no mention of the latter statute; their provisions being incompatible.—*O'Flaherty v. M'Dowell*, 2 I. Jur. N. S. 469. (H.L.)—[S. c. 6 H. L. Cas. 142.]

4. A statute empowered a corporation to make leases of the corporate property under their common seal, for a certain term in possession, and at the highest rent; and provided that all leases made in any other manner should be null and void. *Held*, that the statute did not preclude them from entering into an agreement for a lease, provided it was without delay carried into effect by the execution of leases in compliance with the statute.—*Stevens's Hospital v. Dyas*, 15 I. C. R. 405. (R.)

### I. 3. *Private and Local Acts.*

5. The Limerick Regulation Act (Loc. & Pers.) enacted that the Corporation property should be disposed of only for the public uses and charities of the city, subject to control and formalities mentioned in the Act; and that it should take effect from the 1st of Sept. 1823. It received the royal assent on the 18th of July 1823. At a corporate meeting on the 30th of August, property was leased not for public purposes to a member of the body, and without the control or formalities required by the Act. *Held*, that notwithstanding the clause deferring its operation, the Act bound the corporate property from

the date of its passing; and that the lease was therefore void.

The Act contained a clause declaring it a public Act. It related merely to the affairs of the Limerick Corporation. *Held*, that it was a Private Act, as to the public at large, but that the persons dealing in the transaction in question, being members of the corporation, had notice of and were bound by it.

A lease void under the Act was attempted to be supported by a prior contract which was not under the corporate seal, but was a resolution of the Common Council, who were in the habit of managing the corporate property. The proof that the property had been held for public trusts was defective, but the profits had been for many years applied to public purposes. The resolution was made in favour of the Chamberlain of the Corporation by the Common Council, which consisted of persons under his influence; and the rent, though fixed by valuers appointed by the Common Council, was under the value. *Held*, that although Equity might enforce a contract or resolution, not under seal or binding at Law, against a Corporation, under circumstances, yet this resolution could not be enforced, and would not support the lease.—*The Attorney-General v. Ball*, 10 I. E. R. 146. (C.)

6. The trustees of a bridge were authorised by a Private Act of 1847, to raise by presentment out of the county cess, and by instalments, £10,000 to build a bridge. In 1851, when £1600 had been so raised, another Act was passed reciting that £1600 had been levied, and empowering the trustees to raise the entire unpaid balance of £8400 at the Spring Assizes of 1852. While the Act was passing through Parliament, and before it received the Royal assent, a further instalment of £1600 was presented by the grand jury under the Act of 1847. *Held*, that the Act of 1851 only authorised the levying of £6800, the unassessed and unpaid balance of the £10,000; the £8400 being an inaccurate calculation, by which the Court was not bound.

The entire £8400 having been levied, the Court ordered the trustees to bring in £1600 to the credit of a cause petition matter, by way of information and bill, and at the relation of one of the ratepayers. The trustees, with the approval, and in accordance with a resolution of the grand jury, brought into Parliament a bill to enable them to levy a further sum, which bill was thrown out by the Lords for non-compliance with the standing orders of the House. *Held*, that the trustees could not be allowed the costs of the bill.

A cause petition by way of information and bill should state, and proof should be given of, the individual interest of the person named as relator.

*Quere*—Whether the description of the relator as ratepayer, in the title of the petition and of the affidavit verifying the petition, is sufficient?—*Att.-Gen. v. Le Hunte*, 8 I. C. R. 743. (R.)

## II. IN CASES OF, AND RELATING TO.

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93. *Usury.*
94. *Wills.*
95. *Witnesses.*

II. 1. *Accumulation.*II. 2. *Affirmations.*

1. An affirmation, taken under the 3 & 4 W. 4, c. 82, stated that affirmant was a member of a religious sect, called Separatists; but did not in terms follow the form of affirmation required by the Act. *Held*, that it must be assumed to have been properly made. — *Wolseley v. Worthington*, 14 L. C. R. 369. (C.A.)

II. 3. *Annuity Act (53 G. 3, c. 141.)*

2. A., residing at Brussels, by a deed prepared in England, executed there, and engrossed on English stamps; wherein he was described as of R. in Ireland; reciting that W. (an Englishman residing in England), had agreed to advance him £8000, in consideration of his paying W. £10,000, within six months after the death of A.'s father (then aged 76), if A.'s wife (then aged 41) survived A.'s father, and granting W. an annuity of £3000 a-year to commence from A.'s father's death; and that payment of the annuity and of the £10,000, should be secured on A.'s life estate

in remainder, after his father's death, in estates in Ireland; granted W. the annuity for A.'s wife's life, to be charged on those estates, and paid, at the dining hall of Lincoln's Inn, half-yearly; with clauses of distress and entry. A. demised the lands for 99 years, to secure the annuity and payment of the £10,000; and covenanted to pay that sum and the annuity. *Semble*, that the contract was an English one; and that the annuity deed not having been enrolled, was avoided by the English Annuity Act, 53 G. 3. c. 141.—*Walker v. Lorton*, 6 I. C. R. 329. (R.)

1. A. and B. being seized of lands in Ireland, and entitled to the interest on a mortgage of lands in Ireland, by deed of 1839, conveyed the lands and mortgage, to C. and D. during the lives of A. and B., and the life of the survivor, upon trust, by sale, mortgage, or grant of annuity, to raise a sum of money to pay off the debts of A. and B. By deed of the 15th of July 1840, A., B., C., and D. granted two annuities to E., to be charged upon, and issuing out of, the property comprised in the trust deed. A. and B., by this deed, covenanted to pay the annuities. By a deed of the 26th of June 1840, which recited the deed of the 15th of July 1840, as if it had been previously executed, A. and B. assigned their interest in a fund in the Court of Chancery in England, upon trust, among other things, to secure the annuities granted by the deed of the 15th of July. All the parties, except E., resided in England, and the preliminary agreement was made in Ireland, through an agent of C. and D., there resident. The deeds were executed by A., B., C., and D., in England, upon Irish stamps, but delivered to E. in Ireland, and warrants of attorney, to enter judgment in both countries against A. and B., further to secure the annuities, were also executed in England. The consideration for the annuities was paid in Ireland, in notes of the Bank of Ireland, and applied by the trustees on the trusts of the deed of 1839. *Held*, that the grant of these annuities came within the exception in the English Annuity Act, 53 G. 3. c. 141, s. 10, and was not voidable for want of compliance with the formalities imposed, by that statute.

*Held, in like*, that a purchase money transfer on A.'s interest, could not impeach the annuities by a discharge in a suit to administer the fund (the produce of the mortgage) on which the annuities were a charge. *See also* *v. Harrison*, 8 I. C. R. 460; *Dr. Keppel v. Napier*, 430 (C.A.)

#### II. 4. Appointments (Library)

2. The statute (1 W. 4. c. 46) respecting Illinois appointments validated, as to an appointment of a woman, or a woman's share which was legally valid, but a woman's share in equity an appointment which, because some of the powers objects were executed, was invalid both at law and in equity.

When a power of appointment does not warrant the exclusion of any of its objects at

appointment to some of them; and, if they died under age and unmarried, to the others, is invalid.

A marriage settlement directed that a fund should be divided amongst children as the husband and wife, or the survivor of them should, by any deed or writing, or by his or her will appoint. The wife made an appointment by will, which the husband wrote and proved. *Held*, inoperative either as a joint appointment, or as an appointment by the survivor.—*Minchia v. M.*, 3 I. C. R. 167. (R.)

#### II. 5. Arbitrations and Awards.

3. *Semble*—The 3 & 4 Vic., c. 105, s. 63, does not apply to Courts of Equity.—*Roche v. R.*, 8 I. E. R. 635. (R.)

4. A submission to arbitration, made a rule of Court by consent in a cause, is within the 10 W. 3. c. 14 (*Ir.*)—*Goggia v. Downing*, 13 I. E. R. 60. (R.)

5. The words "Money to become payable by the company under the award of the arbitrator," in the Railways Act (*Ir.*) 1860 (23 & 24 Vic. c. 97), s. 4, are to be construed as referring to an award not traversed.—*In re Lussia Corpn. Waterworks*, 17 I. C. R. 16. (R.)

#### II. 6. Attorneys.

[See 29 & 30 Vic., c. 84.]

6. The rule to change an attorney on payment of costs is not an order under the 3 & 4 Vic. c. 105, s. 29.—*Ennett v. Marnane*, 8 I. E. R. 522. (E.E.)

#### II. 7. Bank of Ireland.

#### II. 8. Bankers.

[See 33 G. 2. c. 14.]

7. The 33 G. 2. c. 14 (Bankers Act), s. 8, applies to a conveyance made in favour of a child or grandchild unborn, as well as to a conveyance made in favour of a child or grandchild alive when the conveyance was executed.

*Semble*—The case of a jointure settled by a banker on his son's wife, on the son's marriage, is not within that sec.—*Spearing v. Delaunay*, 1 Dr. & Wal. 591. (C.)

8. The Bankers Act, 33 G. 2. c. 14, was not repealed by the 6 G. 4. c. 42. Therefore, when a Joint-stock Banking Co., formed under the latter Act, stops payment, a trust is, under the Bankers Act, created in favour of the creditors, and affecting all the property of the stopped bank, which this Court may administer at the suit of any creditor against the company's public officer; the suit being instituted without making the other creditors or the shareholders parties, and the bill stating that the company's assets are sufficient to

discharge the Co.'s liabilities, and it not appearing that the shareholders have any liabilities other than those of their co-partnership.—*Fawcett v. Hodges*, 3 I. E. R. 232; Fl. & K. 100. (R.)—[Overruled: *O'Flaherty v. M'Dowell*, 6 H. L. Cas. 142; 2 I. Jur. N. S. 469. (H.L.)]

1. The Banking Act, 6 G. 4, c. 42, does not prevent a company from buying up the shares of an individual member. Although they dispense with the form of transfer prescribed by the Act, the sale will be binding as between them and the vendor.—*Taylor v. Hughes*, 7 I. E. R. 529; 2 Jon. & L. 24. (C.)

2. A., a stockbroker and notary-public, largely engaged in trade, received money from customers; paid it out upon their drafts; and occasionally discounted bills; but neither held himself out to the public as a banker, nor appeared to be considered one by them. In his books the entries of banking transactions were mixed up with those appertaining to his callings as a stockbroker and trader. *Held*, that he was not a banker within the 33 G. 2, c. 14.

*Quere*—Whether that statute applies to bankers who do not issue notes?—*Stafford v. Henry*, 12 I. E. R. 400. (E.E.)

3. A party trading openly as a banker found to be one within the 33 G. 2, c. 14, and 40 G. 3, c. 22, notwithstanding that he carried on another business more ostensible than that of banker. *Held*, that those Acts extended to all bankers—to those whose banks are not of issue, as well as to those whose banks are of issue.—*In re Guinness*, 1 I. Jur. 359. (M.O.)

4. Pending a petition for, but before the allowance by the Lord Ch. of a certificate under the Bankers Acts (33 G. 2, c. 14, and 40 G. 3, c. 22 (*Ir.*)), a banker not being entitled to be discharged from an arrest at law, cannot obtain an injunction to restrain a creditor from issuing execution against him.

But a creditor who had appeared on the hearing of the petition, and opposed the allowance of the certificate, and had filed a discharge under the order of reference, and thus made himself a party to the proceeding, was enjoined from issuing execution.—*Guinness v. Fitzsimon*, 13 I. E. R. 189. (R.)

5. The Crown is not bound by the Bankers Acts, 33 G. 2, c. 14 (*Ir.*); and 40 G. 3, c. 22 (*Ir.*)—*The Queen v. Guinness*, 3 I. C. R. 211. (C.)

6. An affirmative statute, which creates a new right, does not of itself and necessarily destroy a pre-existing right created by another statute not therein referred to; but will destroy that pre-existing right, if the Legislature's intention appears to have been that the new and old rights should not co-exist.

The 6 G. 4, c. 42, repealed the 33 G. 2, c. 14 (*Ir.*), so far as regards Irish Joint-stock Banks, although the former contains no mention of the latter statute, their provisions being incompatible.

A Joint-stock Banking Company in Ireland comes within the 8 & 9 Vic., c. 98.

A petition under the 33 G. 2, c. 14 (*Ir.*), on behalf of the petitioners and all the creditors of such a bank, to have assets administered under the trusts of that statute, is informal. The petition, if maintainable, should be on behalf of all the creditors of the persons constituting the bank; because the statute affords a remedy not confined to debts due by those persons in respect of the bank, but for their debts generally.

7. The Bankers Act, 33 G. 2, c. 14, does not apply to Joint-stock Banking Companies formed under the 6 G. 4, c. 42.—*O'Flaherty v. M'Dowell*, 6 I. C. R. 350; 2 I. Jur. N. S. 118. (C.)—[See 6 H. L. Cas. 142; 2 I. Jur. N. S. 469. (H.L.)]

## II. 9. Bankruptcy Acts.

[See 20 & 21 Vic., c. 60.]

8. A creditor, by judgment, entered pursuant to warrant of attorney, obtained an order for a receiver under the 5 & 6 W. 4, c. 55, more than two calendar months before the issuing of a commission of bankruptcy against the respondent, the consor. *Held*, that the assignee's execution was protected by sec. 95 from the operation of sec. 126 of the 6 W. 4, c. 14.—*Read v. Davis*, 3 I. E. R. 153. (R.)

9. The 3 & 4 Vic., c. 107, s. 41, applies to ptfs. only. Therefore, when an assignee, a deft., dies, a supplemental bill is necessary to bring the new assignee before the Court.—*Meagher v. O'Mara*, 3 I. E. R. 471; Fl. & K. 269. (R.)

10. On March 3rd, 1841, petitioner obtained a conditional order for a receiver under the 5 & 6 W. 4, c. 55, on a judgment entered in 1828, by warrant of attorney, against respondent, then a trader, and against whom a commission of bankruptcy issued within two months after that order was made absolute. On the assignee's motion,—*Held*, that this case came within the 6 W. 4, c. 14, s. 125, and that the receiver should be removed; that the proceedings in this matter having been, within one year after the 3 & 4 Vic., c. 105, became law, were not protected by its 22nd sec. It appearing that simple contract creditors of the respondent, who had been such before the 1st Nov. 1840, had proved under the commission,—*Held*, that they were entitled to the benefit of the proviso saving the right of purchasers, mortgagees, and creditors, and that the assignee was to be deemed entitled in their right.—*Burt v. Bernard*, 4 I. E. R. 828; Fl. & K. 414. (R.)—[Affid.: 5 I. E. R. 425. (C.)]

11. The 53 G. 3, c. 188, does not oust the jurisdiction of Chancery to entertain a bill by the assignee of a deceased insolvent, to administer his after-acquired property, on behalf of the unsatisfied creditors in the in-

in remainder, after his father's death, in estates in Ireland; granted W. the annuity for A.'s wife's life, to be charged on those estates, and paid, at the dining hall of Lincoln's Inn, half-yearly; with clauses of distress and entry. A. demised the lands for 99 years, to secure the annuity and payment of the £10,000; and covenanted to pay that sum and the annuity. *Semble*, that the contract was an English one; and that the annuity deed not having been enrolled, was avoided by the English Annuity Act, 53 G. 3, c. 141.—*Walker v. Lorton*, 6 I. C. R. 329. (R.)

1. A. and B. being seized of lands in Ireland, and entitled to the interest on a mortgage of lands in Ireland, by deed of 1839, conveyed the lands and mortgage, to C. and D. during the lives of A. and B., and the life of the survivor, upon trust, by sale, mortgage, or grant of annuity, to raise a sum of money to pay off the debts of A. and B. By deed of the 15th of July 1840, A., B., C., and D. granted two annuities to E., to be charged upon, and issuing out of, the property comprised in the trust deed. A. and B., by this deed, covenanted to pay the annuities. By a deed of the 26th of June 1840, which recited the deed of the 15th of July 1840, as if it had been previously executed, A. and B. assigned their interest in a fund in the Court of Chancery in England, upon trust, among other things, to secure the annuities granted by the deed of the 15th of July. All the parties, except E., resided in England, and the preliminary agreement was made in Ireland, through an agent of C. and D., there resident. The deeds were executed by A., B., C., and D., in England, upon Irish stamps, but delivered to E. in Ireland, and warrants of attorney, to enter judgment in both countries against A. and B., further to secure the annuities, were also executed in England. The consideration for the annuities was paid in Ireland, in notes of the Bank of Ireland, and applied by the trustees on the trusts of the deed of 1839. *Held*, that the grant of these annuities came within the exception in the English Annuity Act, 53 G. 3, c. 141, s. 10, and was not voidable for want of compliance with the formalities imposed by that statute.

*Held, further*, that a puisne incumbrancer on A.'s interest could not impeach the annuities by a discharge in a suit to administer the fund (the produce of the mortgage) on which the annuities were a charge.—*Bannatyne v. Barrington*, 9 I. C. R. 406; *Dr. Rep. temp. Napier*, 459. (C.A.)

#### II. 4. Appointments (Illusory).

2. The statute (1 W. 4, c. 46) respecting illusory appointments validated in equity an appointment of a nominal or illusory share which was legally valid; but did not validate in equity an appointment which, because some of the power's objects were excluded, was invalid both at Law and in Equity.

When a power of appointment does not warrant the exclusion of any of its objects, an

appointment to some of them; and, if they died under age and unmarried, to the others, is invalid.

A marriage settlement directed that a fund should be divided amongst children as the husband and wife, or the survivor of them should, by any deed or writing, or by his or her will appoint. The wife made an appointment by will, which the husband wrote and proved. *Held*, inoperative either as a joint appointment, or as an appointment by the survivor.—*Minchin v. M.*, 3 I. C. R. 167. (R.)

#### II. 5. Arbitrations and Awards.

3. *Semble*—The 3 & 4 Vic., c. 105, s. 63, does not apply to Courts of Equity.—*Roche v. R.*, 8 I. E. R. 638. (R.)

4. A submission to arbitration, made a rule of Court by consent in a cause, is within the 10 W. 3, c. 14 (*Ir.*)—*Goggia v. Downing*, 13 I. E. R. 60. (R.)

5. The words "Money to become payable by the company under the award of the arbitrator," in the Railways Act (*Ir.*) 1860 (23 & 24 Vic., c. 97), s. 4, are to be construed as referring to an award not traversed.—*In re Dublin Corp'n. Waterworks*, 17 I. C. R. 16. (R.)

#### II. 6. Attorneys.

[See 29 & 30 Vic., c. 84.]

6. The rule to change an attorney on payment of costs is not an order under the 3 & 4 Vic., c. 105, s. 29.—*Emmett v. Marnane*, 8 I. E. R. 522. (E.E.)

#### II. 7. Bank of Ireland.

#### II. 8. Bankers.

[See 33 G. 2, c. 14.]

7. The 33 G. 2, c. 14 (Bankers Act), s. 3, applies to a conveyance made in favour of a child or grandchild unborn, as well as to a conveyance made in favour of a child or grandchild alive when the conveyance was executed.

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8. The Bankers Act, 33 G. 2, c. 14, was not repealed by the 6 G. 4, c. 42. Therefore, when a Joint-stock Banking Co. formed under the latter Act, stops payment, a trust is, under the Bankers Act, created in favour of the creditors, and affecting all the property of the shareholders, which this Court may administer at the suit of any creditor against the company's public officer; the suit being instituted without making the other creditors or the shareholders parties, and the bill stating that the co-partnership assets are sufficient to

discharge the Co.'s liabilities, and it not appearing that the shareholders have any liabilities other than those of their co-partnership.—*Fawcett v. Hodges*, 8 I. E. R. 232; Fl. & K. 100. (R.)—[Overruled: *O'Flaherty v. M'Dowell*, 6 H. L. Cas. 142; 2 I. Jur. N. S. 469. (H.L.)]

1. The Banking Act, 6 G. 4, c. 42, does not prevent a company from buying up the shares of an individual member. Although they dispense with the form of transfer prescribed by the Act, the sale will be binding as between them and the vendor.—*Taylor v. Hughes*, 7 I. E. R. 529; 2 Jon. & L. 24. (C.)

2. A., a stockbroker and notary-public, largely engaged in trade, received money from customers; paid it out upon their drafts; and occasionally discounted bills; but neither held himself out to the public as a banker, nor appeared to be considered one by them. In his books the entries of banking transactions were mixed up with those appertaining to his callings as a stockbroker and trader. *Held*, that he was not a banker within the 33 G. 2, c. 14.

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4. Pending a petition for, but before the allowance by the Lord Ch. of a certificate under the Bankers Acts (33 G. 2, c. 14, and 40 G. 3, c. 22 (*Ir.*)), a banker not being entitled to be discharged from an arrest at law, cannot obtain an injunction to restrain a creditor from issuing execution against him.

But a creditor who had appeared on the hearing of the petition, and opposed the allowance of the certificate, and had filed a discharge under the order of reference, and thus made himself a party to the proceeding, was enjoined from issuing execution.—*Guinness v. Fitzsimon*, 18 I. E. R. 189. (R.)

5. The Crown is not bound by the Bankers Acts, 33 G. 2, c. 14 (*Ir.*); and 40 G. 3, c. 22 (*Ir.*)—*The Queen v. Guinness*, 3 I. C. R. 211. (C.)

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7. The Bankers Act, 33 G. 2, c. 14, does not apply to Joint-stock Banking Companies formed under the 6 G. 4, c. 42.—*O'Flaherty v. M'Dowell*, 6 I. C. R. 350; 2 I. Jur. N. S. 118. (C.)—[See 6 H. L. Cas. 142; 2 I. Jur. N. S. 469. (H.L.)]

## II. 9. Bankruptcy Acts.

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8. A creditor, by judgment, entered pursuant to warrant of attorney, obtained an order for a receiver under the 5 & 6 W. 4, c. 55, more than two calendar months before the issuing of a commission of bankruptcy against the respondent, the consor. *Held*, that the assignee's execution was protected by sec. 95 from the operation of sec. 126 of the 6 W. 4, c. 14.—*Read v. Davis*, 3 I. E. R. 153. (R.)

9. The 3 & 4 Vic., c. 107, s. 41, applies to pfts. only. Therefore, when an assignee, a deft., dies, a supplemental bill is necessary to bring the new assignee before the Court.—*Meagher v. O'Mara*, 3 I. E. R. 471; Fl. & K. 269. (R.)

10. On March 3rd, 1841, petitioner obtained a conditional order for a receiver under the 5 & 6 W. 4, c. 55, on a judgment entered in 1828, by warrant of attorney, against respondent, then a trader, and against whom a commission of bankruptcy issued within two months after that order was made absolute. On the assignee's motion,—*Held*, that this case came within the 6 W. 4, c. 14, s. 125, and that the receiver should be removed; that the proceedings in this matter having been, within one year after the 3 & 4 Vic., c. 105, became law, were not protected by its 22nd sec. It appearing that simple contract creditors of the respondent, who had been such before the 1st Nov. 1840, had proved under the commission,—*Held*, that they were entitled to the benefit of the proviso saving the right of purchasers, mortgagees, and creditors, and that the assignee was to be deemed entitled in their right.—*Burt v. Bernard*, 4 I. E. R. 328; Fl. & K. 414. (R.)—[Affd.: 5 I. E. R. 425. (C.)]

11. The 58 G. 3, c. 138, does not oust the jurisdiction of Chancery to entertain a bill by the assignee of a deceased insolvent, to administer his after-acquired property, on behalf of the unsatisfied creditors in the in-

solvent matter.—*Byrne v. B.*, Fl. & K. 483. (R.)—[Affd.: 2 Dr. & War. 71; 1 Con. & L. 189; 4 I. E. R. 621. (C.)]

1. The 6 G. 4, c. 14, s. 126, which deprived creditors, who have obtained judgments by confession against their debtor, of preference in bankruptcy, has not been repealed by the 3 & 4 Vic., c. 105.

Creditors by simple contract come within the terms of the proviso in the 3 & 4 Vic., c. 105, s. 22, which enacts "that, as regards purchasers, mortgagees, or creditors, who shall have become such before the time appointed for the commencement of this Act, such judgment shall not affect lands, &c., otherwise than as the same would have been affected by such judgments if this Act had not passed."—*In re Perrin*, 4 I. E. R. 362; 2 Dr. & War. 147; 1 Con. & L. 567. (C.)—[Affg.: 4 I. E. R. 89. (R.)]

2. A. having contracted to buy an estate, obtained a conveyance from the tenant for life, in 1835, in which the remainderman in fee did not join. In M. T. 1835, A. confessed a judgment to W. for £4000. In Feb. 1836, A. mortgaged the estate to E. for £5000. In June 1836, on a further advance of £2000 by W., A. mortgaged to W. for £6000. In March 1837, A. became bankrupt. The estate was deficient to pay both mortgages. *Held*, that the 6 W. 4, c. 14, s. 126, did not apply, and that W.'s judgment had priority over C.'s mortgage.—*Baldwin v. Belcher*, 6 I. E. R. 424; 1 Jon. & L. 18. (C.)

3. By the 3 & 4 Vic., c. 107, s. 20, the property vests in the assignee upon the making, not on the entering of record the vesting order.—*Irwin v. I.*, 8 I. E. R. 9. (R.)

4. Statute 10 Car. 1. c. 6, s. 10, *Ir.* (13 Eliz., c. 5, *Eng.*), in favour of creditors, avoids only deeds which would deprive them of such property as they could make available without their debtors' aid. A settlement by a tenant in tail in 1836, by which he opened and resettled his estate on himself for life, with remainder over, is not within it.

The solvency or insolvency of the debtor affords no certain test whether a deed is void under that Act; each case must be judged by all its circumstances.

The 6 W. 4, c. 14, s. 87 (6 G. 4, c. 16, s. 73, *Eng.*), is retrospective as to conveyances made before the Act.

*Semble*—It is not so touching commissions before the Act.—*Clements v. Eccles*, 11 I. E. R. 229. (C.)

5. A bankrupt, travelling from London to Dublin, learned at Liverpool that a commission had issued against him. On the 21st March, he proceeded to Dublin to surrender; but, finding that he was not bound to do so until the 24th, deferred it until then. Meanwhile he was arrested. *Held*, that he was not entitled, as being on his way to surrender, to

be discharged under the 6 W. 4, c. 14, s. 136.

A commission of bankruptcy was issued pending a motion to set aside a verdict in an action against the bankrupt, the petitioning creditor being the plaintiff's clerk, and having bought up bills for the purpose of creating a petitioning creditor's debt, and the bankrupt's own conduct was suspicious. *Held*, that although the commission may have been collusively issued to prevent the bankrupt resisting the action, yet, as there were other creditors for whose benefit it could be worked, it should not be superseded.

The fact that a commission of bankruptcy is issued for an indirect and improper object, is not a ground for superseding it, if that be not the sole object.—*In re Wall*, 12 I. E. R. 285. (C.)

6. Under the 3 & 4 Vic., c. 107, s. 85, the Insolvent Court had not jurisdiction to order that an insolvent be re-heard upon the matter of his petition and schedule before an Assistant-Barrister, who, in adjudicating upon the case, pursuant to the 14 & 15 Vic., c. 57, s. 119, has fallen into a mistake in law.—*In re G—*, 2 I. C. R. 361; 3 I. Jur. 136, 279. (I.C.)

7. The 13 & 14 Vic., c. 29, repeals the 6 W. 4, c. 14, s. 126.—*In re Ryan*, 3 I. C. R. 33. (B.)

8. By the 12 & 13 Vic., c. 107, s. 108, a judgment against a bankrupt is reduced to the rank of a simple contract debt.—*Jones v. Stokes*, 2 I. Jur. N. S. 42. (R.)

9. When an insolvent is in custody, and has made a pauper declaration (s. 240), and has not made satisfaction for the debt, &c., the detaining creditor may forthwith, after notice in the *Gazette*, file a petition of insolvency under sec. 241, and is not bound, and ought not, to wait until the expiration of the twenty-one days mentioned in sec. 183.—*In re Pratt*, 8 I. C. R. 386. (B.)

11. When a trader debtor summons has been served on a debtor who subsequently files a petition for arrangement, the enlargement of the time given by the 20 & 21 Vic., c. 60, s. 11, to answer it is entirely in the discretion of the Court, which will be influenced by considering whether or not the arrangement will probably be sanctioned by it.—*In re Dobson*, 8 I. C. R. 388. (B.)

12. A petition of arrangement was presented under sec. 343. The petitioner was a member of a subsisting trading co-partnership, and a large proportion of the debts for which the petitioner proposed to arrange were partnership debts. It did not appear that any agreement had been made between the petitioner and the remaining partners whereby the latter were to take on themselves the payment of the partnership debts. The Court refused to grant the prayer of the petitioner, and left the trader to proceed in Bankruptcy.—*In re Parrott*, 8 I. C. R. 391.

1. After an order for protection under the arrangement clauses of the Irish B. and I. Act, 1857, has been made, the Court has not jurisdiction to dismiss the petition, except for the causes mentioned in sec. 353 of that Act. The Judge of the Bankrupt Court having dismissed a petition presented under those clauses, for a reason not mentioned in that section, one of the Assistant Registrars of the Court, by the direction of the Judge, attended on the hearing of an appeal against the order dismissing the petition, to inform the Court of Appeal that no question of jurisdiction had been raised in the Court below. *Held*, that the petition had been improperly dismissed, and that the order dismissing it ought to be reversed.—*In re Craig*, 8 I. C. R. 393; Dr. Rep. temp. Napier, 394. (C.A.)

2. In a bankruptcy of long standing (commission dated 1814), a portion of the estate was unexpectedly realised in the I. E. Court in 1853. Dividends were struck on the separate estates of three partners of the bankrupt firm on the 30th October 1855. A number of the creditors did not appear to claim their dividends. In 1859 an application was made on the part of a creditor, who had appeared, for a re-distribution of the unclaimed dividends. *Held*, that since the repeal of the 6 W. 4, c. 16, by the 20 & 21 Vic., c. 60, the Court has not jurisdiction to order such re-distribution. The right to such dividends remains in the non-claiming creditors, or their representatives. The present Act does not provide for the disposal of such unclaimed dividends. The principle that non-claimers for three years affords a reasonable presumption that the debts have been satisfied has no application in an old bankruptcy. In such a case the Court, if it had jurisdiction to order a re-distribution, would not exercise it.—*In re French*, 9 I. C. R. 1. (B.)

3. Under the trader debtor sections of the Irish Bankrupt Act, the Court may enquire into all the facts of the case, and not permit the trader to make an affidavit of a good defence on the merits. Under the sections of the English Act, the Court must receive the affidavit.—*Re Fivey*, 6 I. Jur. N. S. 22. (B.)

4. An Assistant Barrister, having ascertained the merits of an insolvent's case, adjourned it to the next Q. Sessions, and directed the protection to be withdrawn. This Court refused to entertain an application for a bail rule, or for liberty to apply to the Court of Q. B. for a writ of *habeas corpus* to bring up the insolvent to be heard in Dublin. To such a case the 20 & 21 Vic., c. 60, s. 202, does not apply.—*In re Paul*, 7 I. Jur. N. S. 20. (B.)—[A writ of *h. c.* refused by the Q. B.; 7 I. Jur. N. S. 152.]

5. The 20 & 21 Vic., c. 60, is not an unqualified repeal of the 3 & 4 Vic., c. 107. It is rather a re-enactment of portions of that Act, so far as relates to proceedings pending at the time of the passing of the present Act. The 20 & 21 Vic., c. 60, s. 217, does not in all cases operate retrospectively.

When proceedings were pending in Insolvency at the passing of the 20 & 21 Vic., c. 60, and creditors had then incurred liabilities and acquired rights, those liabilities and rights were regulated by the 3 & 4 Vic., c. 107. The rule as to election in the 3 & 4 Vic., c. 107, s. 71, still prevails.

The creditor is not bound to elect, until he has an opportunity of seeing which fund is most productive.—*In re Browne*, 9 I. C. R. 271. (B.)

6. A., to secure £160 due from him to B., assigned articles by a bill of sale, which provided that A. was to pay the £160, with interest, by instalments, and that, if he paid the £160, with interest, the bill of sale should be void; and that A. should have the use of the furniture so long as he continued to pay the instalments regularly. The first and second instalments were paid. Before the third fell due, A. filed a declaration of insolvency, upon which he was subsequently adjudicated a bankrupt. *Held*, that the furniture passed to the assignees under the order and disposition clause, 20 & 21 Vic., c. 60, s. 313.—*In re Murray*, 9 I. C. R. 281. (B.)

7. A. and B., partners in trade, became bankrupt. C. proved upon the joint estate. D., another creditor, upon an affidavit that the debt for which C. proved was "not justly due," it being the private debt of one of the partners, applied, *ex parte*, under the 20 & 21 Vic., c. 60, s. 263, for an order to examine witnesses, with the view of having the proof expunged, and a dividend, received by C., refunded.

Notice of the application directed to be served on the trade assignee and upon C. Motions under the 263rd sec. must, upon the practice of the Court, be upon such notice.

*Semble*—When the joint estate of a partnership firm is being administered, the private debt of one of the partners is a debt "not justly due" within sec. 263.—*In re Ferrar*, 9 I. C. R. 289. (B.)

8. On the morning of the hearing the solicitor of an opposing creditor informed the insolvent's solicitor of his intention to persist in his opposition. In the momentary absence of the creditor's solicitor the case was called on; and, no one being present to oppose, a discharge was pronounced by the Judge. Immediately after, the creditor's solicitor coming in, asked for a re-hearing. *Held*, that a solicitor does not, by communicating with the solicitor on the other side, lay him under any obligation, or constitute him his agent to convey such a communication to the Court; and, therefore, that the Court cannot in such a case annul or review the adjudication under the 233rd sec. of the Bankrupt and Insolvent Act, on the ground that it was improperly or fraudulently obtained.

The discharge pronounced by the Judge under the 212th sec. is a final and conclusive adjudication; it is not necessary to its completeness that the written order and the warrant to the gaoler (under sec. 219) should be made out by the officer of the Court.



When such an adjudication has been pronounced by the lips of the Judge, he has no power to set it aside under the 236th sec., on the ground that the discharge was a mistake.—*In re Logan*, 9 L. C. R. 569; 5 L. Jur. N. S. 41. (B.)

1. A. employed B., a builder, to take down the front wall of his house, and execute some other repairs. While the works were in progress, C., the occupier of the adjoining house, served a notice upon A., that injury was likely result to his house from the repairs, and that he would hold A. responsible. B. upon this being mentioned to him, wrote on the estimate of the works the following memorandum:—

"In carrying out the foregoing work, I hereby undertake to hold myself responsible for any injury done to the adjoining houses."

Some works in addition to these in the estimate were done, the contract was completed, and B. paid in full for all. C. brought an action against A., averring negligence, and alleging various injuries to his house from the works. B., upon being called upon to settle or defend the action, made no reply, and soon after became bankrupt and absconded. A., having had to pay £191. 7s. 11d., damages and costs, and £60, his own expenses in the action, sought to prove for £251. 7s. 11d. Held, that (supposing the memorandum to constitute a contract upon a valuable consideration) the damages which C. might recover against A. were not necessarily identical with those contemplated by the guarantee; and that A. could not prove for the above sum, either as for a debt payable upon a contingency, within s. 257, or as for a liability to pay money upon a contingency, within s. 258.—*In re Quin*, 11 L. C. R. 57. (B.)

2. Under the 20 & 21 Vic., c. 60, s. 267, the adjudication in Ireland vests, so far as the law of this country is concerned, in the assignees the bankrupt's property situate in a foreign state.—*In re Robinson*, 11 L. C. R. 385; 6 L. Jur. N. S. 42. (B.)

3. P. & Co. sold to the bankrupt several parcels of whiskey in bond. Delivery orders were made out by P. & Co., their store-keeper, to deliver the whiskey to H. or order. The payment was by bills. H. endorsed some of the delivery orders to C. for value before bankruptcy, and C. presented these orders to the store-keeper of H. Some formalities were required to be gone through at the Custom-house, and the whiskey was not immediately delivered to C. Nothing remained to be done by P. & Co., in order to complete the sale to H.

Under these circumstances, P. & Co. claimed the whiskey, as unpaid vendors having a right of stoppage *in transitu*. C. claimed it as endorsee for value of the delivery order, and the assignees in bankruptcy claimed it under the order and disposition clause. Held, that the *transitus* was complete on the receipt of the delivery order by H., and therefore no right of stoppage *in transitu* remained in P. & Co.

That the whiskey was not in the order and disposition of H. at the date of the bankruptcy, and therefore the assignees had no title.

That C. was entitled to the whiskey.—*In re Hughes*, 12 L. C. R. 450 and 463; 6 L. Jur. N. S., 260 and 7 L. Jur. N. S. 336. (B.)

4. R., of the firm of L. & Co., was made a bankrupt in Ireland. The other member of the firm was made bankrupt in England. R. having obtained his certificate, applied for an allowance under sec. 302. Held, that the allowance should be calculated on his separate estate, and on his share of the joint estate; but not on the whole joint estate.—[*Ex parte Lomas*, 4 Dea & Ch. 240, approved of.]—*In re Lunham*, 12 L. C. R. 471; 7 L. Jur. N. S. 403. (B.)

5. The 20 & 21 Vic., c. 60, s. 268, does not vest a bankrupt's lease in his assignees so as to make them liable to its covenants and conditions before election, even though in possession; and the 23 & 24 Vic., c. 154, ss. 14, 15, are inapplicable; and sec. 271, regulating the bankrupt's liabilities, recognises also the obligation of the assignees, and protects the landlord.—*Re E. Ellis*, 10 L. Jur. N. S. 19. (B.)

6. A Ry. Co. is "a Joint-stock Company" within the 20 & 21 Vic., c. 60, and, as such, is liable to be made bankrupt.—*In re Bagnallstown and Wexford Railway Co.*, 15 L. C. R. 491. (C.A.)

## II. 10. Baths and Wash-houses Act.

7. By the Baths and Wash-houses Act, 9 & 10 Vic., c. 87, the town council of a borough, or the commissioners of a city or town, are empowered from time to time to contract for the purchasing or renting of any lands necessary for the purposes of the Act, and to contract for the purchase or lease of any baths and wash-houses already or thereafter to be built and provided in any such borough or such city or town, and appropriate the same to the purposes of the Act; and it was provided that the baths and wash-houses so purchased or leased should be deemed to be within the provisions of the Act as fully as if they had been built or provided by the said council or town commissioners. "Lands" are defined by the Act to mean lands, tenements, or hereditaments, of whatsoever nature or tenure.

The town council of a borough contracted to purchase baths and wash-houses which had been commenced by a private society, and were held under a sub-lease of a portion of lands comprised in a lease of lands demised by the owner of the fee, and which were thus subject to a rent, in addition to the rent reserved in the sub-lease, and to the covenants and conditions in the original lease. Held (affirming the decision of the M. R.), that it would be a breach of trust for the town council to purchase lands, the interest in which might be lost by the default of others, and that specific performance ought not to be enforced.—[*Dissentiente*, the Lord Chancellor,

Napier.]—*Mulholland v. Corporation of Belfast*, 9 I. C. R. 292; Dr. Rep. temp. Napier, 539. (C.A.)

## II. 11. *Bills pro Confesso, and others.*

1. The 25 G. 3, c. 51, s. 3, applies to cases in which the ptf. dismisses his bill by rule in the office; not to cases in which it is dismissed by the act of the Court.—*Bunbury v. O'Brien*, H. & J. 808. (E.E.)

## II. 12. *Bills of Exchange and Promissory Notes.*

## II. 13. *British Claims on France.*

## II. 14. *Champerty and Buying of Titles.*

## II. 15. *Ch. Reg. (Ir.) Act 1850 (13 & 14 Vic., c. 89.)*

[See 30 & 31 Vic., c. 44. See also PRACTICE, XX, a. 1; Ch. Reg. Ir. Act.]

2. A cause petition under the Ch. Reg. Act is open to an objection for multifariousness.—*Cuming v. Taylor*, 1 I. C. R. 25; 3 I. Jur. 65. (C.)

8. When a petition, in the nature of a special case, is presented under the Court of Ch. Reg. Act, s. 11, it is not necessary to the maintenance of such a petition that all the parties interested in the question for adjudication should concur in the statement of facts put forward in the petition.—*In re O'Reilly*, 1 I. C. R. 208; 3 I. Jur. 205. (C.)

4. It may be observed, that previously to the Court of Ch. (Ir.) Reg. Act 1850, no step could have been taken in a minor matter without a petition. Under that statute minors may be made wards of Court by cause petition; and if they are now made wards of Court by a cause petition, instead of an ordinary petition, all subsequent orders may be made on motion and without petition, and expense will thus be saved to minors' estates.—*Hart v. Carleton*, 1 I. C. R. 231; 3 I. Jur. 181. (R.)

5. When a petition is referred summarily under the 15th sec., the Master has power to deal with all questions of multifariousness in the absence of parties.—*Taylor v. Young*, 1 I. C. R. 650; 4 I. Jur. 88. (C.)

6. A petition to take partnership accounts comes within the Ch. Reg. Act, s. 15, even though it prays for a dissolution of the partnership, or the respondent denies the existence of the partnership.

Object of bringing petitions under that sec. before the Court, in the first instance.—*Walsh v. Kinnelly*, 4 I. C. R. 510. (C.)

7. On an appeal from an order of the M. R., in a matter referred to the Master, under

the 15th sec. of the Ch. Reg. Act, the appellant begins.—*Dunlevie v. Hort*, 6 I. C. R. 82, reversed.

The cases of *Thomas v. Pinnell*, 15 Beav. 148, and *In re Moylan*, 16 Beav. 220, held, not to be inconsistent with the former authorities, and approved of.—*Dunlevie v. Hort*, 6 I. C. R. 99; 2 I. Jur. N. S. 293. (C.A.)

8. Orders under the 1st sec. of the Ch. Reg. Act and the 32nd Order of July 1851, should state the character and right in which the parties to them are to be bound.—*Swan v. Doak*, 6 I. C. R. 55. (R.)

9. A minor may be bound by an order under the Ch. Reg. Act, s. 1, and 32nd Order of July 1851. Form of such order.—*Fry v. Johnson*, 6 I. C. R. 56. (R.)

10. The jurisdiction given by the Ch. Reg. Act, s. 15, does not extend to a petition to appoint a new trustee, when it prays the removal of an existing trustee.—*Mills v. O'Loughlin*, 6 I. C. R. 565. (C.)

## II. 16. *Charge and Charging Order.*

[See CHARGING ORDER.]

11. The 6 W. 4, c. 14, s. 126, has not been repealed by the 3 & 4 Vic., c. 105.

Creditors by simple contract are within the proviso in the 3 & 4 Vic., c. 105, s. 22, in favour of "purchasers, mortgagees, or creditors."

A statute may operate upon a subsequent statute, without express words.—*In re Perrin*, 4 I. E. R. 89. (R.)—[Affd.: 4 I. E. R. 362; 2 Dr. & War. 147; 1 Con. & L. 567. (C.)]

12. A judgment creditor, seeking to have his debt charged under the 3 & 4 Vic., c. 105, s. 23, upon a fund, impounded and standing in the name of the Acct.-Gen. of the Court of Ch., ought to present his petition to that Court in the first instance. If he resorts to a Court of Law for the charging order, he must afterwards obtain from this Court liberty for the Acct.-Gen. to act under it, so as to prevent a clashing of jurisdiction. The Acct.-Gen. of this Court has not any right to attend to an order inconsistent with or varying an order of this Court, without its special direction so to do.—*Gore v. G.*, 4 I. E. R. 164. (R.)

13. In a foreclosure suit a surplus remained after payment of the reported incumbrances. The mortgagor being dead, a puisne judgment creditor sought, under the 3 & 4 Vic., c. 105, ss. 23, 24, an order to charge, with the amount of his judgment, that surplus, which was the residue of the price of real estate sold under the decree. *Held*, that that surplus must be deemed either real estate belonging to the judgment debtor's heir-at-law, or personality belonging to his personal representatives; and that the 3 & 4 Vic., c. 105, does not empower the Court to attach by charging order a de-

ceased debtor's property in the hands of his representative.

*Semble*—It is very questionable whether the 3 & 4 Vic., c. 105, s. 23, extends to money.—*Wallace v. McCann*, 4 I. E. R. 522; Fl. & K. 570. (R.)—[See *McAllister v. Murray*, 5 I. L. R. 92.]

1. A married woman was entitled during the joint lives of herself and her husband to the interest of specified stock to her sole use, without power of anticipation. There were limitations over respecting the principal in favour of herself and her husband. Upon petition by a judgment creditor of both, the Court made an order under the 3 & 4 Vic., c. 105, s. 23, charging the judgment on the stock, without prejudice to her right to receive the interest during coverture.—*Carter v. Mahon*, 4 I. E. R. 305; Fl. & K. 342. (R.)

2. The exception in the latter part of the 3 & 4 Vic., c. 105, s. 22, applies as well to cases in which the judgment creditor proceeds by petition, as to those in which he files a bill.—*McDermott v. Moylan*, Long. & T. 555. (E.E.)

3. The Court has jurisdiction to direct satisfaction to be entered upon the registry of an order under the 3 & 4 Vic., c. 105.

The Court made the order upon an affidavit of payment, and a consent signed by the party in whose favour the original order to pay the money had been made.—*O'Neill v. Bass*, 6 I. E. R. 307. (R.)

4. When a charging order has been obtained by a judgment creditor upon funds reported to his debtor in the cause, the Court will, after the expiration of the six months from the date of the order, direct the funds to be transferred to the creditor on motion, without a bill being filed.—*Burke v. B.*, 7 I. E. R. 174. (R.)

5. The 3 & 4 Vic., c. 105, ss. 23, 24, are to be read in connection. The charging order under that statute is first a conditional order *ex parte* to be made absolute, which last is the order contemplated by sec. 23.—*In re Dunscombe*, 9 I. E. R. 4. (R.)

6. This Court has jurisdiction to set aside a fraudulent sale in the Insolvent Court; but it will not be exercised if there be a remedy in the latter Court.

A judgment creditor of 1843, during the life of the conuzor, filed a bill to redeem a judgment of 1842, obtained for a debt which was also secured by a lease to the creditor, reserving a rent which was to be retained until the debt was paid; and for a sale, to pay the sum advanced for redemption and his own debt. *Held*, that he was entitled to redeem, and to have an assignment of the prior creditor's security; but not to a sale, there being creditors before Nov. 1840.

*Semble*—A detaining creditor of an insolvent cannot file a bill for a sale on foot of his judgment, under 3 & 4 Vic., c. 105.—*Maguire v. O'Reilly*, 9 I. E. R. 335; 3 Jon. & L. 224. (C.)

7. A decree against several, for payment of costs is joint and several; and, a receiver may be appointed over the lands of one of them, under the 3 & 4 Vic., c. 105, without making the others parties to the petition.—*Archbp. of Dublin v. Lord Trimleston*, 13 I. E. R. 98. (R.)

8. To obtain a charging order under the 3 & 4 Vic., c. 105, s. 23, it is not necessary to revive the judgment. Therefore, the Court granted an order on the petition of husband and wife on a judgment obtained by the wife *dum sola*, without its having been revived.—*Irwin v. Nesbit*, 13 I. E. R. 125. (R.)

9. When a charging order has been obtained by a judgment creditor upon funds reported to a creditor in a cause, the Court, when there is no controversy as to the right to the fund charged, will direct it to be paid to the petitioner, without bill.—*Fulton v. Farran*; *Blake v. French*, 1 I. Jur. 66. (R.)

10. Although the exact amount of a share to which a party is entitled in government stock, standing in the names of trustees, or in the books of the Acct.-General, to the credit of a cause, is unascertained; yet, if it be ascertained by decree that that party is entitled to a share of such stock, that share may be charged under the 3 & 4 Vic., c. 105, ss. 23, 24.—*White v. O'Grady*, 2 I. C. R. 333. (R.)

11. A., judgment debtor of B., was entitled to an annuity payable by C., who drew a cheque in A.'s favour for a gale of the annuity; and wrote to B., that the cheque was in his (C.'s) hands. *Held*, that this cheque could not be attached under the 3 & 4 Vic., c. 105, s. 20.—*Ex parte Smythe*; *in re Cottrell a minor*, 5 I. Jur. 41. (R.)

12. A policy of insurance is not a "security for money" which the sheriff can seize under the 3 & 4 Vic., c. 105, s. 20.—*Alleyne v. Darcy*, 5 I. C. R. 56. (C.)

13. An equitable mortgagee, by deposit of railway shares, is entitled to priority over a prior judgment creditor of the mortgagor who has obtained an order charging the shares, under the 3 & 4 Vic., c. 105, s. 23, subsequently to the mortgage.

*Quere*—Whether the doctrine of *Dearle v. Hall*, 3 Russ. 1, applies to an equitable assignment of railway shares?—*Dunster v. Glean-gall*, 3 I. C. R. 47; 5 I. Jur. 337. (R.)

14. Funds in Court in an administration suit were decreed to be paid to A., as "administrator of his late wife;" but the Master's report had not been made showing what money was payable to A., or whether he was entitled to any sum in his own right. B., a judgment creditor of A., sought to obtain a charging order, under the 3 & 4 Vic., c. 105, ss. 23, 24, upon the funds in Court to the credit of the suit, or whatever portion thereof A. should be found entitled to. *Held*, that A. had not such an interest in the goods in Court as that they could be charged by an order under that Act.—*Burns v. Owen*, 6 I. Jur. 192. (R.)

1. A., who had a charge upon lands, became an insolvent, but afterwards had his petition dismissed upon the consent of the assignee. The lands were sold in the Landed Estates Court. Creditors of A. obtained charging orders upon his interest in the proceeds, and A. assigned his claim to B. for an insufficient amount. *Held*, that the creditors of A., who had charging orders, were entitled to avoid the assignment to B., and that in any event it could only stand as security for the amount paid by B.—*Roche v. Hassard*, 5 I. C. R. 14; 1 I. Jur. N. S. 246. (C.)

2. On the 30th June, F. obtained a conditional order under the C. L. P. Act, to attach a fund in Ch. It was served on the judgment debtor on the 11th July, was made absolute on the 8th August, and was lodged with the Acct.-General on the 14th Nov.

On the 1st August another creditor obtained a conditional order in Ch. against the same fund, under the 3 & 4 Vic., c. 105. That order was lodged with the Acct.-General on the 7th August, was served on the judgment creditor on the 21st August, and made absolute on the 13th Nov. *Held*, that the order made in Ch. was the first charge upon the fund.—*French v. Balfre*, 3 I. Jur. N. S. 48. (C.A.)—[Affg. Rolls decision, 6 I. C. R. 63; 2 I. Jur. N. S. 299. (R.)]

3. J., entitled to a charge upon land, died under age, unmarried, and intestate, leaving her father P. her sole next-of-kin, who before her death had been discharged under the Insolvent Act. C., a son of P., took out administration to J. The amount of the charge was realised in the I. E. Court, and paid into the Court of Ch., where it was transferred in the Accountant-General's books to the separate credit of the administrator of J. *Held*, that P. had an interest in that fund, which could be attached by a charging order.

*Semble*—Per Lord Justice of Appeal, that the administrator of J. could not rely on the insolvency as an objection to the charging order.—*Brownrigg v. Colclough*, 7 I. C. R. 524; 3 I. Jur. N. S. 329. (C.)

4. The owner of an estate sold in the L. E. Ct. was held to be estopped from objecting, upon the settlement of the final schedule of incumbrances, to a claim which he had admitted, in his affidavit filed as an answer to the conditional order for sale, to be a charge upon the estate. He had also suffered the conditional order to be made absolute, and a sale to be had, without disputing the claim in question.

An incumbrancer cannot avail himself of an objection filed by another party to the validity of a claim, to which he has not himself filed an objection.—*In re Power's Estate*, 11 I. C. R. 295. (C.A.)

5. The Court has not jurisdiction under 3 & 4 Vic., c. 105, ss. 23, 24, to make a charging order against cash standing to the credit of the Suitors' Fee-fund, and ordered to be paid to a judgment debtor, on account of his

pension as a retired Registrar of the Court of Chancery in Ireland.

*Semble*—Such a pension should be paid out of the Consolidated Fund, if the Suitors' Fee-fund proves insufficient, and is not a government annuity within the meaning of that Act.—*Quin v. O'Keeffe*, 9 I. C. R. 331; 4 I. Jur. N. S. 167. (R.)

6. A judgment debtor was a retired officer of the Court of Ch., and thus entitled to a pension charged upon the suitors' fee-fund, by virtue of the Ch. Reg. Act, s. 135. A quarterly instalment of the pension having become due, the judgment creditor obtained a charging order in the Court of Q. B., under the C. L. P. Act 1853, against it. *Held*, that the Court of Ch. had not jurisdiction to enforce such charging order.

*Semble*—That such an instalment was not liable to be attached under the last mentioned statute, not being money in Court in a suit in a matter under the ordinary jurisdiction of the Court.—*Quin v. O'Keeffe*, 10 I. C. R. 151; 5 I. Jur. N. S. 65. (C.)

[This decision was appealed from, and argued before the Court of Appeal; and having stood over for judgment, was directed to be re-argued; when a compromise was entered into.—10 I. C. R. 262. (C.A.)]

## II. 17. Charities and Mortmain.

7. On a petition presented under the 52 G. 3, c. 101, the Court has jurisdiction to authorise the establishment of a charity *cy-pres*.—*In re Lady Belvidere's Charity*, 2 I. E. R. 354. (E.E.)

8. All the English Statutes of Mortmain, earlier than the 10 H. 7, c. 22 (Poyning's Law), are in force in Ireland. A license by the Crown to a corporation to hold lands in mortmain, granted before the passing of the 32 G. 3, c. 31, is good and sufficient.—*Incorporated Society v. Richards*, 4 I. E. R. 177; 1 Dr. & War. 258; 1 Con. & L. 58. (C.)

9. Charities are bound by the Statute of Limitations.—*Commrs. of Ch. Don. & Beg. v. Wybrants*, 7 I. E. R. 580; 2 Jon. & L. 182. (C.)

10. To bring a case within the exception in the 7 & 8 Vic., c. 45, s. 2 (Dissenters Chapel Bill), the instrument declaring the trust, or some book or other document referred to in it, must contain in express terms the particular religious doctrines or opinions, or mode of worship required or forbidden. A general gift of money in trust to be applied towards building a new meeting-house of the Protestant Dissenting Congregation then of New-row, for the service and worship of God in that way—*Held*, not within the exception.—*Att.-General v. Hutton*, 7 I. E. R. 612. (C.)

11. *Quære*—Are trusts for charitable purposes within the 3 & 4 W. 4, c. 27?—*Att.-Gen. v. Persse*, 2 Dr. & War. 67. (C.)

12. The Charitable Bequests Act, 7 & 8 Vic., c. 97, authorising the Commissioners of Ch.

Don. to sue for devises or bequests, withheld, concealed, or misapplied; and to apply them according to the devisor's intention; gives them an interest which entitles them to file a bill to remove a testamentary trustee for a charity, and appoint new trustees. The proceeding need not be by information.

Relief will be granted because of the mere personal unfitness of the trustee.—*Commrs. of Ch. Don. v. Archbold*, 11 I. E. R. 187. (C.)—[Reversed: 2 H. Lds. Cas. 440.]

1. The doctrine of civil death by profession ceased to be law at the Reformation, and was not revived by the R. C. E. Act (10 G. 4, c. 7). Therefore the Court granted a receiver, on a bill filed to raise the arrears of an annuity devised in trust for a lady, who afterwards became a nun, during such period of her natural life as she should continue unmarried.—*Evans v. Cassidy*, 11 I. E. R. 243. (R.)

2. The Court has not power to set aside the valuation of all livings, &c., made by the Eccl. Commrs., in pursuance of the 3 & 4 W. 4, c. 37.

The 11 & 12 Vic., c. 80, reciting that doubts had arisen whether the Eccl. Commrs. were authorised to allow any sum for poor-rate under the words "other charges" in the 3 & 4 W. 4, c. 37, enacted that it should be lawful for them to deduct the poor-rate from any valuation made or to be made. *Held*, that the Act was not declaratory, and did not apply to a tax made on a valuation, and due before the Act.—*Eccl. Commrs. v. Armstrong*, 12 I. E. R. 445. (R.)

3. Town Commissioners constituted by 3 & 4 Vic., c. 108, represent the Sovereign and old Corporation of the Hospital of Holy Trinity and New Ross.—*Att.-Gen. v. Tottenham*, 11 I. Jur. N. S. 107.

4. A bequest of money to build a church in Ireland is not within the 7 & 8 Vic., c. 97, s. 16; and is therefore valid, though the will be made within three months of the testator's death.—*Pollock v. Day*, 14 I. C. R. 297. (R.)—[Affirmed: *ibid*, 371. (C.A.)]

## II. 18. Church Temporalities Act.

[See ECCLESIASTICAL PERSONS, II, *ante*, p. 245. For list of Statutes, see p. 241.]

5. The immediate lessee of an ecclesiastical landlord purchasing the perpetuity under statute 3 & 4 W. 4, c. 37, on conveying the perpetuity to a sub-tenant, is not entitled to interest on the purchase-money, though a considerable time may have elapsed from the date of his own purchase, and although he may have secured the purchase-money by mortgage under section 155, and so have been paying interest on it himself.

*Semble*—In petition matters under the 158rd section, on the return of the Master's report, the Court is confined to such an order as could be made under the original reference, or

on objections to the report.—*Brabazon v. Lord Lucan*, 9 I. E. R. 540. (C.)

## II. 19. Clergy.

[See ECCLESIASTICAL PERSONS, *ante*, p. 243—as to their Property, see *ib.* II, *ante*, p. 245.]

6. The 10 Car. 1, sess. 3, c. 1, extends only to Archbishops and Bishops, and applies only to conveyances other than by will.—*Att.-Gen. v. Flood, Hayes*, 611. (E.E.)

## II. 20. Companies Clauses Consolidation Act (8 & 9 Vic., c. 16.)

[See also JOINT-STOCK COMPANIES, *ante*, p. 440; RAILWAYS, *ante*, p. 1164.]

7. *Held*, affirming the decision of the Commissioner of Bankrupts, I. C. R. 236, that a Railway Co., proving against the estate of a bankrupt for calls, must deduct the price or value of the shares from the amount of their claim, or give up the shares for the benefit of the creditors of the bankrupt.

*Held*, in reversal of the decision, that railway calls payable by instalments may be enforced.

That the day appointed for payment of the last instalment may be deemed the day upon which the call is payable; and that twenty-one days' notice previous thereto is a valid notice within the Companies Clauses Consolidation Act, s. 22.

*Semble*—The non-subscription of the prescribed capital is not a good defence to an action for calls.—*In re Jennings*, 1 I. C. R. 654. (C.)

## II. 21. Contempt.

[See 5 & 6 W. 4, c. 16.]

8. Rule 10 of the 5 & 6 W. 4, c. 16, applies to cases in which the debt in contempt has been turned over to the Marshal's custody.

Its 9th Rule does not apply to a case in which the discovery is not sought for the purposes of the suit, but with reference to future litigation.—*Creagh v. Mahony*, 2 Jones, 342. (E.E.)

## II. 22. Copyhold.

[See ESTATE.]

## II. 23. Copyright.

[See PRACTICE, INJUNCTION, XLVI, 15, *ante*, p. 976.]

## II. 24. Costs.

[See PRACTICE, XXX, 9 a. 1 and 10; Costs, *ante*, p. 831.]

## II. 25. Creditors.

[See DEBTOR AND CREDITOR, *ante*, p. 167.]

II. 26. *De Donis.*

[See ESTATE, ante, p. 269.]

II. 27. *Decrees: Enrolment, &c.*

[See also PRACTICE, XXXIV--DECREE, ante, p. 893.]

1. The 1 *W. 4*, c. 47, s. 12 (authorising the conveyance of estates devised in settlement by tenants for life, &c., under decrees), applies to a decree for a mortgage as well as for an absolute sale.—*Holmes v. H.*, 7 I. E. R. 390. (C.)

2. A writ of *fi. fa.*, sued out under a decree or order of the Court, by virtue of the 4 & 5 *Vic.*, c. 105, s. 27, must correspond with the decree or order.—*Money Penny v. De Massy*, 1 I. C. R. 597. (R.)

3. If a decree directs a sum of money, ascertained by a report made or to be made, to be paid, the report is, by reference, to be considered incorporated in the decree; and the report and decree may be enrolled under the 41 *G. 3*, c. 90, s. 36.—*Rosborough v. Boyse*, 8 I. C. R. 540. (R.)

II. 28. *Dower.*

[See DOWER, ante, p. 237; 10 *Car. 1*, s. 2, c. 1; 8 & 4 *W. 4*, c. 105; 12 & 13 *Vic.*, c. 105, s. 9; 14 & 15 *Vic.*, c. 120.]

II. 29. *Drainage and Draining.*

[See DRAINAGE ACTS, ante, p. 240.]

4. The Irish Drainage Act (5 & 6 *Vic.*, c. 89, ss. 76, 79) gives the costs of the investment, in gov. stock, of the purchase-money of lands taken by the Commissioners of Public Works, as well as the costs of a subsequent purchase of lands.

The Court will not refer it to a Master to approve of a purchase, unless a particular purchase is stated.—*King v. The Commrs. of Public Works*, 2 I. Jur. N. S. 76. (R.)

5. The Commissioners of Drainage, without exceeding their jurisdiction, carried on works in a manner so negligent and expensive that the sum stated in their award very largely exceeded that stated in their engineer's estimate, on the faith of which the proprietors of the lands had assented to the works. *Held*, that (assuming that the facts stated in the petition were proved), an action would lie by those proprietors against the Commissioners; and that the Court had power, and was bound to grant an injunction against the signing and enrolling of the award until the action, which the petitioners undertook to bring, had been determined.—*Stubber v. Hornsby*, 2 I. C. R. 449; 5 I. Jur. 281. (R.)

6. Quit rent is a debt or incumbrance affecting the land in payment of which money lodged in Court, and awarded as compensation for damages occasioned by works carried on

by the Commissioners of Public Works, may be applied under the 69th sec. of the Lands Clauses Consolidation Act.

Advances to a tenant for life, under the Drainage Act (5 & 6 *Vic.*, c. 89), should not be paid out of the fund so lodged in Court; such fund representing the *corpus* of the estate; and the tenant for life being bound to pay the annual instalments which fall due during his lifetime; it being possible that all instalments may become payable during his life.—*In re Commrs. of Public Works, ex parte Studdert*, 6 I. C. R. 53. (R.)

II. 30. *Ejectment Acts.*

[See LANDLORD AND TENANT, ante, p. 489.]

II. 31. *Equity Exchequer.*

[See 13 & 14 *Vic.*, c. 51.]

7. By the 13 & 14 *Vic.*, c. 51, transferring the equitable jurisdiction of the Court of Exchequer to the Court of Ch., recognizances entered into in a cause depending in the Exchequer are transferred to Ch., and may be sued upon at the Petty-bag side.—*The Queen v. Jones*, 4 I. Jur. 265. (C.)

8. Recognizances enrolled in the Court of Exchequer in Ireland were, by the 13 & 14 *Vic.*, c. 51, transferred to the Court of Ch. in Ireland, and may be sued upon at the Petty-bag side.—*The Queen v. Jones*, 5 I. Jur. 287. (C.)

II. 32. *Estate de Provisione Viri.*

[See ESTATE, ante, 269.]

II. 33. *Examiners: Commission.*

[See PRACTICE, III, 8—ANSWER, XXXVIII, 28, b—EVIDENCE, WITNESS, EXAMINATION OF, ante, 948.]

II. 34. *Exchequer Bills.*

[See ante, STATUTE, 81—EQUITY EXCHEQUER.]

II. 35. *Executors and Administrators: Distribution.*

[See ADMINISTRATION, ante, p. 19—EXECUTORS AND ADMINISTRATORS, ante, p. 318.]

9. Specialty debts, in which heirs are not bound, have not priority over simple contract debts in the administration of real estate under the 3 & 4 *W. 4*, c. 104.—*Cummins v. C.*, 8 I. E. R. 723; 3 *Jon. & L.* 64. (C.)

10. Nothing short of an actual renunciation will come within the 20 & 21 *Vic.*, c. 79, s. 84.—*In the Goods of Usher*, 5 I. Jur. N. S. 72. (P.)

11. There is not any Irish statute corresponding with the 21 *H. 8*, c. 4 (*Eng.*). Therefore, if two executors have a power to sell real estates, and one of them renounces, the

power cannot be exercised by the other.—*Thompson v. Todd*, 15 I. C. R. 387. (R.)

## II. 36. Factors Act.

1. In a composition, after bankruptcy, a manager was appointed by resolution of the creditors, with a definite duty in managing a grazing and farming estate. He wrote to the auctioneer stating that the auctioneer could deduct from the proceeds of the auction the amount due on his (the writer's) promissory note. The auctioneer knew that the writer was then acting as manager of the estate. *Held*, that the auctioneer could not, under the Factors Act, or in any other way, make title to the proceeds of the sale of all the bankrupt's stock taken possession of under colour of the authority given by the manager's letter.—*Re P. Grehan*, 11 I. Jur. N. S. 40. (B.)

## II. 37. Fines and Recoveries.

[See 21 G. 2, c. 11: abolished by 3 & 4 W., 4, c. 74. See ESTATE, II.]

## II. 38. Forfeiture for Treason and Felony.

## II. 39. Frauds.

[See also FRAUD, ante, p. 346.]

2. The purchaser of lands by auction signed a memorandum of agreement annexed to the conditions of sale, stating the purchase, and that he paid into the vendor's hands £300 deposit. The vendor's name did not appear, either in the conditions of sale, or on the face of the agreement. Subsequently the vendor's name was fully disclosed in several written communications. *Held*, that they might be connected with the memorandum of agreement signed by the purchaser; and, taken together, constituted a sufficient note in writing binding both parties under the Statute of Frauds, although neither the original agreement, nor the conditions of sale contained the vendor's name.—*Irvine v. Deane*, 2 I. Jur. 209. (C.)

3. The separate estate of a *femme covert* is liable in equity when she has obtained goods upon credit, though there be no written contract, nor any reference to her separate estate. If it be an interest in realty, the Statute of Frauds prevents the enforcement of that liability, if there be not any writing.—*Burke v. Tuite*, 10 I. C. R. 467. (C.)

## II. 40. Fraudulent Conveyances and Devises.

[See FRAUDS, STATUTE OF; 13 Car. 1, c. 6 (Ir.); 13 Eliz., c. 5 (Eng.).]

4. *Semble*—The protection, given to a purchaser under the statute against fraudulent conveyances, is not to be confined to cases in which the first and second conveyances are made by the same person.—*Blake v. Hyland*, 2 Dr. & Wal. 397. (C.)

5. The 10 Car. 1, c. 6, s. 10 (13 Eliz., c. 5, Eng.), in favour of creditors, avoids only deeds which would deprive them of property which they could, without their debtor's aid, make available. The debtor's solvency or insolvency affords no test whether the deed is void under that Act. Each case must be judged by its own circumstances.—*Clements v. Eccles*, 11 I. E. R. 229; 2 I. Jur. 286. (C.)

6. The Statute of Voluntary Conveyances applies to a conveyance to evade the creditors of a third person, as well as to a conveyance to evade the creditors of the debtor himself.—*Blennerhassett v. Monsell*, 4 I. Jur. 177. (C.)

7. Rents falling due after the lessee's death, under a covenant for himself, his heirs, executors, &c., to pay it, is not a debt which can, under the Statute of Fraudulent Devises (4 Anne, c. 5, Ir.) be enforced against his real estate in the hands of his devisee.—*Macnamara v. Vincent*, 2 I. C. R. 481; 4 I. Jur. 197. (C.)

8. The respondent owed to the petitioner £625, secured by judgment, and wrote to him as follows:—"You having a judgment against me, I undertake that if I do not pay the sum secured thereby on or before the 10th of Oct. 1852, I will give you a legal mortgage on all my landed property." The petitioner filed a petition in I. E. Court to raise the amount of the judgment, before the 10th of Oct. 1852. He afterwards filed the petition in this cause, for specific performance of the agreement to grant a mortgage. *Held*, either that the above document did not disclose any consideration, and was consequently invalid within the Statute of Frauds, or that if there were any implied consideration it had failed.

An antecedent debt is not, in contemplation of a Court of Equity, consideration for an agreement to mortgage.—*Crofts v. Feuge*, 4 I. C. R. 316; 6 I. Jur. 160. (C.)

9. W. assigned a leasehold house to J., upon trusts, leaving to W. a resulting interest in the residue of the rents. W. afterwards gave to R., a creditor, the following letter:—"I have handed to you a policy of insurance as a collateral security for my debt; the premiums on said policy to be paid out of the balance of the profit rent arising from the house assigned to J." On this letter J. wrote an endorsement:—"I agree to pay the premium of the within-mentioned policy to R., out of the profit rent arising from the said house." *Held*, that these documents amounted to a complete declaration of trust, and that no consideration was required to give them validity.

*Semble*—That if consideration were required, the first letter did not amount to an agreement sufficient to satisfy the provisions of the Statute of Frauds.

*Semble*—An antecedent debt is not, in the contemplation of a Court of Equity, a consideration for a security upon lands.—*Woodroffe Johnston*, 4 I. C. R. 319. (C.)

1. A father, previously to his second marriage in 1833, executed three bonds, with warrants of attorney to confess judgments to trustees, as provisions for his three daughters of his first marriage. Judgments were not entered on the bonds until after the second marriage took place, although it was stated in the settlement executed prior to that marriage, that judgments had been entered on them, and that the object of them was to make a provision for the children of the first marriage. In 1843, the father mortgaged the lands in settlement, and in 1844 he granted annuity out of them. In 1853, on the marriages of two of the daughters, their judgments were settled for valuable consideration. *Held*, first, that the judgments were voluntary. Secondly, that although they became judgments for value on the execution of the daughters' marriage settlements, they did not become by relation valid against the mortgagee and annuitant.

Judgments prior to the 3 & 4 Vic., c. 105, were incumbrances, and as such within the Irish Statute against voluntary conveyances.—*O'Donovan v. Rogers*, 7 I. C. R. 1. (R.)—[Affirmed: *ibid*, 496. (C.A.)]

2. A written proposal, for a lease for 31 years or three lives, at a rent, was sent to a tenant for life, who replied that he had not power to execute such a lease; but "if you choose to take the lease in the usual way I will allow you £20 to get up a cottage, and a lease for your own life." *Held*, that the answer not being a simple acceptance, the proposal and answer were not a sufficient agreement within the Statute of Frauds.—*O'Fay v. Burke*, 8 I. C. R. 225. (R.)—[Affirmed: *ibid*, 511. (C.A.)]

3. The separate estate of a *femme covert* is liable in Equity when she has obtained goods upon credit, though there be no contract in writing, nor reference to her separate estate. But if the separate estate be an interest in realty, the provisions of the Statute of Frauds prevent such liability being enforced if there be no writing.—*Burke v. Tuite*, 10 I. C. R. 467. (C.)

#### II. 41. Friendly Societies and Savings Banks.

[See BANK, *ante*, p. 72; JOINT-STOCK COMPANIES, *ante*, p. 438; WINDING-UP ACT, *ante*, p. 440.]

#### II. 42. Habeas Corpus.

[See HABEAS CORPUS, *ante*, p. 370; 21 & 22 G. 3, c. 11.]

4. A solicitor being in custody under an attachment, the Court granted a writ of *habeas corpus*, directed to the Marshal, to bring him before the Taxing Master to enable him to attend the taxation of bills of costs.—*Walsh v. Wilson*, 2 I. C. R. 79. (C.)

5. A R. C. father, married to a Protestant, had all his children, eight in number, baptised by R. C. clergymen, but permitted the children, when of sufficient age, to receive instruc-

tion and attend divine service as Protestants. They did not receive any religious instruction as R. Catholics, nor attend the Catholic worship. The father died in the life of the mother, who afterwards was obliged to enter the workhouse, and there registered the children as Protestants. The mother died, leaving the eldest child about twelve years of age, and the youngest about one. Her wish was that the children should be brought up as Protestants. The husband on his death-bed was attended by a R. C. priest, and it was alleged that he had expressed a wish that the children should be brought up as R. Catholics; but evidence was given that he had subsequently expressed a different wish. *Held*, that the children were to be brought up as Protestants.

The children had no property whatever, but an undertaking to invest a sum for their benefit was given. *Held*, that the Court had jurisdiction to direct who should have the custody of the children.—*In re O'Malley's Minors*, 8 I. C. R. 291; Dr. Rep. temp. Napier, 358; 4 I. Jur. N. S. 192. (C.)

6. In order to discharge a bankrupt, the Court before which he is brought up on *habeas corpus* must be fully satisfied that the Judge below was wrong in committing him.—*In re Courtney*, 11 I. C. R. 410. (B.)

#### II. 43. Incumbered Estates Court.

[See PRACTICE, LIV, a, LANDED ESTATES COURT, *ante*, p. 993.]

#### II. 44. Infant's Estate and Person.

[See INFANT, I, *ante*, p. 395; INFANT TRUSTEE, *see* 13 & 14 Vic., c. 10, and 15 & 16 Vic., c. 65.]

7. The infant tenant in tail of lands decreed to be sold for an equitable charge is a trustee within the 8th and 18th secs. of the 11 G. 4 & 1 W. 4, c. 60.—*Peyton v. M'Dermott*, 6 I. E. R. 220. (R.)

8. When lands are decreed to be sold in a mortgage suit, the mortgagor's infant heir-at-law is not a trustee within the 8th or 18th sec. of the 11 G. 4 & 1 W. 4, c. 60.

*Semble*—Under the 11 G. 4 & 1 W. 4, c. 47, s. 11, the Court has jurisdiction to order such infant heir to execute a conveyance.

He is not within the 28 G. 3, c. 35; nor is he a necessary party to the conveyance to the purchaser.—*Goddard v. Macaulay*, 6 I. E. R. 221. (R.)

9. The Court will make an order under the 11 G. 4 & 1 W. 4, c. 47, s. 11, that the infant shall execute the deed of conveyance to the purchaser.—*Clinton v. Bernard*, 6 I. E. R. 355. (C.)

10. *Semble*—That a mother, whose children are in her custody, is not enabled by the 2 & 3 Vic., c. 54, to resist their father's right to have them delivered over to him.—*Corsellis v. C.*, 1 Dr. & War. 235. (C.)



1. An order was obtained on petition against a minor, not a party to the cause, to execute the conveyance. The minor refused to obey the order. It was necessary to present a further petition to obtain an order that an attachment should issue against the minor, or that a person appointed by the Court should execute in his name.

*Seemle*—Statute 4 & 5 W. 4, c. 78, does not apply to minors.—*Moore v. Grogan*, 9 I. E. R. 472. (R.)

2. The Court has not power under the 28 G. 3, c. 35, to direct the Master to execute a conveyance in the name of an infant resident out of the jurisdiction.

An application to the Court for that purpose, under the 1 W. 4, c. 47, or 1 W. 4, c. 60, must be made by petition, unless at the hearing of the cause the minor is ordered to convey.—*M'Geehan v. Rankin*, 12 I. E. R. 182. (R.)

3. The 4 & 5 W. 4, c. 78, s. 7, authorises the Lord Chancellor of Ireland to appoint a receiver over a minor's estate, upon petition, and without the filing of a bill for that purpose.—*In re Goode*, 1 I. C. R. 256; 3 I. Jur. 50. (C.)

4. A father, by will, appointed a guardian, and expressly directed that his children should be removed from their mother's custody. The Court refused to make an order under the 2 & 3 Vic., c. 54, that the mother should obtain the custody of the children.—*In re Cornwallis minors*, 2 I. Jur. N. S. 148. (R.)—[*Affd.*: *ibid.*, 458. (C.A.)]

5. In a settlement made under the 18 & 19 Vic., c. 43, there ought not to be any limitation to collaterals, or any benefit conferred upon the guardian of the minor whose property is settled.

The words "Court of Chancery" in an Act of Parliament do not *per se* refer to the Court of Ch. in Ireland.

Under the 18 & 19 Vic., c. 43, the Court of Ch. in Ireland has not jurisdiction to order a settlement to be made of a minor's estate.—*In re M'Clintock*, 10 I. C. R. 469; 5 I. Jur. N. S. 209. (C.)

[*See* the 23 & 24 Vic., c. 83, conferring upon the Court of Ch. in Ireland the same powers which the 18 & 19 Vic., c. 43, conferred upon that in England.]

## II. 45. *Infant Lessee.*

[*See* INFANT, I, 3; HIS ESTATE, &c.]

## II. 49. *Infant, Lunatic, and other Trustees. See infra, 42.\**

[*See* TRUSTEE.]

6. This Court will not appoint a new trustee under the 1 W. 4, c. 60, s. 22, instead of one who appears never to have accepted the trust, and who refuses to act.—*Mitchell v. Nizon*, 1 I. E. R. 155. (R.)

7. The Court will not, on motion, amend minutes of a decree by striking out the day thereby given to minor defts. to show cause.

*Quere*—Whether the old practice, of giving a minor deft. a day to show cause, has been affected by the 11 G. 4 & 1 W. 4, c. 47.—*Esmonde Cooke*, 1 Dr. & Wal. 250. (C.)

8. A petition under the 1 W. 4, c. 47, s. 11, should state the minor's age.

*Seemle*—That Act applies to suits instituted before it passed.—*Jones v. Ham*, 3 I. E. R. 65. (E.E.)

9. C. devised his real and personal estate to trustees to pay debts; then to G. for life; remainder to G.'s issue; remainder to W. for life; remainder to such of her children as should be living at her death, in equal shares. G. died without issue. W. had several children. In a creditor's suit to pay C.'s debts, and for sale of the real estate, the purchaser objected to title. *Held*, that the 1 W. 4, c. 47, s. 12, did not apply to this case.—*Oldham v. Wilkins*, 1 I. E. R. 59. (R.)

10. On demurrer to a bill filed by the assignee of a deceased insolvent, discharged under the 53 G. 3, c. 138—*Held*, that the Court has jurisdiction to administer the after-acquired property on behalf of the unsatisfied creditors in the insolvent matter.

The provisions in the Insolvent Acts, enabling the Insolvent Court to direct proceedings to be taken against the property of insolvents acquired after their discharge, do not deprive the Courts of Equity of their jurisdiction to administer the assets of such persons.—*Byrne v. B.*, Fl. & K. 435. (R.)—[*Affd.*: 4 I. E. R. 621; 2 Dr. & War. 71; 1 Con. & L. 189. (C.)]

11. Real estate having been applied for 150 years on trusts specified by will, the Court assumed that the will created a trust, and that the testator's heir became a trustee; and, the present heir not being known, *Held*, that the case came within the 11 G. 4 & 1 W. 4, c. 60, s. 23.—*In re Gore's Charities*, 4 Dr. & War. 270; 2 Con. & L. 411. (C.)

12. The infant tenant in tail, of lands decreed to be sold for an equitable charge, is a trustee under the 1 W. 4, c. 60, ss. 8, 18; and, if he refuses to execute, the Master will be directed under that Act to execute in his name.

*Seemle*—The 4 & 5 W. 4, c. 78, s. 8, does not apply to infants.—*Peyton v. M'Dermott*, 6 I. E. R. 220. (R.)

13. When lands are decreed to be sold in a mortgage suit, the mortgagor's infant heir-at-law is not a trustee within the 1 W. 4, c. 60, ss. 8, 18.

*Seemle*—Under the 11 G. 4 & 1 W. 4, c. 47, s. 11, the Court has jurisdiction to order the infant heir to execute the conveyance.

The infant heir is not within the 28 G. 4, c. 35; nor is he a necessary party to the conveyance to the purchaser.—*Goddard v. Macaulay*, 6 I. E. R. 221. (R.)

1. Under the 1 W. 4, c. 47, s. 11, the Court will order the infant to execute the deed of conveyance to the purchaser.—*Clinton v. Bernard*, 6 I. E. R. 355. (C.)

2. The heir of a trustee of a lessee's interest in a lease for lives renewable for ever, having been applied to to accept a renewal to him, refused to execute the conveyance.—*Held*, that the Trustees Act (11 G. 4 & 1 W. 4, c. 60), s. 8, did not extend to such a case.—*Lewis v. FitzGibbon*, 6 I. E. R. 560. (C.)

3. A petition under the 1 W. 4, c. 60, stated that, in 1823, the testator devised real estate to a trustee to pay debts; and, after payment thereof, in trust for petitioner; that testator died in 1824, and thereupon petitioner entered; that, many years ago, petitioner and the trustee sold part of the estate, and paid all the debts; that the trustee had died, and that his heir was a minor: and prayed a conveyance of the real estate.

The Court directed enquiries whether the minor was a trustee for the petitioner alone, discharged of debts and the trusts of the will.—*In re Barry*, 2 Jon. & L. 1. (C.)

4. B. was entitled to a rentcharge for life, and legal estate for life in remainder in lands decreed to be sold to pay paramount incumbrances. After decree he became lunatic, but no commission issued. A conveyance by him to a purchaser was ordered under sec. 5 of the Trustee Act.—*Blake v. B.*, 9 I. E. R. 592. (C.)

5. The Court has not power under the 1 W. 4, c. 65, s. 14, to give the landlord the costs of appearing on a petition under the 12th sec. for liberty to the guardian of an infant to accept the renewal of a lease.—*In re Leech*, 9 I. E. R. 318; 3 Jon. & L. 189. (C.)

6. The heir-at-law of a mortgagee, who had never been in possession, was out of the jurisdiction; and the produce of the sale of the mortgaged lands under a decree was insufficient to pay off the mortgage, by reason of prior incumbrances. *Held*, that the Court had not jurisdiction to make an order to convey the legal estate to the purchaser either under 1 W. 4, c. 60, s. 8, or 1 Vic., c. 69, s. 1. *In re Thompson*, 12 Sim. 392, disapproved of.—*Spunner v. Walsh*, 10 I. E. R. 214. (R.)

## II. 47. Insolvent. [See ante, STATUTES, II, 7.]

### II. 48. Insurance.

7. An Act incorporating an Insurance Co., provided that actions against it should be brought against the secretary, but that execution might issue against any member or members, who should be reimbursed out of the funds of the Co. "all such damages, sum and sums of money, costs, charges, and expenses, as, by the event of any such proceedings, he or they should be put unto, or become chargeable with."

A judgment was obtained against the secretary, and execution issued against ptf., a member of the Co. He resisted it unsuccessfully, and incurred a considerable amount of costs. *Held*, that he was entitled to be reimbursed, not merely the sum paid on foot of the execution, but also all the costs incurred at law in resisting it.—*M'Owen v. Hunter*, 1 Dr. & Wal. 347. (C.)

## II. 49. Irish Tenantry Acts.

[See 19 & 20 G. 3, c. 30.]

8. V., lessee for lives renewable for ever, settled his estate, making himself tenant for life. The lives dropped. In 1809, the landlord, X., brought an ejectment. The summonses were served on V., and on the trustees of his marriage settlement. V. taking defence, X. abandoned the action, and filed against V., alone, a bill praying that V. should be compelled to elect whether he would accept a renewal or not; and, if he did not elect to accept it, might be compelled to surrender possession to X., who obtained a conditional order on sequestration, and, in 1811, was put by injunction into possession. X., though a lessee for lives, had not renewed from a period anterior to 1809. His right to a renewal being disputed, he obtained one only after a suit, in 1812, in which year V. died. The remaindermen tendered the arrears of rent, and sought a renewal; the fine being nominal. *Held*, that they were entitled to a renewal; the delay having been excused, and the decree in 1811 not having operated as a demand under the Tenantry Act, even if it applied; but that it was inapplicable, there not being any fine payable.—*Armstrong v. Jessop*, Beat. Rep. 515. (C.)

9. The Irish Tenantry Act, 19 & 20 G. 3, c. 30, considered.—*Butler v. Earl of Portarlington*, 4 I. E. R. 1; 1 Dr. & War. 20; 1 Con. & L. 1. (C.)

10. The 3 & 4 Vic., c. 105, s. 21, does not authorise the appointment of a receiver in a case of constructive trust. The Court refused to appoint a receiver when the interest of the conuzor of a judgment in a lease had been evicted for non-payment of rent, and a new lease had been granted to a third party under circumstances which constituted the new lease a graft.

Leave given to show cause after the appointment of a receiver, on an affidavit stating that the respondent had been informed and believed that the ten days for showing cause, mentioned in the conditional order to appoint the receiver, were sitting days in Term; the respondent paying the costs of the absolute order, and the costs consequential thereto.—*Cassidy v. Hopkins*, 10 I. E. R. 208. (R.)

11. In the Sub-letting Act, 7 G. 4, c. 29, s. 2, the word "void" means "voidable" only.—*Strickland v. M'Nicholas*, 5 I. Jur. N. S. 258. (C.)

II. 50. *Judgments.* See *infra*, 62.[See also JUDGMENTS, *ante*, p. 444.]II. 51. *Land Tax Redemption.*

[See DRAINAGE ACTS, &amp;c.]

II. 52. *Landed Estates Court.*

(I. E. Court Act, 12 &amp; 13 Vic., c. 77; L. E. Court Act, 21 &amp; 22 Vic., c. 72.)

[See PRACTICE, LANDED ESTATES COURT, *ante*, p. 993.]II. 53. *Landed Security.* (2 & 3 Vic., c. 27.)[See ESTATE, VIII, 2; CHARGES ON LAND, *ante*, p. 292.]

1. G., seized of lands, borrowed various sums of money from S. On the occasion of each loan, G. gave S. possession of a piece of the land; and a memorandum was executed, that S. should hold the land rent-free until the loan was repaid. Two of the memoranda provided that G. should not pay interest for the loan while S. retained the land. *Held*, that the transaction amounted to a security upon land within the 2 & 3 Vic., c. 27; and that the annual value of the land beyond legal interest should go to reduce the principal.—*Gore v. Spotten*, 7 I. C. R. 508. (C.)

II. 54. *Landlord and Tenant.*[See also LANDLORD & TENANT, *ante*, p. 489.]

2. A purchaser, who has agreed to take an assignment of premises held under a lease for years, cannot object to the title upon the grounds of the discovery, that such lease is an under-lease; because the sub-lessee is now placed by the 23 & 24 Vic., c. 154, s. 21, in privity with the head landlord.—*Balfour v. Macneill*, 7 I. Jur. N. S. 8. (C.)

3. The 20 & 21 Vic., c. 60, s. 268, does not, before election by the assignees, vest in them the bankrupt's lease so as to make them, though in possession, liable to its covenants and conditions. Sec. 271, regulating the bankrupt's liability, recognises the assignees' obligation, and protects the landlord.

The 23 & 24 Vic., c. 154, ss. 14, 15, does not apply.—*Re Ellis*, 10 I. Jur. N. S. 19. (B.)

II. 55. *Lands Clauses Consolidation Act* (8 & 9 Vic., c. 18.)[See RAILWAYS, *ante*, p. 1164.]

4. When in a petition matter under the Lands Clauses Consolidation Act, a party seeks the costs given by its 82nd sec., the order made should specify those costs; it is not sufficient that it states generally that the party is entitled to the costs properly payable under that Act.—*Macrory v. The Belfast Commissioners of Customs*, 4 I. Jur. N. S. 41. (R.)

II. 56. *Lease by Tenant in Tail.*

[See ESTATE. See also Leases and Sales of Settled Estates Act, 19 &amp; 20 Vic., c. 120: G. O. of May 22, 1867: Gam. Ch. Or. 336.]

II. 57. *Limitations* (3 & 4 W. 4, c. 27.)[See LIMITATION OF ACTIONS, *ante*, p. 578.]

5. A judgment is not a sum of money charged upon or payable out of land within the 3 & 4 W. 4, c. 27, s. 42. Therefore an application to discharge an order for a receiver under the 5 & 6 W. 4, c. 55, on payment of the principal due on the judgment, with six years' interest, was refused.—*Kealy v. Bodkin*, S. & Sc. 211. (R.)

6. The 3 & 4 W. 4, c. 27, is not retrospective.—*Peyton v. McDermott*, 1 Dr. & Wal. 198. (C.)

7. *Quare*—Does the 3 & 4 W. 4, c. 27, apply to defendants?—*Murphy v. Sterne*, 1 Dr. & Wal. 236. (C.)

8. The 9 G. 4, c. 35, s. 2, applies as well to purchases made before, as to those made after it became law.—*Knox v. Kelly*, 1 Dr. & Wal. 542. (C.)

9. The 3 & 4 W. 4, c. 27, s. 42, applies to portions charged on lands under a power in a settlement, and six years' interest thereon is recoverable.—*Burne v. Robinson*, 1 Dr. & Wal. 688. (C.)

10. In 1790, N. entered into possession of lands as assignee of an incumbrancer, and purchaser from A., B., C., and D., each of whom was tenant for life of one-fourth. A. died in 1819, and B. in 1836. The next remaindermen of their shares, who were tenants in tail, filed against the devisees of N. a bill to redeem the premises. *Held*, that ptfs. were within the very terms of, and bound by the 3 & 4 W. 4, c. 27, s. 28. That its provisions are entirely independent of those of sec. 15, which relate to the title to the lands so affected by the provisions of the preceding sections, whereas sec. 28 relates exclusively to mortgagees.—*Browne v. Bishop of Cork*, 1 Dr. & Wal. 700. (C.)

11. Upon the true construction of the 3 & 4 W. 4, c. 27, s. 42, more than six years' interest cannot be charged upon land in respect of a sum of money secured by judgment. *O'Kelly v. Bodkin*, 2 I. E. R. 361. (E.E.)

12. The 3 & 4 W. 4, c. 27, s. 42, applies as well to judgments upon which interest is recoverable by virtue of the 3 & 4 Vic., c. 105, s. 26, as to any other.—*Henry v. Smith*, 4 I. E. R. 502, 510; 2 Dr. & War. 381; 1 Con. & L. 506. (C.)

13. An annuity charged on land by will, comes within the meaning of the word "rent" in the 3 & 4 W. 4, c. 27, s. 42. No more than six years' arrears are recoverable. When on

the face of the bill the time which operates as a statutable bar appears to have elapsed, the Statute of Limitations may be relied on by demurrer.—*Ferguson v. Livingston*, 9 I. E. R. 202. (R.)

1. A decree on sequestration is only a conditional decree, and will not prevent the operation of the Statute of Limitations, or of the 81st G. O.—*Young v. Wilton*, 10 I. E. R. 265. (C.)

2. A., entitled to a jointure of £480 a year, charged on lands producing only £240 a year, went into possession of the lands in 1800. In 1815, the rental was increased, so as to leave a large surplus after paying the jointure. She continued in possession. *Held*, that the Statute of Limitations did not apply, and that she was entitled to all the arrears accumulating since 1800.—*Battersby v. Rochfort*, 10 I. E. R. 439. (C.)

3. A payment of principal and interest of a sum of money charged upon lands by a person expressly or impliedly authorised to make it, is equivalent to a payment by the party liable, so as to prevent the operation of the Statute of Limitations (3 & 4 W. 4, c. 27, s. 40); but a payment by a stranger will not.

Parties seized of the lands of A. and B., subject to a term to pay off incumbrances, conveyed A. to a purchaser, and B. to trustees to indemnify and protect A. from all charges and incumbrances. By a subsequent deed, W., owner of B., subject to the trust to indemnify, covenanted to pay the interest of one of the charges. *Held*, that it being W.'s duty to pay the charges, payments of interest by him were payments by an agent, to save the bar of the statute as against the purchaser of A. But *Seem*, the payment of interest by the owner of the indemnity lands, after the expiration of twenty years, would not revive the right to proceed against the purchased lands.—*Homan v. Andrews*, 1 I. C. R. 106. (R.)

4. The 3 & 4 W. 4, c. 27, s. 2, applies only to adverse claimants of a rent, and cannot be set up by an occupier of land against an owner of tithe rentcharge as a defence to a suit by the latter for such tithe rentcharge.—*Incorporated Society v. Sheil*, 10 I. E. R. 411, confirmed. *Netterville v. Power*, 6 I. Jur. N. S. 123. (R.)

5. The 3 & 4 W. 4, c. 27, s. 24, bars equitable rights only so far as they would have been barred if they had been legal rights.—[Lord Cranworth.]—*Archbold v. Scully*, 7 I. Jur. N. S. 1. (H. L.); 9 H. Lds. Cas. 360.

6. An agent's written acknowledgment, made after the passing of the Mercantile Law Amendment Act, 19 & 20 Vic., c. 97, suffices to save from the bar of the Statute of Limitations a debt contracted before that Act passed.—*Leland v. Murphy*, 16 I. C. R. 500. (R.)

## II. 58. Lunatic's Estate.

[See LUNACY AND IDIOTCY, ante, p. 608.]

## II. 59. Marriage Acts: Marriage of Infants.

(58 G. 3, c. 81; 3 & 4 W. 4, c. 102; 5 & 6 Vic., c. 28, s. 1; 7 & 8 Vic., c. 81; 9 & 10 Vic., c. 72; 10 & 11 Vic., c. 58; 12 & 13 Vic., c. 99; 21 & 22 Vic., c. 3; 23 & 24 Vic., c. 18; 26 & 27 Vic., c. 90.)

[See also MARRIAGE, ante, p. 614.]

7. Purchase for value without notice is not a defence to a suit instituted to enforce a mere legal right, such as dower. A purchaser, in 1840, obtained possession of the deed creating an attendant term, but did not procure an assignment of the term. *Held*, that he could not rely on this term as a bar to a claim for dower.

The Act for the Confirmation of Marriages in Ireland (5 & 6 Vic., c. 113) confirms marriages theretofore solemnized by persons who had been Protestant Dissenting Ministers, even though at the time of the marriage they had been degraded or suspended.

A purchase made for a minor ward of the Court, under a power given by an Act of Parliament, is an act done under the authority of the Court within the meaning of the 3rd sec. of the same Act. A statement of an admission in the petitioner's affidavit in reply is not a compliance with the rules of equity pleading requiring admissions to be put in issue.—*Corry v. Cremorne*, 12 I. C. R. 136; 7 I. Jur. N. S. 21. (C.)

## II. 60. Masters in Chancery; their Jurisdiction, &c.

[See PRACTICE, LVI—MASTER, REFERENCE TO REPORT OF, &c., ante, p. 1004.]

## II. 61. Mercantile Law Amendment Act (19 & 20 Vic., c. 97.)

[See also DEBTOR AND CREDITOR, ante, p. 167—BANKRUPTCY, ante, p. 73.]

8. An agent's written acknowledgment, made since the passing of the 19 & 20 Vic., c. 97, saves from the bar of the Statute of Limitations a debt contracted before that Act passed.—*Leland v. Murphy*, 16 I. C. R. 500. (R.)

## II. 62. Mortgages and Judgments.

[See also MORTGAGE, ante, p. 621.]

9. An order, dismissing a bill with costs for want of prosecution, is an order within the 3 & 4 Vic., c. 105, s. 27.—*Madden v. Davis*, Fl. & K. 475. (R.)

10. The exception contained in the latter part of the 22nd sec. of 3 & 4 Vic., c. 105, applies as well to cases in which the judgment creditor proceeds by petition, as in which he files a bill.—*M'Dermott v. Moylan*, Long. & T. 555. (E.E.)

1. A., indebted to B., by deed of 1819, granted lands to C. as trustee for B. to discharge the debt, &c., with specified powers; and, after discharging the other trusts, then to reconvey to A. After B.'s death, C. being his executor, a bill was filed to carry into execution the trusts of his will, and to sell his estate to pay debts. The produce of the sale proving insufficient to pay all B.'s reported creditors, C., as trustee and executor of B., assigned to ptf. by deed, in 1834, the benefit of the deed of 1819, as part of B.'s assets, on trust to apply the produce of the sale thereof in further paying B.'s creditors. In pursuance of the last deed, a bill was filed against A., and a decretal order referred it to the Master to take the accounts. The Master reported that D., assignee of a judgment obtained in 1811 against A., filed a charge on foot thereof; but that the judgment was void against ptf., a purchaser for value under the two deeds, since the judgment had not been revived or re-docketed pursuant to the 9 G. 4, c. 35. Upon exceptions—*Held*, that the Master was right in postponing the judgment, and that the report should accordingly be confirmed. That the latter deed was one for value within the 9 G. 4, c. 35. That its 2nd sec. applies as well to purchases made before, as to those made after that Act passed.—*Knox v. Kelly*, 1 Dr. & Wal. 542; 1 I. E. R. 87, n. (C).—[S. P.:—*Blake v. D'Arcy*, 1 Dr. & Wal. 559, n.; 1 I. E. R. 84.]

2. The 3 & 4 Vic., c. 105, s. 33, does not repeal the 3 & 4 W. 4, c. 27, s. 42. Those two sections are to be construed together.—*Hughes v. Kelly*, 5 I. E. R. 286; 3 Dr. & War. 482. (C.)

3. The dominion of a tenant in tail in possession over the estates of remaindermen and reversioners enabling him of his own will, and by his own act, without anybody's assent, to extinguish those estates, and acquire the fee-simple for his own benefit, is not "a disposing power" within the 3 & 4 Vic., c. 105. Its 22nd sec., making a judgment binding, not only as against the debtor, but "also against the issue of his body, and all other persons whom he might, without the assent of any other person, cut off and debar from any remainder, reversion, or other interest," creates an equitable charge only, which cannot be enforced save by a suit in equity.—*Fletcher v. Steele*, 6 I. E. R. 376. (R.)

4. A judgment was entered on a bond executed by two sureties for a land agent. *Held*, that interest on the balance due by him could not be claimed under the 3 & 4 Vic., c. 105, s. 26.—*Lord Templeton v. Murdock*, 7 I. E. R. 470. (C.)

5. As a general rule, there can be no revival for untaxed costs, whether the abatement is occasioned by the death of the party who is to pay the costs, or by the death of the party who is to receive them.

That rule is not affected by the 3 & 4 Vic., c. 105, s. 27.

Cases of *Morgan v. Scudamore*, 3 Ves. jun. 313; 3 Ves. 195; and *Barry v. Stawell*, 3 I. E. R. 18, 146, considered and commented on.—*Bowyer v. Beamish*, 8 I. E. R. 63. (C.)

6. The rule to change an attorney on payment of costs is not an order under the 3 & 4 Vic., c. 105, s. 29.—*Emmett v. Marnane*, 8 I. E. R. 522. (E.E.)

7. The 7 & 8 Vic., c. 93, s. 10, which requires that a *lis pendens* shall be registered, to affect a purchaser, does not apply to a purchase made before that Act passed.—*Jennings v. Bond*, 8 I. E. R. 755; 2 Jon. & L. 720. (C.)

8. *Semble*—The 3 & 4 Vic., c. 105, s. 63, does not apply to Courts of Equity.—*Roche v. R.*, 8 I. E. R. 638. (R.)

9. The Docketing Acts, 7 W. 3, c. 13, and 3 G. 2, c. 7, apply only between purchasers and judgment creditors, and give no priority to judgments *inter se*.—*Abbott v. Stratton*, 9 I. E. R. 233; 3 Jon. & L. 603. (C.)

10. *Semble*—A detaining creditor of an insolvent cannot file a bill for a sale on foot of his judgment, under the 3 & 4 Vic., c. 105.—*Maguire v. O'Reilly*, 9 I. E. R. 335; 3 Jon. & L. 224. (C.)

11. In a petition matter under the Mortgage Act, the Court will not decide equities between owners of different parts of the mortgaged premises.—*Lane v. Lynch*, 9 I. E. R. 501. (C.)

12. The pendency of a suit, when the 9 G. 4, c. 35, passed, does not dispense with the necessity of redocketing or reviving a judgment under its 3rd sec.—*Joyce v. J.*, 10 I. E. R. 128. (C.)

13. The assignee of an insolvent is not a purchaser within the meaning of the Acts for Redocketing or Registering Judgments.—*Baylee v. Browne*, 10 I. E. R. 180. (R.)

14. The 2nd sec., as well as the 1st, of the Redocketing Act, 9 G. 4, c. 35, only avoids judgments in favour of purchasers becoming such after twenty years from their entry. A judgment of M. T. 1818 was not rendered void under the 2nd sec. in favour of a purchaser under a conveyance of 1831, though not revived or redocketed either within twenty years of its entry or five years of the passing of the Act (June 1828).

*Hickson v. Collis*, 6 I. E. R., reversed on re-hearing.—*Hickson v. Collis*, 10 I. E. R. 447. (C.)

15. Since the 3 & 4 Vic., c. 105, judgments of the same Term, entered after its passing, have priority *inter se* as charges on lands, according to the true dates of their entries.

*Quære*—As to the priority *inter se* of such judgments entered before the passing of that Act?

A. devised to his sons, to be disposed of as after mentioned, all his estate in W., and to the survivor, &c., of his sons, with all his estate

in P., subject to his proportion of the head-rent; and also subject to and in trust to pay out of the rents thereof an annuity to his daughter, and the remainder of the rents until she should be paid £500. Then followed a bequest of an annuity of £40 charged on parts of W. There was a residuary devise to the three sons. *Held*, that the bequest to his daughter was charged only on P., and not on W.—*Borough v. Williamson*, 11 I. E. R. 1. (C.)

1. A. obtained a judgment in T. Term 1845. B. obtained a judgment in T. Term 1846. A. sued out an *elegit*, the inquisition on which was returned and filed on the 20th July 1846, and went into possession of the lands extended. B.'s judgment was registered in Sept. 1846; A.'s in Feb. 1847. *Held*, that A.'s judgment had priority.

*Semble*—The registration of a judgment under the 7 & 8 Vic., c. 90, gives no priority as between judgment creditors, except for the protection of heirs and personal representatives in the administration of assets.—*O'Brien v. Scott*, 11 I. E. R. 63. (R.)—[*Ibid*, 459. (C.)]

2 Orders in lunacy giving the receiver liberty to pay money are not within the meaning of the 3 & 4 Vic., c. 105, s. 27, so as to bear interest.—*Hoops v. Lord Kingston*, 11 I. E. R. 469. (C.)

3. The saving in the 3 & 4 Vic., c. 105, s. 22, of the rights of incumbrancers before the 1st of Nov. 1840, is solely for their protection. Therefore in a suit by a judgment creditor for a sale of the conuzor's lands in his lifetime, he cannot rely on the existence of such incumbrances if their owners do not object to the sale.

*Semble*—This Court will sell an estate subject to incumbrances.—*Kieran v. Corr*, 11 I. E. R. 514. (C.)

4. In future it will not be necessary to present a petition in order to show cause against an order for a receiver under the Mortgage Act; and all applications under that Act, after an order made on the first petition, may be by motion.—*Hart v. Carleton*, 11 I. C. R. 231; 3 I. Jur. 131. (R.)

5. A plea of confession is not included within the meaning of the terms "warrant of attorney" or "cognovit" in the 12 & 13 Vic., c. 95, s. 2.—*Gibbon v. Magan*, 2 I. Jur. 60. (R.)

6. The writ of *feri facias* sued out under a decree or order of the Court by virtue of the 8 & 4 Vic., c. 105, s. 27, must correspond with the decree or order. Therefore where a separate *fi. fa.* against one issued on a joint order for payment of costs against several, the Court set aside the writ as irregular, but without costs, and paid back the money levied, on the party undertaking not to bring an action in respect of the seizure and sale by the sheriff.—*Money Penny v. De Massy*, 1 I. C. R. 597. (R.)

7. The 11 & 12 Vic., c. 48, s. 72, enacting that the release of any portion of lands in Ireland, from any judgment affecting it, shall not nullify or affect the force of such judgment as regards the residue of such lands, or any other property not specially released, does not apply to releases executed before that Act passed.—*Handcock v. H.*, 1 I. C. R. 444. (C.)

8. The 12 & 13 Vic., c. 95, s. 2, applies to all judgments, whether recovered in an adverse action or entered upon a warrant of attorney. The Court therefore refused to appoint a receiver, on petition, in a judgment in case recovered in 1850 for £120 exclusive of costs.—*McDonnell v. Malone*, 2 I. C. R. 108; 4 I. Jur. 124. (R.)

9. In order to constitute a fraudulent preference, it is not sufficient that a payment or security was voluntary, and made at a time when the trader was in insolvent circumstances. It is necessary to show that it was made in contemplation of bankruptcy.

A judgment obtained against a bankrupt, and registered as a mortgage under the 6th and 7th sections of the 13 & 14 Vic., c. 29, before the issuing of the commission, is a charge on the bankrupt's lands, in priority to his simple contract debts.

The 13 & 14 Vic., c. 29, repeals the 6 W. 4 c. 14, s. 126, the leading Irish Bankrupt Act.

*Quære*—Whether an affidavit made by one only of several conuzees is a sufficient compliance with the terms of the 6th sec.?—*In re Ryan*, 3 I. C. R. 33. (B.)

10. *Quære*—Whether judgments entered, within twenty years before the passing of the Redocking Act, 9 G. 4, c. 35, and not redocketed within twenty years from their entry, or within five years from the passing of the Act, are void as against a purchaser (a mortgagee of 1825), who became such before the passing of the Act?

*Held*, that such judgments were void as against a sub-mortgage (made in 1841) of the mortgage of 1825.—*Walcott v. Condon*, 3 I. C. R. 1; 5 I. Jur. 49. (C.)

11. Neither the suing out of an *elegit* nor the appointment of a receiver on a judgment not redocketed or revived, as required by the 9 G. 4, c. 35, will render it valid against a subsequent purchaser for value.—*In re Judge*, 3 I. C. R. 152. (P.C.)

12. Under the 3 & 4 Vic., c. 105, s. 22, a judgment is a good charge upon an ecclesiastical benefice in Ireland, the 13 Eliz., c. 20, not extending to Ireland, where there is no corresponding enactment.—*Winter v. Homan*, 1 I. Jur. N. S. 899. (C.)

13. A judgment was obtained for poor-rates in 1848 against the owner of the land. In 1850 he took the benefit of the Insolvent Act. In 1855 the judgment was registered. *Held*, that the judgment did not, by reason of the regis-

tration, take priority as a charge over a mortgage of 1832, under the 12 & 13 Vic., c. 104, s. 18.—*In re Malley*, 5 I. C. R. 342. (P.C.)

1. The proviso at the end of the 17 & 18 Vic., c. 113, that it shall not affect the rights of any person claiming under any deed or document made before the 1st of Jan. 1855, does not save a right to the heir to be exonerated from the mortgage debt out of the personal estate bequeathed to a legatee by a will made before that date.

In 1834, A. devised to B. all his right, title, and interest to real estate; and also devised and bequeathed to B. all his personal property, together with all other real, freehold, and chattel property of every nature and kind whatsoever, of which he might be seized or possessed at his death, and appointed C. his executor. After making his will, A. granted mortgages, to secure which he executed a disentailing deed, which was held to be a revocation of the will, as to the real estate. A. died in 1856.

*Quere*—Whether the bequest of the personal estate was specific, so as to exonerate it from the mortgage debts?

*Held*, that the 17 & 18 Vic., c. 113, applied, and that the heir was not entitled, as against the legatee of the personal estate, to be exonerated from the mortgage.—*Power v. F.*, 8 I. C. R. 340. (R.)

2. In 1851, B. obtained a judgment against A. In 1855, a decree on consent was made in an administration suit, declaring A. a trustee for himself and his brothers and sisters, as to lands in which he had the legal estate. In 1856, the judgment creditor registered his judgment as a mortgage, under the 13 & 14 Vic., c. 29, against the lands. *Held*, that the registration of the judgment affected that portion only of the lands in which A. was beneficially interested.

The registration of a judgment as a mortgage under the 13 & 14 Vic., c. 29, operates in equity to pass the beneficial interest of the debtor only. If the debtor has a legal estate, it is transferred to the creditor, subject to the same equities as it was liable to before the registration.—*M'Auley v. Clarendon*, 8 I. C. R. 568; *Dru. Rep. temp. Napier*, 433. (C.A.)

3. A. having two estates mortgaged with judgments collateral to the mortgage, by will, made after 1854, devised them in strict settlement to two of his sons; bequeathed several pecuniary and specific legacies, and directed that his debts and legacies should be paid out of the residue of his personal estate and property which he bequeathed to his sons. *Held*, that the mortgage debts should be paid out of the personal estate in preference to the pecuniary legacies.—*Smith v. S.*, 10 I. C. R. 89; 5 I. Jur. N. S. 88. (R.)—[*Affd.*: 10 I. C. R. 461; 5 I. Jur. N. S. 201. (C.A.)]

4. A creditor, having obtained a judgment against the official manager of a banking company, registered an affidavit of the judgment

against the real estate of a former shareholder in the company, without having issued a *sci. fa.* against him. *Held*, that a Court of Equity ought to give relief against that registration, as being a cloud on the shareholder's title to his lands.—*Hone v. O'Flaherty*, 9 I. C. R. 119; *Dr. Rep. temp. Napier*, 505. (C.)

5. In an affidavit filed under the 13 & 14 Vic., c. 29, s. 6, for the purpose of converting a judgment into a mortgage, a description of the deft.'s last known place of abode, as "late of the town of Galway, but now of the county of Dublin," was held insufficient, as being too vague.

The same affidavit stated the amount of the judgment to be £894, and £3. 2s. 8d. for costs; whereas the sum mentioned for costs on the record was £2. 2s. 8d.; the fee of £1 for registration having been added to the costs in the affidavit. *Held*, to be such a variance as invalidated the affidavit.—*In re Fitzgerald's Estate*, 11 I. C. R. 278; 5 I. Jur. N. S. 204. (C.A.)

6. If an affidavit filed for the purpose of registering a judgment as a mortgage, under the 13 & 14 Vic., c. 29, substantially complies with the requirements of its 6th section, it is sufficient. When such an affidavit was entitled in the same words as the record of the judgment, and stated (*inter alia*) that "J. T., the ptf., by the name and description of J. T., of 116 Grafton-street, in the city of Dublin, solicitor, did, on the 15th of July 1858, obtain a judgment in the Court of Exchequer against the deft. in this cause, by the name and description of E. S. P., of, &c., that the usual or last-known place of abode of the said E. S. P., the deft. in this cause, the person whose estate is intended to be affected by the registration of this affidavit, is at, &c.; that, to the best of deponent's knowledge and belief, the said E. S. P., the deft. in this cause, is, at the time of swearing this affidavit, seized or possessed of," &c. &c. *Held*, that that affidavit contained a sufficient statement of the title of the cause. That it sufficiently identified the deft. in the judgment with the person whose estate was sought to be affected by the registration of the affidavit.—*In re Power's Estate*, 11 I. C. R. 288. (C.A.)

7. An affidavit registered under the 13 & 14 Vic., c. 29, s. 6, stated that the sum recovered by the judgment was £265, with £3. 2s. 8d. for costs. The record of the judgment stated that the sum recovered was £265, besides £2. 2s. 8d. for damages, and £1 for registry. *Held*, that the variance did not invalidate the affidavit.—*In re Edgeworth's Estate*, 11 I. C. R. 293; 6 I. Jur. N. S. 11. (C.A.)

8. In an affidavit registered under the 13 & 14 Vic., c. 29, s. 6, a statement "that deponent was, and still is a gentleman," was held to be a sufficient description of the ptf., when he had not any trade or profession.—*In re Edgeworth's Estate*, 11 I. C. R. 294. (C.A.)

1. An affidavit filed for the purpose of registering a judgment, as a mortgage, under the 13 & 14 Vic., c. 29, was entitled in the margin "J. M. of D., in the county of W., farmer, ptf., T. J. F. of B., in the county of W., Esq., deft.," and stated that J. M. of, &c., &c., had recovered a judgment against the deft. in this cause, by the name and description of Thomas Joseph Fitzgerald of Ballinapark, in the county of Waterford, Esq. *Held*, a sufficient description of the name, and usual or last known place of abode of the deft.

*Semble*—That a supplemental affidavit under the 21 & 22 Vic., c. 105, may be filed after the death of the conuzor.—*In re Fitzgerald's Estate*, 11 I. C. R. 356. (C.A.)

2. Statements in the title of a judgment mortgage affidavit may be incorporated, by reference, in the affidavit itself. A description of the residence of the parties, in an affidavit to register a judgment as a mortgage, will be sufficient, if it be their ordinary trade residence. The description must be substantially contained within the affidavit itself. Such affidavits need not be construed with strict grammatical accuracy. [*M'Dowell v. Wheatly* commented on and distinguished.]—*In re Smith & Ross*, 11 I. C. R. 394; 6 I. Jur. N. S. 72. (B.)

3. The 13 & 14 Vic., c. 29, s. 10, is to be read as an exception to the concluding portion of 1st sec.

The words "anything in this Act notwithstanding," in the 13 & 14 Vic., c. 29, s. 10, are equivalent to "anything to the contrary in this Act notwithstanding," and refer to that clause of the 1st sec. of the Act, which abolishes execution against all interests in lands.—*In re Gerrard's Estate*, 14 I. C. R. 466; 9 I. Jur. N. S. 21. (C.A.)

4. Although the 13 & 14 Vic., c. 29, uses the word "person," as owner of property to be affected by a judgment mortgage, yet, all the Judgment Acts being *in pari materia*, to be read as one code, the property of a body corporate is, as regards a judgment mortgage, to be treated as the property of an individual.—*In re Bagnalstown Ry. Co.*, 10 I. Jur. N. S. 156. (B.)

5. The affidavit to register a judgment under the 13 & 14 Vic., c. 29, described the deft., as "formerly of B. in the county of W., but now of the city of Dublin, Esq." *Held*, following *In re Fitzgerald's Estate*, 11 I. C. R. 278, that the judgment was not duly registered.

*Semble*—The statute's object was to identify the parties to the judgment; and therefore the judgment is duly registered, if it describes them in a manner not calculated to mislead.

The supplemental affidavit filed under the 21 & 22 Vic., c. 105, can only supply a defect in the original affidavit, by stating positively that which had been stated only by way of recital; but cannot supply a defect in the description itself.—*Thorpe v. Browne*, 16 I. C.

R. 365; 10 I. Jur. N. S. 166. (R.)—[*Rev'd.*: L. R., 2 H. L., 220.]

## II. 63. National Debt.

### II. 64. Partition.

(*See* 5 G. 2, c. 9; 21 & 22 Vic., c. 72, s. 81.)

[*See* PRACTICE, LANDED ESTATES COURT.]

6. A reversioner in fee, expectant on a lease for lives renewable for ever, is a proprietor within the 5 G. 2, c. 9, and must be served with a copy of the petition to divide a bog.—*Kelly v. Skelton*, 1 Jones, 555. (E.E.)

7. A., being possessed of land, presented a petition under the 5 G. 2, c. 9, to ascertain the boundaries of an adjoining bog to which his title was disputed by the respondent. The Court would not dismiss the petition, but retained it till the petitioner established his right at law.

*Semble*—Though no jurisdiction be given to the Court by the statute under which the proceedings are taken, to direct an issue, or an enquiry as to the facts, yet the Court, to satisfy itself, will exercise its inherent powers by either of those methods.—*Lahiffe v. Gregory*, 4 I. Jur. 97. (C.)

8. When lands, forming the subject of a proposed partition, are held by different tenures, or under several leases, each estate must be separately partitioned. The Court will not sanction a partition which gives the freehold lands to one owner, and the leaseholds to another. Each owner must receive a portion of each estate.

In the partition of leaseholds the Court will not allow one lease to be given to one owner, and another lease to the other owner. Each lease must be partitioned separately. The Court will not allow the entire rent reserved by a lease to be thrown on a single owner.

These rules apply equally to a partition by consent without a sale by the Court under sec. 81 of the L. E. Court Act, as to partition under sec. 80, when the petition prays for a partition and sale.—*In re Foley's Estate*, 7 I. Jur. N. S. 402. (L.E.C.)

## II. 65. Partnership.

[*See* PARTNERS & PARTNERSHIP, *ante*, p. 657.]

### II. 65a. Pigot's Act.

[*See* JUDGMENT, *ante*, p. 444; STATUTES, 62; MORTGAGE, JUDGMENT.]

## II. 66. Poor-law Relief Commissioners: Guardians, &c.

[*Poor Removal Acts*, 3 & 4 W. 4, c. 40; 7 W. 4 & 1 Vic., c. 10; 3 & 4 Vic., c. 27; 7 & 8



*Vic.*, c. 42, altered and amended by 8 & 9 *Vic.*, c. 117; 10 & 11 *Vic.*, c. 33; 24 & 25 *Vic.*, c. 76; 25 & 26 *Vic.*, c. 113; 26 & 27 *Vic.*, c. 89; 26 & 27 *Vic.*, c. 33, s. 22.

Poor Relief, 49 *G. 3.*, c. 95; 47 *G. 3.*, s. 1, c. 44; 1 & 2 *Vic.*, c. 56; 2 & 3 *Vic.*, c. 1; 4 & 5 *Vic.*, c. 1; 6 & 7 *Vic.*, c. 92; 10 & 11 *Vic.*, c. 31, ss. 84, 90; 11 & 12 *Vic.*, c. 25; 12 & 13 *Vic.*, c. 4, s. 104; 13 & 14 *Vic.*, c. 69; 15 & 16 *Vic.*, c. 37; 16 & 17 *Vic.*, c. 75; 19 & 20 *Vic.*, c. 14; 23 & 24 *Vic.*, c. 148; 25 & 26 *Vic.*, c. 83; 26 & 27 *Vic.*, c. 21.

Abolishing Vestries Cess, 27 & 28 *Vic.*, c. 17.

Union Officers, 28 & 29 *Vic.*, c. 26, s. 119.

Fever Patients, 58 *G. 3.*, c. 47; 9 & 10 *Vic.*, c. 6; 10 & 11 *Vic.*, c. 22; 11 & 12 *Vic.*, c. 131.]

1. The conversion of lands into a cemetery is waste. Demise of lands for lives and years, with a covenant to yield them up in repair at the expiration of the lease. The lessees' assignee agreed with Poor-law Guardians, with the Poor-law Commissioners' assent, not under seal, to let a portion of the lands to the Guardians as a cemetery. The land was so used for many years. The reversion was sold in the L. E. Court, and conveyed subject to the lease to the petitioner, who before the conveyance had notice of the cemetery's existence. *Held*, that the agreement with the Guardians was not a "purchase or hiring" by the Commissioners within the 10 *Vic.*, c. 31, s. 20.

*Seemle*—Such a "purchase or hiring" must be by deed from or with the concurrence of the owner of the fee.

The Court granted an injunction to restrain future burials, but refused to order the restoration of the surface to its condition at the date of the demise.—*Cregan v. Cullen*, 16 I. C. R. 339. (R.)

## II. 67. Poor-rates.

[See STATUTES, POOR-LAW.]

## II. 68. Persons under Religious Disabilities.

[See also MORTMAIN, ante, p. 1233.]

2. A Roman Catholic entitled to real estate did not take the oath necessary under the statutes to qualify him to hold it, and did not enjoy the lands. Proceedings to enforce his title were not taken until after the passing of the 10 *G. 4.*, c. 7 (the R. C. Relief Act.). *Held*, that its 23rd sec. removed his former disability.—*O'Connell v. O'Callaghan*, 7 I. E. R. 596. (C.)

3. The doctrine of civil death by profession ceased to be law at the Reformation, and was not revived by the 10 *G. 4.*, c. 7.—*Evans v. Cassidy*, 11 I. E. R. 243. (R.)

## II. 69. Prescription.

[See 2 & 3 *W. 4.*, c. 71, extended to Ireland, by the 21 & 22 *Vic.*, c. 42. As to Tithes, 2 & 3 *W. 4.*, c. 100.]

SEC. IV. That each of the respective periods of years hereinbefore mentioned, shall be

deemed and taken to be the period next before some suit or action wherein the claim or matter to which such period may relate shall have been or shall be brought into question, and that no act or other matter shall be deemed to be an interruption, within the meaning of this Statute, unless the same shall have been or shall be submitted to or acquiesced in for one year after the party interrupted shall have had or shall have notice thereof, and of the person making or authorising the same to be made.

4. F., proprietor of a house, during 1856, 1857, 1858, obstructed the ancient lights of the next house wherein C., during those years, carried on his business, and was seized of an estate in fee. C. did not reside there, and died before the making of this motion for an injunction by the present tenant in *quasi fee*. No written notice of the obstruction had been served on C. *Held*, that the Court would presume notice, which need not be in writing to bring it within the 2 & 3 *W. 4.*, c. 71, s. 4 (21 & 22 *Vic.*, c. 42, Ireland).—*Dockrell v. Findlater*, 11 I. Jur. N. S. 161. (C.)

## II. 70. PROBATE COURT: ACT: GENERALLY.

(20 & 21 *Vic.*, cc. 56, 79.)

[See PRACTICE, PROBATE COURT, ante, p. 1037.]

## II. 71. Property Tax.

[See Income Tax Act, 16 & 17 *Vic.*, c. 34.]

## II. 72. Quia Emptores.

[See ESTATE, ante, p. 269.]

5. Since the statute of *Quia Emptores*, there cannot be a grant in f.-f.—*Brady v. Fitz Gerald*, 11 I. E. R. 55. (R.)

## II. 73. Railways (Ir.) Act,

[See RAILWAY, ante, p. 1164.]

[Railways Clauses Consolidation Act, 8 & 9 *Vic.*, c. 20; 14 & 15 *Vic.*, c. 70; 17 & 18 *Vic.*, c. 31; 19 & 20 *Vic.*, c. 72; 21 & 22 *Vic.*, c. 34; 23 & 24 *Vic.*, c. 97; 25 & 26 *Vic.*, c. 69, s. 6; 27 & 28, c. 71. Cheap Trains, 7 & 8 *Vic.*, c. 85, ss. 6 & 7; 21 & 22 *Vic.*, c. 75; 23 & 24 *Vic.*, c. 41; 26 & 27 *Vic.*, c. 33, s. 14.

Granting to Railways Further Powers and Facilities, 27 & 28 *Vic.*, c. 120, s. 121. As to Constables on Railways, 11 & 12 *Vic.*, c. 72.

Railway Cos. and Power of Canal Cos., 21 & 22 *Vic.*, c. 75.

Tramways, 23 & 24 *Vic.*, c. 152.]

6. The G. S. & W. Ry. Co. having purchased settled land, the tenant for life conveyed to them under their Act. He and the tenant in tail applied to draw the purchase-money out of Court. No disentailing deed had been executed. *Held*, that the money was to be considered bound by the limitations affecting the land, and to be dealt with as subject to be invested in lands, to be settled

to the same uses as the sold lands; and that a disentailing deed was necessary to enable the parties to draw the money.—*G. S. & W. Ry. Co. v. Leinster*, 7 I. E. R. 482. (R.)

1. A Railway Company having taken lands occupied by D.'s tenants, and the parties not agreeing to the compensation offered, steps were taken for holding an inquisition, in which one solicitor acted for D. and the tenants. The company afterwards acceded to the valuation made for the tenants; a verdict was taken by consent for D.; and the company gave a written undertaking to pay any sum to which the solicitor was entitled as solicitor for D. and his tenants, when ascertained by the proper officer under their Act. They took from D. a conveyance the costs of which, and of making title, were taxable in Ch. under their Act. The costs of ascertaining the compensation for the tenants should properly under it have been settled with their claim by Justices of the Peace; the costs of an inquisition were taxable in a Law Court. The solicitor, having furnished separate bills of costs for D. and the tenants, to which the Company objected, petitioned for taxation and to enforce payment. *Held*, that the costs of D. only could be taxed or enforced in this Court, and that the undertaking gave no jurisdiction as to the costs of the tenants.—*Marquis of Drogheda v. The Gt. S. & W. Ry. Co.*, 12 I. E. R. 103. (C.)

2. The words "money to become payable by the Company under the award of the arbitrator," in the 23 & 24 Vic., c. 97, s. 4, are to be construed as referring to an award not traversed.—*In re Dublin Corporation Waterworks*, 17 I. C. R. 16. (R.)

#### II. 74. Receiver.

[See PRACTICE, LXXVIII—RECEIVER, *ante*, p. 1050.]

#### II. 75. Releases.

(See 8 & 9 Vic., c. 106, s. 3; 11 & 12 Vic., c. 48.)  
[See LANDLORD AND TENANT, *ante*, p. 489.]

3. The 11 & 12 Vic., c. 48, s. 72, enacting that the release of any portion of lands in Ireland from any judgment affecting them, shall not nullify or affect the force of that judgment, as regards the residue of such lands, or any other property not specially released, does not apply to releases executed before that Act passed.—*Hancock v. H.*, 1 I. C. R. 444. (C.)

#### II. 76. Renewable Leasehold Conv. Act, 12 & 13 Vic., c. 105.

[See LANDLORD AND TENANT, V, 4—RENEWABLE, LEASEHOLD CONVERSION ACT, *ante*, p. 503—LEASE, VIII—RENEWAL, *ante*, p. 524.]

4. An original lease and the renewal thereof contained a reservation of £5 yearly for every

acre on the premises that should be ploughed &c., without the consent of the lessor, and so for a lesser quantity, except for the planting of trees; and £5 for every acre of the premises which should be let to any person who should hold any part of adjacent lands; and forty shillings yearly for every tenant or undertenant inhabiting on the premises that should be a Papist, or so reputed; and covenants to fence the lands and to pay the rents and penalties. *Held*, on a petition under the 12 & 13 Vic., c. 105 (Ren. Lease. Conv. Act), that the lessee was entitled to have the reservation as to the meadow commuted under sec. 3, and that "meadow" meant meadow at the date of the last renewal.

The reservation letting to persons for holding the adjacent lands could not be omitted from the f.-f. grant, or commuted, as it was not a covenant interfering with the proper cultivation of the land within sec. 3.

That the reservation for every Papist tenant was not illegal; was a subsisting clause within the 1st sec., and did not interfere with the proper cultivation of the land; and therefore could neither be omitted nor commuted.—*Mahony v. Tynte*, 1 I. C. R. 577. (R.)

5. The R. L. Conversion Act provided for compensating the owner of the reversion for the rent and fines, but gave the landlord no general right to compensation for the depreciation in value of his estate by reason of such compulsory conversion of the reversion into a f.-f. rent. However, s. 5 provided that where the conversion would not afford full compensation for the loss of the original reversion, or of any power of benefit or advantage incident thereto, he should be entitled to compensation for such loss. *Held*, that this sec. did not include the general case of a compensation to all landlords for any depreciation caused by the conversion; and was either insensible, or referred to some special cause external to the leasehold estate.—*The Marquis of Donegal v. Layard*, 5 I. Jur. N. S. 401. (H. L.)—[S. c. 8 H. Lds. Cas. 460.]

6. A contract—to grant a lease for the same term, namely, for lives renewable for ever, as the contractor holds—does not, when made after the passing of the Ren. Lease. Conv. Act, operate as an agreement for a f.-f. grant.—*Forde v. Brew*, 17 I. C. R. 1. (R.)

#### II. 77. Rents, Apportionment of.

[See APPORTIONMENT, *ante*, p. 59.]

7. The 4 & 5 W. 4, c. 22, does not apply to rents reserved on tenancies from year to year, without writing.

B., seized in fee subject to tenancies from year to year, by will, in 1840, devised to A., for life, remainder over. A. lived for some years, without determining the tenancies. *Held*, that the rents were not apportionable under the 23 & 24 G. 3, c. 46 (*Ir.*).—*In re Alexander*, 4 I. C. R. 257. (R.)

8. The power given to the L. E. Court by the 21 & 22 Vic., c. 72, s. 72, is discretionary, and

exists both in the case of an incumbered, and of an unincumbered estate. The landlord's consent is not necessary; but the Court requires clear proof that his interest is not made in any appreciable degree less secure, less enjoyable, or less marketable.

If there is any reason to believe that the petition has been presented, not for a *b. f.* sale, but to obtain an apportionment, the Court will make an order which will apportion the rent only if the proceedings be duly prosecuted, and the sale had.—*In re Comyn's Estate*, 11 I. C. R. 330. (L.E.C.)

1. When a landlord dies between two gale days, the rents payable by his tenants are made by the L. & T. Act (23 & 24 Vic., c. 154), apportionable between his executor, and his devisee — *Hall v. H.*, 11 I. Jur. N. S. 244. (R.)

## II. 78. Rentcharge.

2. A rentcharge granted, to secure a loan to an owner in fee subject to a rent, by a grant before the 14 & 15 Vic., c. 20, has priority over the rent under the Land Improvement Act, 10 Vic., c. 32, s. 38.

*Semble*—When the loan is made to a tenant the rentcharge has not priority over the rent reserved by his lease, such rent not being a charge or incumbrance within sec. 38 of that Act.—*Att.-Gen. v. Evans*, 11 I. C. R. 171. (R.)

## II. 79. Settlement of Poor.

[See STATUTES, POOR-LAW ACTS.]

## II. 80. Settled Estates Act (19 & 20 Vic., c. 120.)

[See STATUTES, LEASES.]

3. The Court has not power under the Settled Estates Act to grant a power to lease in reversion.

The order of the Court, granting leasing powers under the Settled Estates Act, does not dispense with the necessity of the party, who takes a lease, investigating title.—*Ex parte Henchy*, 3 I. Jur. N. S. 73. (R.)

4. Under the Settled Estates Act, the Court will not grant a power to make such a lease of a minor's estate as is tantamount to an entire alienation thereof.—*In re Blood's Estate*, 3 I. Jur. N. S. 336. (R.)

## II. 81. Sheriffs.

[See CHARGING ORDER, *ante*, p. 119.]

(56 G. 3, c. 68: 5 & 6 W. 4, c. 55).

[SHERIFFS ACT. See PRACTICE, LXXVIII, RECEIVER, *ante*, p. 1050.]

5. A party in possession under an *elegit* must abandon the proceedings which he has taken thereunder before the Court will grant him a receiver under the Sheriffs Act.—*Mahon v. Fitzgibbon*, 1 I. E. R. 6. (C.)

6. Tenant for life confesses a judgment; is discharged as an insolvent; and dies. Under the 5 & 6 W. 4, c. 55, the Court has jurisdiction, after his death, to make absolute, as against his assignees, a conditional order to extend a receiver obtained during the insolvent's life upon a petition against him, so far as to give effect to the petitioner's lien on the life estate, and the rents received by the receiver thereout, and the purposes necessarily connected therewith.—*Barry v. Wilkinson*, 3 I. E. R. 121. (E.E.)—[See *ibid*, p. 564.]

7. Under the 5 & 6 W. 4, c. 55, a judgment creditor is entitled to a receiver in every case in which he could, at law, issue an *elegit*.—*Walsh v. Keane*, 3 I. E. R. 426. (R.)

## II. 82. Ships.

[18 & 19 Vic., c. 96; 24 & 25 Vic., c. 96. Wrecked vessels, 17 & 18 Vic., c. 104; 18 & 19 Vic., c. 91; 25 & 26 Vic., c. 63.]

8. The M. Sh. Act Am. Act 1862 (25 & 26 Vic. c. 63) applies only to the case of a lien for freight claimed by the shipowner against the owner of the cargo; not to a case of conflicting claims between the mortgagor and mortgagee of the vessel touching ownership of the freight.—*B. H. Commrs. v. Lawther*, 17 I. C. R. 54. (C.)

## II. 83. Solicitors.

[See SOLICITOR, *ante*, 1203.]

9. When an apprentice to an attorney had not attended any of the Courts in Dublin during any Term in the fifth year of his apprenticeship, but after that year, his master being then dead, attended the Courts for two Terms without having any master, his application for admission was refused.

*Semble*—Indentures cannot be assigned after five years from the date thereof.

*Semble*—The sickness and accidents, provided for in 13 & 14 G. 3, c. 23, refer to the apprentice, and not to the master.

The Terms for attendance must be in the three years next preceding the application for admission.—*Ex parte Roberts*, 8 I. E. R. 507. (E.E.)

10. The Court has not discretion to dispense with the provisions respecting the period of a solicitor's apprenticeship, except, perhaps, in cases of fatality. Therefore, under the 1 & 2 G. 4, c. 48, s. 4, the Court refused to admit a graduate on a three years' apprenticeship, commenced more than four years after his degree had been obtained.—*In the Matter of A. B.*, 12 I. E. R. 237. (C.)

## II. 84. Stock and Stock-jobbing.

## II. 85. Sub-letting Acts.

[See *ante*, 49; IRISH TENANTRY ACTS.]

II. 86. *Tenant in Tail and for Life: Money to be laid out in Land: Conveyance by Tenant for Life.*

[See ESTATE, II, ante, p. 273.]

1. The 1 W. 4, c. 47, s. 12 (authorising the conveyance of estates devised in settlement by tenants for life, &c., under decrees), extends to a decree for a mortgage, as well as to one for an absolute sale.—*Holmes v. H.*, 7 I. E. R. 890. (C.)

2. In the 4 & 5 W. 4, c. 92, s. 68, the phrase "money subject to be invested in lands," means "money directed" to be so invested.—*Smithwick v. S.*, 12 I. C. R. 181; 6 I. Jur. N. S. 282. (R.)

II. 87. *Timber.*

[See also TIMBER, post.]

3. A lease, made in 1821, for three lives or 41 years, excepted and reserved all timber trees, or trees likely to be timber, then growing or being on, or which should thereafter grow or be on the demised premises, with liberty of ingress, &c., for the lessor to cut and carry away them. It also contained a covenant by the lessee, to repair, preserve, &c., the premises, with all buildings, plantations, improvements, timber, and other trees, that then were, or might at any time thereafter be, erected or planted thereupon, in good and tenantable order, repair, and condition; and at the determination of the demise to deliver up peaceable possession of the premises, together with all improvements as then (1821) were or should thereafter be made thereon, in like good tenantable order, repair, and condition. The lessee, in 1828, planted a large quantity of timber trees, and within a year afterwards duly registered them pursuant to the 23 & 24 G. 3, c. 39 (*Ir.*), having previously given notice of his intention to his lessor, who offered no opposition to the registration. By divers deeds of assignment, not registered under that statute, the lessee's interest in the lands became vested in A. A cause petition (to which the lessee was not made a respondent), filed in 1851, by the lessor against A., praying that A. might be restrained by injunction from cutting the timber trees planted by the lessee, was dismissed, with costs, but without prejudice to such other proceedings as the lessor might be advised to adopt.

*Semble*—That by the registry of the trees in 1829, the lessee acquired the absolute property in them; and that by the deeds of assignment under which A. claimed, that property, as well as the lessee's estate in the lands, passed to A.

*Semble*—That the decision in *Herbert v. Jameson* (2 Law Rec. N. S. 92), cannot be upheld.—*Standish v. Murphy*, 2 I. C. R. 264; 4 I. Jur. 297. (C.)

4. Tenants for lives, with a covenant for perpetual renewal, are, by the 5 G. 3, c. 17 (*Ir.*), rendered unimpeachable of waste in respect of trees planted by them since the pass-

ing of that Act, whether the trees be or be not registered, and whether the leases, under which the tenants claim, are of a date prior or subsequent to the passing of that Act.

*Semble*—That by a special covenant tenants for lives renewable for ever, whose leases are of a date subsequent to the passing of that statute, may render themselves impeachable of waste in respect of trees planted by themselves.

A lease for lives renewable for ever, made in 1791, reserved and excepted from the demise all timber trees, woods, and underwoods, with liberty of ingress, egress, and regress for the lessor to cut and carry away the same. *Held*, that he was entitled only to trees standing at the date of the lease, or to trees growing from the stocks of trees then standing.

Tenant for lives renewable for ever, though unimpeachable of waste, will be restrained from felling ornamental timber, or timber too young for cutting, or from felling timber in an unhusbandlike manner; but an intention on the part of the tenant to commit such acts must be shown to the Court, in order to induce it to interfere by injunction.—*Penland v. Somerville*, 2 I. C. R. 289; 4 I. Jur. 4, and 335. (C.)

5. In 1818, lands were conveyed to the use that A. and B. should have for ever a yearly rentcharge, with a clause of distress, if it should be in arrear for twenty-one days; and if no sufficient distress or distresses could or might be had or found in or upon the premises for forty-one days next after the days appointed for payment, it should and might be lawful for A. and B., their heirs and assigns, to enter the premises, and to take and seize upon the rents and profits, and to detain and keep them, &c., for payment and satisfaction of the rentcharge, and all arrears. A. and B., their heirs and assigns, were empowered, by sale or mortgage of the lands, or out of the rents and profits, to raise such sum or sums as should for ever thereafter be sufficient to pay and discharge the rentcharge. In 1842, the portion of the arrears due from Nov. 1834 to Nov. 1840 were assigned to the petitioner, who, in 1853, filed a petition to raise it out of the lands charged. A. died, leaving B. surviving.

*Semble*—That an ejectment could not be sustained on the clause of re-entry, unless it was proved that no sufficient distress could be had on the premises to answer the arrears.

*Held*, that the question whether the petitioner was or was not barred by the Statute of Limitations, sec. 25, depended on B.'s right to recover in the ejectment; and there being no evidence of want of sufficient distress on the premises, the Court gave liberty to bring an ejectment.

*Quere*—Whether the clause of re-entry, being conditional, and in the nature of a power of distress, could be made available to recover an arrear of rent, where the right to distrain is barred by the 42nd sec.?

*Held*, that the power of sale or mortgage could not be exercised by the surviving trust-

tee to raise arrears, the recovery of which by distress or action was barred by sec. 42.

*Quære*—Whether the surviving trustee could in any case exercise the power?

*Held*—That an acknowledgment by a tenant for life of lands charged with a rent will bind the remainderman, so as to take the case out of sec. 42, where the right to recover the arrears is not barred; but such an acknowledgment will not revive a demand already barred.—*Smith v. S.*, 5 I. C. R. 88. (R.)

1. Under the Irish Acts 5 & 6 G. 3, c. 17, and 23 & 24 G. 3, c. 39, a tenant, having twelve or more years of his lease to run, is entitled to the property of any trees which he plants. A demise reserved "all wood and underwood, timber and timber trees, standing, growing, or being on the demised premises, or at any time thereafter to stand or grow thereon, with full and free liberty of ingress and egress to take and carry away the same." *Held*, that this clause secured to the owner of the inheritance the benefit of such trees as were upon the premises at the date of the demise, but did not transfer to him the property in trees planted under those statutes. The property in those trees was vested in the lessee.—*Galwey v. Baker*, 7 Cl. & F. 379; West, 467.

## II. 88. Tithes.

[See also PRACTICE, TITHES.]

2. The 2 & 3 W. 4, c. 119, s. 30, applies only to cases of compositions for tithes made between the tithe owner and the tithe payer.—*Knor v. Potter*, 2 Jones, 276. (E.E.)

3. A person, having a clear equitable estate in the lands, greater than a tenancy from year to year, is liable to the tithe composition, within the 2 & 3 W. 4, c. 119, s. 12.—*Stewart v. Alexander*, 2 Jones, 534. (E.E.)

4. Although a direct covenant by the tenant to pay the tithe would be void by the 2 & 3 W. 4, c. 119, s. 13, there is not anything to prevent a landlord from reserving, and a tenant from agreeing to pay, a larger rent in consideration of the tithe.—*Davies v. Fitton*, 4 I. E. R. 612; 2 Dr. & War. 225. (C.)

5. The 3 & 4 W. 4, c. 37, enacted that the Ecclesiastical Commissioners should make or cause to be made a valuation of all livings, &c., from which they were to deduct all rents, synodals, proxies, and other charges; and levy therefrom a yearly tax computed and imposed on such valuation, to be paid on the 1st July, and 1st January; and that, if the tax should be in arrear and unpaid more than a reasonable time after demand, the Commissioners might apply to the Court in a summary way by petition for relief in that behalf. *Held*, that the Court had not power to set aside or alter the valuation; and, the tax being fixed in respect of the valuation, was bound to make an order for payment.

*Quære*—Whether poor-rate imposed by a subsequent statute (1 & 2 Vic., c. 56), is a

charge which should be deducted from the valuation?

The 11 & 12 Vic., c. 80, after reciting that doubts had arisen whether the Commissioners were authorised to allow any sum for poor-rate, enacted that it should be lawful for them to deduct the poor-rate from any valuation made or to be made. *Held*, that the Act was not declaratory, and did not apply to a tax made on a valuation and due prior to the Act.

That the tax became due on the gale day, though no demand was made.—*Eccl. Commrs. v. Armstrong*, 12 I. E. R. 445. (R.)

6. The Earl of A., being seized in fee under a grant to his ancestor by James II, with a license to alien, to be held of the grantee and his heirs, *non obstante* the Statute of *Quia Emptores*, conveyed the lands to P. and his heirs in 1834. *Held*, that no reversion being left in the Earl, the lands were not let, set, or demised, within the meaning of the 2 & 3 W. 4, c. 119 (Stanley's Act); and that therefore P.'s estate was liable to the tithe rent-charge.—*Verschoyle v. Perkins*, 13 I. E. R. 72. (R.)

7. When lands were not formerly in the possession of the dissolved monasteries, unity of possession of the lands and tithes will not extinguish the tithe. Therefore when the petitioner derived title under a lease for lives renewable for ever of lands, and the tithes thereof, made in 1700, the Court refused to declare the lands tithe free (on a petition presented under the 1 & 2 Vic., c. 109, s. 16), though no tithe had been paid since 1700, there being no proof that the lands were Abbey lands, and no notice of the proceedings having been given to the reversioner.—*Denny v. Duke of Devonshire*, 1 I. C. R. 401; 4 I. Jur. 245. (R.)

8. The 1 & 2 Vic., c. 109, s. 20, enacting that the provisions thereinbefore contained "with respect to the establishment of exemption, &c., from tithes, shall not extend to any case where the tithes of any land shall have been demised by deed for any term of life or years, or where any composition for tithes shall have been made by deed or writing, by the person entitled to such tithes, with the owner or occupier of the lands, for any such term for life or years, and such demise or composition shall be subsisting at the time of the passing of the Act, nor to any suit for establishing a claim to tithes then pending," means that the exempting clauses of the statute are not applicable to the case of the owner of tithes demising them to the owner or occupier of the land chargeable with those tithes; but a person actually entitled to the common ownership both of lands and the tithes thereof is not, merely because he has derived his title under a lease making separate demises of each, disentitled by that section to hold the lands tithe free.—*Denny v. Duke of Devonshire*, 1 I. C. R. 657. (C.)—[Varying, 1 I. C. R. 401. (R.)]

1. A lease by the owner of tithe-free lands, demising "both land and tithe," is not a conveyance by the owner of the land and tithe to the occupier within the 1 & 2 Vic., c. 109, s. 20; but is a mode of leasing the land tithe free.—*Denny v. Duke of Devonshire*, 5 I. Jur. 357. (C.)

2. A lease, made in 1832, contained a covenant by the tenant to pay the rent reserved "over and above all taxes, tithes, charges, and impositions whatsoever, quit-rent and crown-rent only excepted." For many years the tenant paid the reserved rent, without claiming to deduct the tithe composition. The lessor mortgaged the lands; the mortgage vested in the tenant against whom was filed a petition for an account. *Held*, that he was entitled to deduct the tithe composition from the rent with which the lessor was to be credited.

The 4 G. 4, c. 99, contains an implied negative respecting any such covenant.—*Usher v. Boyd*, 2 I. Jur. N. S. 274. (C.)

## II. 89. Traders.

Abolition of Exclusive Privileges, 9 & 10 Vic., c. 76.

Excise Licenses, 6 G. 4, c. 81.

Spiritual Powers Restrained from Carrying, &c., 5 G. 4, c. 91; 3 & 4 Vic., c. 37.

## II. 90. Treasurer of County.

[Election of, 4 G. 4, c. 33; 5 G. 4, c. 29, s. 93; 6 G. 4, c. 52; 7 W. 4 & 1 Vic., c. 54; 1 & 2 Vic., c. 53; 6 & 7 Vic., c. 78, s. 3; 9 & 10 Vic., c. 37; 13 & 14 Vic., c. 51, s. 23; 19 & 20 Vic., c. 68.)

3. The 1 Vic. c. 54, s. 12, enabling a county treasurer to apply to the Court of Ch. by motion to vacate the recognizances of himself and his sureties, upon his investing in govt. securities a sum equal to that secured by the recognizances, applies only to those cases in which the party continues to be treasurer when the application is made. Therefore, a petition presented under that sec., by one who had resigned that office before the Act passed, was dismissed.

In cases of principal and surety, circumstances may arise in which payment of the whole sum by the principal would not discharge the sureties.—*In re O'Callaghan*, 1 I. E. R. 448, n.; 450, n. (R.)

## II. 91. Trustees.

(11 G. 4 & 1 W. 4, c. 60; 13 & 14 Vic., c. 60; 15 & 16 Vic., c. 55; 22 & 23 Vic., c. 35, &c., &c.)

[See TRUSTEES.]

## II. 92. Uniformity.

[See ECCLESIASTICAL PERSONS AND THINGS, ante, p. 241.]

## II. 93. Usury.

[See USURY, post.]

## II. 94. Wills.

[Wills Act, 7 W. 4 & 1 Vic., c. 26. See 15 & 16 Vic., c. 24.

Probate Acts, 20 & 21 Vic., c. 79; 22 & 23 Vic., c. 31; 24 & 25 Vic., c. 111.

Probates as to India, 23 & 24 Vic., c. 5.

Forgery of, 24 & 25 Vic., c. 98, s. 21.

Of Seamen, &c., 28 & 29 Vic., c. 72, ss. 111, 114.]

[See also ADMINISTRATOR.]

4. *Quære*—Whether the devisee of an estate, which testator subsequently contracts to sell, is entitled, under the 1 Vic., c. 26, to the purchase-money?—*Saunders v. Cramer*, 5 I. E. R. 12; 3 Dr. & War. 87; 2 Con. & L. 54. (C.)

5. A rentcharge was granted to A. and his heirs, charged on land held for lives, with covenant for perpetual renewal. A. died intestate and without an heir. *Held*, that his administratrix was entitled to the rentcharge under the 1 Vic., c. 26, s. 6.—*Phunket v. Reilly*, 2 I. C. R. 585. (R.)

6. One of the attesting witnesses subscribed the will in the presence of the others, and after the testator's signature; but before execution. *Held*, a bad execution under the 1st Vic., c. 26.

That witness should sign again.—*Mitchell v. Huffington*, 4 I. Jur. N. S. 40. (P.)

7. A., by will dated the 29th of May 1836 bequeathed to his illegitimate son, R., leaseholds; and, if R. should die without "heirs or issue," over. *Held*, that, as the 29th sec. of the Wills Act is expressly confined to the word "issue," it makes no change in the meaning of the expression "die without heirs of the body;" and therefore ("without heirs" in the will meaning "without heirs of the body," and R., being illegitimate), the will did not confer the absolute interest on R., with an executory devise over if he died without issue living at his death, but an estate tail; and, the property being leasehold, the absolute interest. — *In re Sallery*, 11 I. C. R. 236. (L.E.C.)

8. A., having a power to appoint real estate and £4000 to all or any, or one or more of the children, or more remote issue of his marriage, made his will before any child was born, but while the wife was *enroute*, bequeathing all his property in trust, that if he left one child, it should inherit all his landed and personal property; but if he left a son

and daughter, he devised and bequeathed all his landed and personal property to his son, save and except £4000 to his daughter. He afterwards died, having no real estate except what was the subject of the power, but considerable personal estate, and leaving two sons and two daughters. *Held*, that the will did not operate as an execution of the power over the real estate, as the devise was either void for uncertainty, or conditional on events which had not happened.

That the will did not operate as an execution of the power over the £4000, the Statute of Wills (1 Vic., c. 26, s. 27) applying to general powers and not to special powers in favour of particular objects.—*Russell v. R.*, 12 I. C. R. 377. (R.)

## II. 95. Witnesses.

- *Affirmation of*, 24 & 25 Vic., c. 66.
- *Attendance of*, 17 & 18 Vic., c. 34.
- *Commission to Examine*, 55 G. 3, c. 157; 13 & 14 Vic., c. 51.
- *Incapacity of, removed*, 6 & 7 Vic., c. 85; 14 & 15 Vic., c. 99, s. 1; 16 & 17 Vic., c. 83; 20 & 21 Vic., c. 62, s. 14.

[See PRACTICE, EVIDENCE.]

## STAYING.

- *Advertisement in Gazette*. See BANKRUPTCY, VI.
- *Certificate*. See BANKRUPTCY, XVI.
- *Certificate; Petition to Stay; Practice thereon*. See *ibid*.
- *Proceedings during Appeal*. See PRACTICE, APPEAL.
- *Proceedings generally*. See PRACTICE, STAYING PROCEEDINGS.
- *Trial; Injunction for*. See PRACTICE, INJUNCTION.
- *Execution; Injunction for*. See PRACTICE, INJUNCTION.

## STIPULATED DAMAGES.

See also COVENANT.

1. A lease contained a covenant against turning up the ground "under a penalty of £5 per acre." *Held*, that, strictly, this was a penalty, not in the nature of liquidated damages; and that the Court might interfere by injunction to stay waste.—*Carden v. Butler*, Hay. & J. 112. (E.E.)

2. A lessee covenanted not to do a specified act "under the penalty of double the yearly rent herein reserved, same to be recovered by distress, or otherwise, the same as the said yearly rent." *Held*, liquidated damages, not a penalty.—*Gerrard v. O'Reilly*, 3 Dr. & War. 414; 2 Con. & L. 165. (C.)

8. A conditional order may be served on a Sunday.—*O'Leary v. Cavanagh*, Hay. & J. 378. (E.E.)

## STOCK, DIVIDENDS ON, AND TRANSFER OF.

See BANKRUPTCY, XI—CHATELS PERSONAL—RE-CONVEYANCE.

[1 W. 4, c. 60, s. 32; 1 W. 4, c. 65; 6 G. 4, c. 74, ss. 13, 14, 15, 16; 39 & 40 G. 3, c. 36, ss. 1, 2, 4.]

— *Investment of Trust Funds in*. See 22 & 23 Vic., c. 35, s. 32; 23 & 24 Vic., c. 38, s. 10. See also, G. Order of May 24, 1861, and 30 & 31 Vic., c. 132, s. 10.

4. Stock was invested in the names of two persons in trust, as was alleged, for the petitioners. The sole evidence of the trust consisted of statements, contained in the petition and verifying affidavits, of a letter written by the donor for the purposes of the application. One of the alleged trustees being resident in some unknown place, out of the jurisdiction, a petition was presented, praying that the stock might be transferred to the petitioners. The Court refused to make that order in the trustee's absence, though it was stated that he declined to act, and though the co-trustee submitted to act as the Court should direct.—*In re Dunbar*, 8 I. E. R. 71; 2 Jon. & L. 120. (C.)

## STOCK-JOBGING.

See GAMBLING—STATUTES, CONSTRUCTION OF, II.

## STOP-ORDER.

See DEBTOR AND CREDITOR—CHARGING ORDER—PRACTICE, VII—ATTACHMENT AGAINST PROPERTY.

## STOPPAGE IN TRANSITU.

## STRANGERS.

See PRACTICE, PARTY.

## STRIKING OFF ROLL.

See SOLICITOR, III.

## SUBDIVISION COURTS.

See BANKRUPTCY, XIX.

## SUBPENA.

- *Ad Testificandum*. See PRACTICE, EVIDENCE.
- *Generally*. See PRACTICE, SUBPENA.
- *To hear Judgment*. See PRACTICE, SUBPENA.

## SUBMISSION.

- *To Exceptions*. See PRACTICE, ANSWER.
- *To Arbitration*. See ARBITRATION, II.

## SUBSEQUENT CONDITION.

See CONDITION, III.

## SUBSISTING TRUST.

See TRUST, VII.

## SUBSTITUTED.

- *Appearance.* See PRACTICE, APPEARANCE.
- *Service, Affidavit of.* See PRACTICE, EVIDENCE.
- *Service, generally.* See PRACTICE, SUBSTITUTED SERVICE.

## SUBSTITUTION.

- *Of Petitioning Creditor's Debt.* See BANKRUPTCY, V.
- *Of Security, or accepting one Partner as Debtor in lieu of several.* See PARTNERSHIP, VIII.
- *Of Legacy.* See LEGACY, VII.
- *Of Will.* See WILL, XI.

## SUFFERING RECOVERY.

See FINES, &amp;c., II.

## SUFFICIENCY.

- *Of Answer.* See PLEADING, ANSWER—PRACTICE, ANSWER.
- *Of Evidence.* See PRACTICE, EVIDENCE.
- *Of Security.* See SECURITY, I.

## SUGGESTIO FALSI.

See FRAUD, VI—BOND, III—AGREEMENT, VIII—DEED, VI.

## SUIT.

- *Generally.* See PRACTICE, CAUSE.
- *For Tithes.* See TITHES, VI.
- *For Modus.* See TITHES, X.
- *By or against Assignees.* See BANKRUPTCY, X.

## SUIT: CIRCUITY OF.

1. By R.'s marriage settlement in 1767, £1500 were secured for portions for the younger children; that sum to be apportioned as R. might think fit. In 1806, R.'s daughter (a younger child) married G. Then R. executed two bonds to secure two sums (£1000 and £500) payable on his death; interest to be borne by the latter from its date, by the former from R.'s death. Warrants of attorney, upon which,

however, judgment was not ever entered up, accompanied those bonds. A marriage settlement, of even date therewith, vested the bonds in B. (son and heir-at-law of R.) and J., as trustees (described as such in the bonds), on trust to pay the interest to G. and his wife during their lives; then in trust for their children, in such shares as G. should appoint; otherwise equally. No appointment was made. In 1807, B. married. A settlement, then executed, conveyed R.'s estates to trustees for 300 years, on trusts, whereof one was to raise £5000, and apply that money, first, in paying the £1500, the portions for R.'s younger children; then to apply the balance in paying such specialty debts as "are now due and owing" by R.; and to pay the residue, if any, to R. Subject to this term, the estates were conveyed to R. for life; to B. for life; to B.'s first and other sons in t. m. In 1816, R. died. B. entered into possession of the estates. R.'s widow took out probate of his will, and received general assets to the amount of £7500. In 1836, B. died. Interest on the money secured to G. was paid to him during B.'s life, by his agent, and also during the life of C., B.'s son, who had succeeded to the estates, under the settlement of 1807. In 1844, part of the £500 was raised. The £1500 secured by the settlement of 1767 were paid, but the £1500 secured by the bonds were not raised. In 1846, G. died. There was not any evidence that interest had been paid after his death. In 1848, G.'s children filed their bill against C. and F. (one of their brothers, who, for the purposes of the suit, had taken out administration *de bonis non* to R.), and against the possessor of the term. The bill prayed that the money secured by the bonds might be paid out of the term, &c. An enquiry and accounts were directed; and a report was made, and confirmed on further directions. On appeal against the original decree, and against the decree on further directions—*Held*, that, under the special circumstances, the suit was maintainable; that, though R.'s personal representative was primarily liable, yet, since the trustees of the bond debt could only sue the actual possessor of the term; since *he* must then sue C., as holder of the estate subject to the term; and since C., besides being the holder of that estate, was also representative of B., the surviving trustee of the bond debt under the settlement of 1806, a Court of Equity, seeing that all the really interested parties were before it, would not, especially after an enquiry and report, dismiss the bill for matter of form, and thus create a necessity for such a multiplicity of needless suits.—*Burrows v. Gore*, 6 H. L. Cas. 907.—[Affg. decrees of the Court of Ch. in Ir.]

## SUNDAY.

See PRACTICE, VACATION.

## SUPERSEDEAS.

See BANKRUPTCY, VI.



**SUPPLEMENTAL BILL.**

- *Generally.* See PLEADING, BILL.
- *In the nature of a Bill of Review or Revivor.* See PLEADING, BILL.

**SUPPLEMENTAL ANSWER.**

See PLEADING, ANSWER—PRACTICE, ANSWER.

**SUPPLICAVIT.**

See PRACTICE, WRIT.

**SUPPLYING NON-EXECUTION, OR DEFECTIVE EXECUTION OF POWER.**

See POWER, I.

**SUPPRESSION.**

- *Of Deeds.* See DEEDS, IX.
- *Of Frauds.* See FRAUD, IV, V.
- *Of Depositions.* See PRACTICE, EVIDENCE.
- *Of Facts in Pleadings.* See PLEADING.

**SURETY.**

- *Proof by.* See BANKRUPTCY, XIII.
  - *For Receiver.* See PRACTICE, RECEIVER.
  - *On Ne Exeat Regno.* See PRACTICE, WRIT.
- See PRINCIPAL AND SURETY—FRAUDS, STATUTE OF, IV.

**SURPLUS.**

See BANKRUPTCY, IX.

**SURPLUSAGE.**

- *In Plea.* See PLEADING, PLEA.

**SURRENDER.**

- *Of Copyhold.* See COPYHOLD, IX.
- *Of Lease.* See LEASE, IV.
- *Of Bankrupt.* See BANKRUPTCY, VIII.

**SURVIVORSHIP.**

- *Effect of Clause of.* See ESTATE, INTEREST IN PROPERTY, II, III.
- *Respecting Wife's Chose in Action.* See HUSBAND AND WIFE, III.
- *Respecting Executors.* See EXECUTORS, IV.
- *Among Partners.* See PARTNERS, IX. See PORTIONS, V—POWERS, II—RESIDUE.

1. Bequest of personal estate in equal shares to each and every of my children and their issue, whether sons or daughters, "with benefit of survivorship." *Held*, that the period of survivorship was the death of the testator.—*Caulfield v. Giles*, 12 I. E. R. 427. (R.)

2. A testator bequeathed to his four children, A., B., C., and D., £8000, to be equally divided between them, share and share alike as tenants in common, and not as joint tenants, but with benefit of survivorship; the

same to be paid and payable to them respectively upon their attaining the age of twenty-one years; the interest thereof in the meantime, or so much as by his executors should be considered sufficient, to be applied to their maintenance and education. He left to B. and C. all the residue of his personal estate; and in case of their decease before twenty-one, he bequeathed the residue to A. and D., or the survivor of them, share and share alike; and in case of the decease of all his before-named children before twenty-one, he gave the residue, including his lapsed legacies, to his brother. By a codicil he gave to his children, E., F., G., and H. (who were born after the will) £4000 in equal shares, with benefit of survivorship, not only as to them, but as to the rest of the children named in the will, payable at twenty-one. Maintenance to be granted by the Court of Ch. *Held*, that the share of G., who died under twenty-one, went to all his surviving brothers and sisters, and not to his widow and child.

The cases as to the period to which survivorship is to be referred, reviewed and classified.—*Forrester v. Smith*, 2 I. C. R. 70. (R.)

3. Effect of devise to A. and B. and the survivor of them.—*Connie v. Taaffe*, 12 I. C. R. 338; 9 I. Jur. N. S. 232. (C.)—[Decision revd: 10 H. L. Cas. 64.]

**SUSPENSION.**

- *Of Decree.* See PRACTICE, DECREE.
  - *Of Order.* See PRACTICE, ORDER.
- See POWERS, XI.

**SWEARING**

- *And Jurat of Answer.* See PRACTICE, ANSWER.
- *Plea.* See PRACTICE, PLEA.
- *Affidavits.* See PRACTICE, EVIDENCE.

**TACKING**

- *Securities.* See MORTGAGE, IV—PRIORITY OF SECURITIES, II.

**TAIL.**

See ESTATE, II.

**TAKING**

- *Pleadings off the File.* See PRACTICE, TAKING PLEADINGS OFF THE FILE.
- *Exceptions to Answer.* See PRACTICE, ANSWER, EXCEPTIONS.

**TAXATION.**

- *Generally.* See PRACTICE, COSTS.
- *Costs of.* See PRACTICE, COSTS.

**TAXES.**

See LEGACY DUTY—LAND TAX.

## TENANT

- *At Will.* See ESTATE, IV.
- *Pour autre vie.* See ESTATE, V.
- *By Courtesy.* See ESTATE, III.
- *In Fee.* See ESTATE, I.
- *For Years.* See LANDLORD AND TENANT—ESTATE, IV—PLEADING, PARTIES.
- *And Tenancy in Common.* See ESTATE, VII—PLEADING, PARTIES—PRACTICE, RECEIVER.
- *And Tenancy in Tail.* See ESTATE, II—PLEADING, PARTIES.
- *And Tenancy for Life.* See ESTATE, III—PLEADING, PARTIES.
- *In Tail and Remainderman.* See ESTATE, II.
- *For Life and Remainderman.* See ESTATE, III.
- *In Tail, after possibility, &c.* See *ibid.*
- *Under the Court.* See PRACTICE, RECEIVER.

## TENDER

- *Of Costs: its Effect.* See PRACTICE, COSTS.
- *Of Demand: its Effect as to Costs.* See PRACTICE, COSTS.

See MORTGAGE, IX.

1. An award directed that A. should pay B. a sum of money, and that B. should pay A. half the costs when taxed. *Held*, that a tender by A. of the balance between the sum awarded and the half of the taxed costs was not a compliance with the award.—*Watt v. W.*, 7 I. E. R. 334. (E.E.)

## TERMS

- *Of Redemption.* See MORTGAGE, V.  
See ESTATE, IX—MERGER.
- (Satisfied Terms Act, 8 & 9 Vic., c. 112.)
- I. LIMITATION OF.
- II. ATTENDANT.
  1. *Nature of.*
  2. *When attendant by Implication.*
  3. *When, and against what, a Protection.*

## III. TRUST TERM: EFFECT OF MARRIAGE ON.

## II. ATTENDANT TERMS.

1. *Their Nature.*
2. *When attendant by Implication.*
3. *When, and against what, a Protection.*

II. 2. *When attendant by Implication.*

2. A. being possessed of a term of 1000 years in Y., bequeathed it to K., charged with an annuity of £182 for M. K. mortgaged Y., subject to the annuity, and afterwards purchased the fee. There was not any declaration of trust that the fee should attend the inheritance. *Held*, that the term, though mortgaged, became attendant on the inheritance, though there was not any express declaration to that effect.—*Scott v. Knox*, 4 I. E. R. 397; Long. & T. 381. (E.E.)

II. 3. *When, and against what, a Protection.*

3. Purchase for value, without notice, is not a defence to a suit instituted to enforce a mere legal right, such as dower.

A purchaser, in 1840, obtained possession of the deed creating an attendant term, but did not procure an assignment of the term. *Held*, that he could not rely on this term as a bar to a claim for dower.

The Act for the Confirmation of Marriages in Ireland (5 & 6 Vic., c. 113), confirms marriages theretofore solemnized by persons who had been Protestant Dissenting Ministers, even though at the time of the marriage they had been degraded or suspended.

A purchase made for a minor ward of the Court, under a power given by that Act of Parliament, is an act done under the authority of the Court, within the meaning of the 3rd sec. of that Act.

A statement of an admission, in the petitioner's affidavit in reply, is not a compliance with the rules of Equity pleading, requiring admissions to be put in issue.—*Corry v. Cremorne*, 12 I. C. R. 136; 7 I. Jur. N. S. 21. (C.)

## III. TRUST TERM: EFFECT OF MARRIAGE ON.

## TERM.

- *Time.* See PRACTICE, TERM TIME.

## TESTAMENTARY MATTERS.

See JURISDICTION, VI.

## TESTAMENTARY GUARDIAN.

See GUARDIAN AND WARD, II.

## THIRDS.

- *Wife's Bar of.* See SETTLEMENT, XIII.

## TIMBER TREES, AND UNDERWOOD.

See PRACTICE, INJUNCTION—WASTE.

[9 G. 2, c. 7; 5 & 6 G. 3, c. 17; 23 & 24 G. 3, c. 39; 31 G. 3, c. 40; 23 & 24 Vic., c. 154, s. 131.]

4. Practice as to timber trees blown down on an estate over which a receiver had been appointed.—*Crofts v. Poe*, Jon. & Car. 193. (E.E.)

5. A lease made in 1821, for three lives or 41 years, excepted and reserved all timber trees, or trees likely to be timber, then growing or being on, or which should thereafter grow or be on the demised premises, with liberty of ingress, &c., for the lessor to cut and carry away the same. It also contained a covenant by the lessee, at all times during the continuance of the demise, to repair, &c., the premises, with all buildings, plantations, improvements, timber and other trees, that then were, or might at any time thereafter be, erected or planted thereupon, in good and te-

nantable order, &c., and at the determination of the demise to deliver up peaceable possession of the premises, together with all improvements as then (1821) were or should thereafter be made thereon, in like good tenantable order, &c. The lessee, in 1828, planted a large quantity of timber trees, and within a year duly registered them, pursuant to the 23 & 24 G. 3, c. 39 (*Ir.*), having previously given notice of his intention to his lessor, who offered no opposition to the registration. By deeds of assignment, not registered under that statute, the lessee's interest in the lands vested in B. A cause petition (to which the lessee was not made a respondent), filed in 1851, by the lessor against B., praying that B. might be restrained by injunction from cutting the timber trees planted by the lessee, was dismissed with costs; but without prejudice to such other proceedings as the lessor might be advised to adopt.

*Semble*—That, by the registry of the trees, the lessee acquired the absolute property in them; and that, by the deeds of assignment under which B. claimed, that property, as well as the lessee's estate in the lands, passed to B.

*Semble also*—That the decision in *Herbert v. Jameson*, 2 Law Rec. N. S. 92, cannot be upheld.—*Standish v. Murphy*, 2 I. C. R. 264; 4 I. Jur. 297. (C.)

1. Tenants for lives, with a covenant for perpetual renewal, are, by the 5 G. 3, c. 17 (*Ir.*), rendered unimpeachable of waste in respect of trees planted by them since the passing of that Act, whether the trees be or be not registered, and whether the leases, under which the tenants claim, are of a date prior or subsequent to the passing of that Act.

*Semble*—That by a special covenant, tenants for lives renewable for ever, whose leases are of a date after the passing of the 5 G. 3, c. 17 (*Ir.*), may render themselves impeachable of waste in respect of trees planted by themselves.

Tenants for lives renewable for ever, though unimpeachable of waste, will be restrained from felling ornamental timber, or timber too young for cutting, or from felling timber in an unhusbandlike manner; but an intention on the part of the tenant to commit such acts must be shown to the Court, in order to induce it to interfere by injunction.—*Pentland v. Somerville*, 2 I. C. R. 289; 4 I. Jur. 4, and 335. (C.)

2. A lease for lives renewable for ever, made before the 5 G. 3, c. 17 (*Ir.*), contained an exception of all timber trees then standing, growing, or being, or which at any time thereafter should be standing, growing, or being on the demised premises. *Held*, that in a f.f. grant under the Ren. Lease. Conv. Act, the exception should not be inserted in those terms, but should be altered, having regard to the rights of the tenant under that statute.—*Ex parte Armstrong*, 8 I. C. R. 30. (R.)

## TIME.

- *Of Tenancy.* See LEASE, II.
  - *From which Interest is given.* See INTEREST, PECUNIARY, V.
  - *From which Account will be ordered.* See ACCOUNT, III.
  - *For Opening Fiat.* See BANKRUPTCY, VI.
  - *When it is of the essence of the Agreement.* See AGREEMENT, IX.
  - *For Excepting to Answer.* See PRACTICE, ANSWER.
  - *Filing Answer nunc pro tunc.* See PRACTICE, ANSWER.
  - *Filing Affidavits.* See PRACTICE, EVIDENCE, 11—AFFIDAVITS.
  - *For Appealing.* See PRACTICE, APPEAL.
  - *Of Amending Bill.* See PRACTICE—BILL, AMENDMENT OF.
  - *Given within which to Answer.* See PRACTICE, ANSWER.
  - *Given, Answer ordered to be Filed in.* See PRACTICE, ANSWER.
  - *For Answering generally.* See PRACTICE, ANSWER.
  - *When a Power may be Executed.* See POWER, II.
  - *For Filing Exceptions to Report.* See PRACTICE, MASTER, REFERENCE TO.
- See LENGTH OF TIME—MORTGAGE, V—PRACTICE, EVIDENCE.
- I. IN GENERAL.
- II. COMPUTATION OF.

## TITHES.

- *Causes, Evidence on.* See PRACTICE, EVIDENCE, GENERALLY. See PLEADING, PARTIES.
- I. GENERALLY.
- II. TITLE TO: ENDOWMENT OF VICARAGE.
- III. OF WHAT, PAYABLE.
- IV. SETTING OUT—HOW PAYABLE—CARRYING AWAY.
- V. WHETHER GREAT OR SMALL.
- VI. SUITS FOR; PLEADING AND EVIDENCE RELATING THERETO.
- VII. IMPROPRIATOR OF.
- VIII. EASTER OFFERINGS, &c.
- IX. EXEMPTION AND DISCHARGE FROM: PRESCRIPTION DE NON DECIMANDO.
- X. MODUS.
  - 1. *Validity.*
  - 2. *Suits, and Evidence thereon, in Establishing Modus by Bill, or as a Defence by Plea, &c.*
- XI. CUSTOM RESPECTING.
- XII. COMPOSITION.
- XIII. COMMUTATION AND RENTCHARGE.

## I. TITHES GENERALLY.

[See 4 G. 4, c. 99; 2 & 3 W. 4, c. 119; 5 & 6 W. 4, c. 74; 6 & 7 W. 4, c. 71; 1 & 2 Vic., c. 109; 9 & 10 Vic., c. 73; 10 & 11 Vic., c. 10.]

3. Upon the application of a tithe owner, under the 4 G. 4, c. 99, s. 38, a receiver in a minor's cause was directed to pay over one year's arrear of tithe composition out of the

proceeds of a distress for rent made by him upon a tenant, who was primarily liable to pay the tithe composition.

The tenant ought to have notice of such an application.

When the amount is small, the tithe owner will not be compelled to apply to be examined *pro interesse suo*.—*Hawkes v. Smith*, S. & Sc. 326. (R.)

1. In a tithe suit in which the disputed sum was only £6. 1s. 5d., the deft. moved at the Rolls that, on paying this sum, ptf. should be stayed from taking any further proceedings. That motion was granted. On appeal—*Held*, that the Rolls order should be affirmed; and that since there was not, in this case, an allegation of any special circumstances arising either from combination, or from any right, to be ascertained; nor any difficulty in the way of proceeding at law; the bill might have been demurred to, or dismissed at the hearing, with costs.

*Semble*—The tithe composition might have been recovered in any county in which the deft. resided, even though the lands, out of which the tithe issued, were situated in a different county.—*Disney v. Taaffe*, 1 Dr. & Wal. 94. (C.)—[*Affg.* S. & Sc. 105. (R.)]

2. A receiver appointed over a renewable leasehold, subject to a heavy head rent, and to the payment of tithe rentcharge, will be required to pay the rentcharge in priority to the head rent.—*Madden v. Wilson*, 6 I. Jur. 129. (R.)

3. The 1 & 2 W. 4, c. 27, s. 2, applies only to adverse claimants of a rent; and the occupier of land cannot set it up as a defence against an owner of tithe rentcharge in a suit for it.—[*Incorporated Society v. Sheil*, 10 I. E. R. 411, confirmed.]—*Netterville v. Power*, 6 I. Jur. N. S. 123. (R.)

## II. TITLE TO TITHES: ENDOWMENT OF VICARAGE.

4. King James I. granted by letters patent the rectorial churches and chapels of T. and K., and two parts of the tithes and altarages of the rectory or chapel of C., parcel of the possessions of the late abbey or monastery of T.; the grantee maintaining and repairing the chancel of the churches, rectory, and chapels, at his cost, from time to time for ever; and supporting annually, and from time to time paying the stipend of the curates, and all other the rents and services issuing or payable out of or from the premises. In 1641 the church of K. was destroyed, and was not afterwards re-built. By an order of the Lord Deputy and Council, in 1618 the parish of K. was united with the parish of A. In 1855 the bishop of the diocese, by deed executed under the 13 & 14 Vic., c. 72, erected the ancient parish of K., and a part of the parish of A., into a new district or parish, to be called by the name of the parish of K., and constituted the district or new parish of K. into a perpetual cure, and declared that the curate thereof,

and his successors, should be perpetual curates thenceforth and for ever, of the new parish; and appointed a salary for the perpetual curates. In 1856 a new church was erected in the old parish of K. *Held*, that the curate of the new parish of K. was not entitled to any stipend from the owner of the tithes of K.

That the owner of the tithes was not bound to repair the chancel of the new church of K.

A solicitor, who claimed a lien on deeds, was summoned as a witness, with a subpoena *duces tecum*. He brought the deeds into Court, but refused to produce them. *Held*, that secondary evidence of their contents was not admissible, the person proposing to give secondary evidence being liable to pay the costs of the solicitor.—*Att.-General v. Ashe*, 10 I. C. R. 309. (R.)

## III. OF WHAT, PAYABLE.

5. Where lands were not formerly in the possession of the dissolved monasteries, unity of possession of the lands and tithe will not extinguish the tithe. Therefore where the petitioner derived title under a lease made in 1700, for lives renewable for ever of lands, and the tithes thereof, the Court refused to declare the lands tithe free (on a petition presented under the 1 & 2 Vic., c. 109, s. 16), though no tithe had been paid since 1700, there being no proof that the lands were abbey lands, and no notice of the proceedings having been given to the reversioner.—*Denny v. Duke of Devonshire*, 1 I. C. R. 401; 4 I. Jur. 245. (R.)—[Varied on appeal: next case.]

6. A demise of lands and the tithes thereof does not necessarily mean a demise of lands and a demise of tithes as separate and independent properties; but may, if the circumstances warrant such an interpretation, be construed to mean a demise of lands tithe free. [Varying the decision 1 I. C. R. 401.]

The 1 & 2 Vic., c. 109, s. 20, enacting that the provisions thereinbefore contained, "with respect to the establishment of exemption, &c., from tithes, shall not extend to any case where the tithes of any land shall have been demised by deed for any term of life or years, or where any composition for tithes shall have been made by deed or writing, by the person entitled to such tithes, with the owner or occupier of the lands, for any such term for life or years, and such demise or composition shall be subsisting at the time of the passing of the Act, nor to any suit for establishing a claim to tithes then pending," means that the exempting clauses of the statute are not applicable to the case of the owner of tithes demising them to the owner or occupier of the land chargeable with those tithes; but a person actually entitled to the common ownership both of lands and the tithes thereof is not, merely because he has derived his title under a lease making separate demises of each, disentitled by that sec. to hold the lands tithe free.

When petitioners under the statute 1 & 2 Vic., c. 109, s. 16, praying that W. should be

declared tithe free, alleged that W. had constituted part of the possessions of the monastery of D. and were held by the friars and abbots free from tithes; and that under a commission issued in the 18 *Eliz.* an inquisition was held, and the jury found that 150 acres of land in W., with their tithes, formed parcel of the possessions of the monastery of D., and had been concealed from the Queen and her progenitors; and the petitioners also alleged that by letters patent in the 19 *Eliz.* 150 acres of land in W. and their tithes were granted to H., under whom the petitioners alleged that they derived by lease made in 1700, demising W. and the tithes thereof for three lives, with a covenant for perpetual renewal; and stated a composition made in 1833, and a certificate of the commissioner certifying the composition of the parish in which W. was situate (of which £47 was assessed on W.), and certifying that it was payable to the respondent; and the petitioners also alleged that for sixty years anterior to the composition, W. was held by the owner and the tenants thereof tithe free. The respondent denied that W. was part of the possessions of the monastery, and insisted that even admitting the statement of the petitioners as to the 150 acres to be true, it only led to the conclusion that to that extent alone were the lands of W. tithe free. The Court referred it to the Master to enquire whether W. was rightly charged with tithe composition if the 1 & 2 *Vic.*, c. 109, had not passed, or if such composition had not been suspended. Evidence was entered into on both sides, and tendered to the Master, who declined to consider it; and as it appeared on the petition and the charge that the lands and tithes were separately demised by the lease of 1700, he found that W. would have been rightfully charged with tithe composition if the 1 & 2 *Vic.*, c. 109, had not passed, or if such composition had not been suspended. The Court (being of opinion that the lease of 1700 was susceptible of being construed to mean a demise of W. tithe free, and as the respondent had not in his discharge rested his defence upon the view adopted by the Master, but had denied the title of H., the lessor of the petitioners) directed the Master to review his report; but ordered that notice of all further proceedings should be given to the person entitled to the reversion on the lease of 1700, who had not previously been made a party in the matter.—*Denny v. Devonshire*, 1 L. C. R. 657; 5 I. Jur. 357. (C.)

#### IV. SETTING OUT: HOW PAYABLE: CARRYING AWAY.

#### V. WHETHER GREAT OR SMALL.

#### VI. SUITS FOR: PLEADING AND EVIDENCE RELATING THERETO.

[See 5 & 6 *W. 4*, c. 74.]

1. Deft., in a tithe suit, said by his answer that he heard and believed that ptf. was insti-

tuted and inducted into the rectory of A.; that he had ever since continued, and then was, rector of A., and as such was entitled to the tithes of A.; "but for greater certainty as to the truth and legality of said several matters, deft. begs leave to refer to such proof of same as complainant may adduce." It was proved that ptf. had been in the receipt of tithes for several years, and had been paid tithes by deft. *Held*, that ptf. was not bound to prove his title by producing the certificate of his collation, presentation, or donation.—*Jones v. Waller*, 1 Jones, 300. (E.E.)

2. The ptf. sued as vicar for tithe composition; and in his bill set out the certificate in which he was named as vicar, and the applotment charging the deft. as occupier. The deft. in his answer said that he believed the commissioners did make and sign such certificate as in bill stated; but whether the same was duly prepared and signed, he referred to such proof as the ptf. should produce thereof. Upon hearing upon bill and answer—*Held*, that the certificate sufficiently proved the title of the ptf.—*Crowley v. Flood*, 2 Jones, 555. (E.E.)

3. When the Remembrancer has allocated a sum to be paid by a receiver, as the tithe rentcharge due out of the lands over which he has been appointed, and his certificate has been served upon the receiver, and a personal demand made for the amount of such rentcharge, upon non-payment of same, the party entitled will obtain an attachment against the receiver. The G. O. of the Court, directing the receiver to pay the tithe rentcharge, amounts to an order to pay it in each particular case.—*Drown v. B.*, 2 I. E. R. 409. (E.E.)

4. A sequestrator, appointed over a parish, at the suit of judgment creditors of the incumbent, presented a memorial, under 1 & 2 *Vic.*, c. 109, for arrears of tithe composition, due before the sequestration issued; and a sum was accordingly lodged in the Treasury on account of those arrears. Before the payment the incumbent died, and the memorial having stated, by mistake, as was alleged, that he was the person entitled to the arrears, his personal representative claimed the money in the Treasury against the sequestrator, and the officer refused to pay either party without the order of the Court of Ch. Whereupon, a bill was filed in the names of the sequestrator and the judgment creditors in whose behalf he was appointed, as co-ptfs., against the personal representative of the incumbent, stating the foregoing facts, and praying that the sequestrator might be decreed to be the person entitled to receive the money in the Treasury. *Held*, that a general demurrer should be allowed to the bill, on two grounds: first, that the sequestration was not retrospective, but attached the future accruing tithe only, and therefore did not entitle the ptfs. to the money in the Treasury; secondly, that at any rate the sequestrator could have had no interest or title in this suit, and should not have been made a co-ptf.—*Egan v. Heenan*, 3 I. E. R. 50. (R.)

1. Under the 1 & 2 Vic., c. 109, s. 32, upon application by three or more persons in any parish, each charged with payment of £3 or upwards in respect of the tithe rentcharge, and who have given notice in the manner specified by the Act, Quarter Sessions may vary the rentcharge according to the price of corn. An order reducing the rentcharge recited that—whereas, due notice having been first by them given, three owners and occupiers of land in the parish of F., &c., each charged with payment of £3 and upwards in respect of the rentcharge payable in lieu of the composition for tithes made by certificate of, &c., applied to the Justices of the Peace at Quarter Sessions, &c. Afterwards the incumbent proceeded by petitions under the 30th sec. of the Act, to recover the rentcharge which accrued from the gale day after the order of Sessions, as if no reduction had taken place; and, a rule nisi for a receiver having been obtained, the respondent came in to show cause against it, relying upon the order of the Quarter Sessions. *Held*, that the recitals in the order were not evidence of the facts thereby stated.—*Thompson v. Sheil*, 3 I. E. R. 135. (R.)

2. Proceedings stayed against one of several debts in a tithe suit, upon payment of the sums decreed against him, and the costs of the cause and motion, save so far as the costs of the cause related exclusively to the other debts.—*Ould v. Griffin*, 8 I. E. R. 512. (E.E.)

3. The petitioner, as rector and vicar of a parish, claimed by his petition one year's tithe rentcharge from the owner of the first estate of inheritance in lands. *Held*, that the petition was properly framed within the Ch. Reg. Act, s. 15, and the 9th G. O., 1851.

The applotment of tithe rentcharge made by commissioners under the 4 G. 4, c. 99, is not in every case conclusive evidence of the amount payable by the tithe-payer.

Statutes are to be construed as mandatory and imperative when they prescribe acts to be done by private parties; but are only directory when they require public officers to do the acts; in which case the default or mistake of the officers will not destroy the rights of the parties.—*Plunket v. Malley*, 8 I. Jur. N. S. 83. (M.O.)

#### VII. IMPROPRIATOR OF.

#### VIII. EASTER OFFERINGS, &c.

#### IX. EXEMPTION AND DISCHARGE FROM: PRESCRIPTION DE NON DECIMANDO.

4. In 1731, the lands of B. and M., with so much of the tithes as were vested in the lessor, were demised for 51 years. In 1764, F. became entitled to the interest in the lease, and so continued until 1782, when it expired. The lands of B., C., and M. were demised to F., for lives, with covenant for perpetual renewal, in 1751.

In 1766, the tithes of B., C., and M. were demised for lives, with covenant for perpetual renewal. In 1813 and 1832, renewals of the lease were granted, the interest of which was vested in A. In 1834, a tithe composition was made in the parish where the lands were situate, and the commissioners certified that a certain proportion of the tithes was payable to those claiming under the lease of 1766, and the remainder to the vicar. There was no evidence of the payment of tithes for sixty years previous to 1834. *Held*, overruling objections to the Master's report, that the right of exemption from the payment of tithes, under the 1 & 2 Vic., c. 109, s. 18, was not established, the case falling within the exception in sec. 20.

The exception in the 1 & 2 Vic., c. 109, s. 20, is not confined to the case of a demise of tithes to the owner or occupier of the lands in respect of which tithes are payable.—*Ellis v. O'Neill*, 3 I. C. R. 280. (R.)—[See next case.]

5. When there is no evidence of the payment of tithes from a particular denomination for 60 years next preceding the establishment of a composition in lieu of tithes in the parish, the presumptive bar thus created under the 1 & 2 Vic., c. 109, s. 18, is not avoided by showing that the tithes of the lands in question had, amongst others, been demised to a person not in privity with the lands, for a term which was subsisting at the passing of the Act.—*Ellis v. O'Neill*, 3 I. C. R. 609. (C.)

6. When upon hearing a petition under the Tithe Acts, lands are declared to have been exempt from tithes and tithe rentcharge, the order will be made without prejudice to the amount of tithe rentcharge or composition (from which those lands are declared to be exempted) being re-applotted upon the other lands in the parish, which are not tithe free; and to the certificate of tithe composition being amended accordingly.—*Sherlock v. Daly*, 2 I. Jur. N. S. 225. (R.)

#### X. MODUS.

##### 1. Validity.

##### 2. Suits and Evidence thereon in Establishing Modus by Bill, or as a Defence by Plea, &c.

#### XI. CUSTOM RESPECTING.

7. The 1 & 2 Vic., c. 109, does not create any new grounds of exemption from payment of the rentcharge in lieu of tithe, or establish exemptions in cases in which they could not have existed independently of the Act; and the 18th sec. relates to cases of the possession or enjoyment of exemption, and to the evidence to be required of such possession or enjoyment. In order to show an exemption, two things are necessary: first, the title to the lands giving a legal capability of exemption, e. g., being derived from an ancient monastery; and, secondly, the enjoyment of the exemption for the period specified in the Act. Therefore, a petition claiming exemption

exclusively on the ground of non-payment of tithe, &c., for sixty years next before the signing of the certificate of tithe composition, was dismissed, with costs—the Court, after argument, holding that it had jurisdiction so to dismiss it, although the statute is silent as to costs.—*Chambers v. The Earl of Shannon*, 5 I. E. R. 835. (R.)

## XII. TITHE COMPOSITION.

1. A demise of lands and the tithes thereof does not necessarily mean a demise of lands and a demise of tithes as separate and independent properties, but may, if the circumstances warrant such an interpretation, be construed to mean a demise of lands tithe free.

The 1 & 2 Vic., c. 109, s. 201, enacting that the provisions thereinbefore contained "with respect to the establishment of exemption, &c., from tithes, shall not extend to any case where the tithes of any land shall have been demised by deed for any term of life or years, or where any composition for tithes shall have been made by deed or writing, by the person entitled to such tithes, with the owner or occupier of the land, for any such term for life or years, and such demise or composition shall be subsisting at the time of the passing of the Act, nor to any suit for establishing a claim to tithes then pending," means that the exempting clauses of the statute are not applicable to the case of the owner of tithes demising them to the owner or occupier of the land chargeable with those tithes; but a person actually entitled to the common ownership both of lands and the tithes thereof is not, merely because he has derived his title under a lease making separate demises of each, disentitled by that sec. to hold the lands tithe free.

When petitioners under the 1 & 2 Vic., c. 109, s. 16, praying that W. should be declared tithe free, alleged that those lands had constituted part of the possessions of the monastery of D. and were held by the friars and abbots free from tithes; and that under a commission issued in the 18 Eliz. an inquisition was held, and the jury found that 150 acres in W., and their tithes, formed parcel of the possessions of the monastery of D., and had been concealed from the Queen and her progenitors; and the petitioners also alleged that by letters patent in the 19 Eliz., 150 acres in W., and their tithes, were granted to H., under whom the petitioners alleged that they derived by lease made in 1700, demising W. and the tithes thereof for three lives, with a covenant for perpetual renewal; and stated a composition made in 1833, and a certificate of the commissioner certifying the composition of the parish in which W. was situate (of which £47 was assessed on W.), and certifying that it was payable to the respondent; and the petitioners alleged that for sixty years anterior to the composition, W. was held by the owner and the tenants thereof tithe free. The respondent denied that W. was part of the possessions of the monastery; and insisted that, even

admitting the statement of the petitioners as to the 150 acres to be true, it only led to the conclusion that to that extent alone were the lands of W. tithe free. The Court referred it to the Master to enquire whether W. would have been rightfully charged with tithe composition if the 1 & 2 Vic., c. 109, had not passed, or if such composition had not been suspended? Evidence was entered into on both sides, and tendered to the Master, who declined to consider it; and, as it appeared on the petition and the charge that the lands and tithes were separately demised by the lease of 1700, he found that W. would have been rightfully charged with tithe composition if the 1 & 2 Vic., c. 109, had not been passed, or if such composition had not been suspended. The Court (being of opinion that the lease of 1700 was susceptible of being construed to mean a demise of W. tithe free, as the respondent had not in his discharge rested his defence upon the view adopted by the Master, but had denied the title of H., the lessor of the petitioners) directed the Master to review his report, but ordered that notice of all further proceedings should be given to the person entitled to the reversion on the lease of 1700, who had not previously been made a party in the matter.—*Denny v. Devonshire*, 1 I. C. R. 657; 5 I. Jur. 357. (C.)—[Varying, 1 I. C. R. 401; 4 I. Jur. 245. (R.)]

## XIII. COMMUTATION AND RENTCHARGE.

[See 2 & 3 W. 4, c. 119; 1 & 2 Vic., c. 109.]

2. Service of subpoena, to appear and answer a bill for tithe composition, may be effected out of the jurisdiction, under the 4 & 5 W. 4, c. 82.—*Anon.*, 1 Jones, 561. (E.E.)

3. The owner of a tithe composition, effected under the 4 G. 3, c. 99, may sue for it by a bill in Equity, though he might have distrained deft. for the amount.

The jurisdiction of the Superior Court is not taken away in cases in which the amount of the tithe composition demanded is within the Civil-bill Court's jurisdiction.—*Ryan v. Maher*, 1 Jones, 595. (E.E.)

4. A lessee of tithes may maintain a bill to recover tithe composition effected under the 2 & 3 W. 4, c. 119.—*Kane v. Potter*, 2 Jones, 276. (E.E.)

5. In answer to a petition for a receiver to pay tithe composition under the 2 & 3 W. 4, c. 119, s. 15, respondent cannot set up as a defence that the lands are occupied by his undertenants, who held under unstamped accepted proposals in writing, executed before the 16th August 1832.—*Orpen v. Allen*, 2 Jones, 434. (E.E.)

6. *Semble*—A person in possession of lands under a contract for a lease for a term greater than three years, but on which an action at law could not be maintained, is not a person having an estate or interest therein greater than a tenancy from year to year, within the 2 & 3 W. 4, c. 119, s. 12, though a Court

of Equity would decree specific execution of the contract, on the ground of part performance.—*Orpen v. Moore*, 2 Jones, 435. (E.E.)

1. A purchaser of an estate, sold under a decree of the Court of Ch., who confirmed his sale on the 28th April, but whose purchase deed was not executed until the 8th Dec. following, is liable for the tithe composition which accrued due on the 1st Nov.; the lands being in the occupation of tenants from year to year.

A person having in the lands a clear equitable estate, greater than a tenancy from year to year, is a person liable to the tithe composition, within the 2 & 3 W. 4, c. 119, s. 12.—*Stewart v. Alexander*, 2 Jones, 530. (E.E.)

2. Under the 1 & 2 Vic., c. 109, s. 1, a ptf. is entitled to dismiss his bill without paying costs, though it was filed to recover not only the tithe composition due for 1834, 1835, and 1836, but also the arrears or additions recoverable therewith, under the Million Act. He may dismiss the bill as against one of several defts., and retain it as to the others.

As a general rule, the costs in a Court of Equity follow the result.—*Burgh v. Kenny*, 1 I. E. R. 264. (E.E.)

3. On a summary petition, under the 1 & 2 Vic., c. 109, s. 16, the Court has not jurisdiction to declare a certificate null and void: it can only amend the certificate of applotment as to the charge on the petitioner's land.

On such a petition, the Court has not jurisdiction to decide between the two conflicting certificates.—*Connor v. Devonshire*, 1 I. E. R. 328. (E.E.)

4. On a petition under the 1 & 2 Vic., c. 109, s. 16, claiming a partial exemption on the ground of a *modus decimandi*, it was referred to the Remembrancer to enquire and report whether those lands were rightfully charged with tithe or tithe composition. On the report of a *modus decimandi*, as contemplated by the Act, they were declared not chargeable with tithe composition; and the applotment book was directed to be altered accordingly by the proper officer, without prejudice to the previous liabilities of the applicants. A copy of the order and summons to proceed thereunder, to be served, one month previously, on the churchwardens of the parish, and on twelve of the tithe payers, and to be posted on the usual places for posting notices of road sessions; with liberty to the tithe payers to appear on such reference.—*Houston v. Kinahan*, 1 I. E. R. 470; *Patterson v. Kinahan*, 1 I. E. R. 478. (E.E.)

5. In a suit for arrears of tithe composition in the names of a sequestrator of the parish, and of the Bishop, who died, deft. may, nevertheless, proceed with a motion for costs.—*Egan v. Doherty*, 2 I. E. R. 68. (E.E.)

6. Lands were applotted with tithe composition for two parishes. On a petition pre-

sented under the 1 & 2 Vic., c. 109, s. 16, the Court referred it to the Remembrancer to enquire and report in which parish the lands were situated, and whether they were doubly charged with the rentcharge; and, if so, for which parish they had been rightfully charged therewith.—*Armstrong v. Pepper*, 2 I. E. R. 89. (E.E.)

7. The mode of service required by the 1 & 2 Vic., c. 109 (Tithe Rentcharge Act), s. 30, respecting the ten days' notice of a party's intention to apply for a receiver under that Act, does not apply to service of the order appointing the receiver. That order must be served in the usual manner required by the Court for serving its orders.—*Mangan v. Massy*, 2 I. E. R. 106. (E.E.)

8. A receiver appointed under the 1 & 2 Vic., c. 109, s. 30, to pay the tithe rentcharge, is bound to apply, in the first instance, the sums received in discharging the rentcharge and costs, and has nothing to do with paying the head rent to which the land is liable.—*Saunderson v. Stoney*, 2 I. E. R. 153. (R.)

9. The Registrar of the Diocese is the proper officer to amend the tithe certificate and applotment, pursuant to an order made under the 1 & 2 Vic., c. 109.—*Adair v. Johnson*, 3 I. E. R. 61. (E.E.)

10. Under 1 & 2 Vic., c. 109, s. 32, upon application by three or more persons in any parish, each charged with payment of £3 or upwards, in respect of the tithe rentcharge, and who have given notice in the manner specified by the Act, the Q. Sessions may vary the rentcharge, according to the price of corn. An order reducing the rentcharge recited, that "Whereas due notice having been first by them given, three owners and occupiers of land, in the parish of T., &c., each charged with payment of £3 and upwards in respect of the rentcharge payable in lieu of the composition for tithes made by certificate of, &c., applied to the Justices of the Peace at Q. Sessions," &c. Afterwards the incumbent proceeded by petition under the 30th sec. of the Act, to recover the rentcharge which accrued from the gale day after the order of Sessions, as if no reduction had taken place; and a rule *nisi* for a receiver having been obtained, the respondents came in to show cause against it, relying upon the order of the Q. Sessions. *Held*, that the recitals in the order were not evidence of the facts thereby stated; and as it now appeared that one of the three persons who signed the notice, and upon whose application the order was made, was not an owner or occupier of land in the parish, nor charged with payment of any portion of the rentcharge—*Held*, that the Q. Sessions had not jurisdiction, and that the order was a nullity.—*Thompson v. Shiel*, 3 I. E. R. 135; *Fl. & K. 58*. (R.)

11. *Semble*—That when an agreement has been entered into since the passing of Stanley's Act, for granting a lease at a rent, over and above the tithe rentcharge, the Court will perform the agreement, by adding the amount



of the rentcharge to the rent agreed on.—*Davies v. Fitton*, 4 I. E. R. 612; 2 Dr. & War. 225. (C.)

1. The affidavit verifying a petition under 1 & 2 Vic., c. 109, s. 30 (Tithe Rentcharge Act), may be, in a proper case, made by the agent of the petitioner, as, when the agent has peculiar knowledge of the fact.—*Kellett v. Sturgeon*, 5 I. E. R. 159. (E.E.)

2. If the person liable to pay tithe rentcharge fail to do so, within ten days after service of notice, as prescribed by 1 & 2 Vic., c. 109, the rentcharger is then entitled to prepare his petition, and is justified in refusing to receive the arrears without the costs incurred in preparing his petition and incidental thereto.

What are reasonable costs in such case.—*Macartney v. Graydon*, 8 I. E. R. 99. (R.)

3. The Court has a discretion to grant or to withhold a receiver under the 1 & 2 Vic., c. 109, s. 20 (Tithe Rentcharge Act). Therefore, though the petition states a *prima facie* title, if the answering affidavit casts a fair doubt on it, the Court will not appoint a receiver.

*Semble*—A certificate by the commissioners under the Tithe Composition Act, 4 G. 4, c. 90, s. 25, is valid, though it only finds generally that tithes are payable to a lay impropriator, without giving his name.

*Semble*—The certificate does not conclude the title to the tithes.

A receiver refused to a lay impropriator to get in the tithe rentcharge, there being a contest in the parish, and the affidavit stating merely that he was lay impropriator.—*Greville v. Fleming*, 8 I. E. R. 201; 2 Jon. & L. 335. (C.)

4. The Statute of Limitations (3 & 4 W. 4, c. 27, s. 2) applies only between adverse claimants of estates in tithe rentcharge, and not as between the owner of the tithe rentcharge and the occupier and owner of the land.

*The Dean of Ely v. Bliss* (5 Beav. 581), disapproved of.

*Quere*—Whether a lay landowner can establish an exemption from tithe rentcharge by proof of non-payment for one of the periods mentioned in the 1 & 2 Vic., c. 109, s. 18, without other proof of the legal origin of the exemption?—*Sheil v. The Incorporated Society*, 10 I. E. R. 411. (R.)

5. The Earl of A., being seized in fee under a grant to his ancestor by James II, with a license to alien, to be held of the grantee and his heirs, *non obstante* the Statute of *Quia Emptores*, conveyed the lands to P. and his heirs in 1834. *Held*, that, no reversion being left in the Earl, the lands were not let, set, or demised within the 2 & 3 W. 4, c. 119, s. 13 (Stanley's Act), and that therefore the estate of P. was liable to the tithe rentcharge.—*Verschoyle v. Perkins*, 18 I. E. R. 72. (R.)

6. When the petitioners under the 1 & 2 Vic., c. 109, s. 16, praying that W. should be declared tithe free, alleged that those lands had constituted part of the possessions of the monastery of D., and were held by the friars and abbots free from tithes; and that under a commission issued in the 18 Eliz., an inquisition was held, and the jury found that 150 acres of land in W., with the tithes of the same, formed parcel of the possessions of the monastery of D., and had been concealed from the Queen and her progenitors; and the petitioners also alleged that by letters patent in the 19 Eliz., 150 acres of land in W., and the tithes of the same, were granted to H., under whom the petitioners alleged that they derived by lease made in 1700, demising W. and the tithes thereof for three lives, with a covenant for perpetual renewal: and stated a composition made in 1833, and a certificate of the commissioners certifying the composition (of which £47 was assessed on W.) of the parish in which W. was situate and also certifying that it was payable to the respondent; and the petitioners also alleged that for sixty years anterior to the composition, W. was held by the owner and the tenants thereof tithe free. The respondent denied that W. was part of the possessions of the monastery, and insisted that, even admitting the statement of the petitioners as to the 150 acres to be true, it only led to the conclusion that to that extent alone was W. tithe free. The Court referred it to the Master to enquire whether W. was rightly charged with tithe composition if the 1 & 2 Vic., c. 109, had not passed, or if such composition had not been suspended. Evidence was entered into on both sides, and tendered to the Master, who declined to consider it; and inasmuch as it appeared on the petition and the charge that the lands and tithes were separately demised by the lease of 1700, he found that W. would have been rightfully charged with tithe composition if the 1 & 2 Vic., c. 109, had not been passed, or if such composition had not been suspended. The Court (being of opinion that the lease of 1700 was susceptible of being construed to mean a demise of W. tithe free, and inasmuch as the respondent had not in his discharge rested his defence upon the view adopted by the Master, but had denied the title of H., the lessor of the petitioners) directed the Master to review his report; but ordered that notice of all further proceedings should be given to the person entitled to the reversion on the lease of 1700, who had not previously been made a party in the matter.—*Denny v. Duke of Devonshire*, 1 I. C. R. 657; 5 I. Jur. 357. (C.)—[Varying, 1 I. C. R. 401; 4 I. Jur. 245. (R.)]

7. When there is no evidence of the payment of tithes from a particular denomination for sixty years next preceding the establishment of a composition in lieu of tithes in the parish, the presumptive bar thus created under the 1 & 2 Vic., c. 109, s. 18, is not avoided by showing that the tithes of the lands in question had, amongst others, been demised to a person not in privity with the lands, for a

term which was subsisting at the date of the passing of the said Act.—*Ellis v. O'Neill*, 5 I. C. R. 609; 1 I. Jur. N. S. 847. (C.)—[See s. c., 8 I. C. R. 280. (R.)]

## TITLE.

- *Plea of.* See PLEADING, PLEA.
- *Of Landlord: Disputing Landlord's Title.* See LANDLORD AND TENANT, VII—FORFEITURE, I.
- *Concealment of.* See FRAUD, V.
- *Buying of.* See CHAMPERTY.
- *Generally.* See VENDOR AND PURCHASER, IV.
- *To Tithes.* See TITHES, II.
- *Deeds.* See TITLE, I.—See also DEEDS.
- *Privity of.* See PRIVACY OF CONTRACT, &c.
- *Presumption of.* See PRESUMPTION, I.
- *On Sales Judicial.* See PRACTICE, SALES JUDICIAL.
- *Reference respecting.* See PRACTICE, MASTER, REFERENCE TO.

## I. TITLE DEEDS.

## II. WHEN TITLE MUST BE ESTABLISHED AT LAW, OR ELSEWHERE, BEFORE RELIEF WILL BE GIVEN IN EQUITY.

## III. PLEA OF.

## IV. DISCOVERY OF. See PRACTICE, PRODUCTION OF DEEDS.

## V. REGARDING RELATIONSHIP OF LESSOR AND LESSEE.

## VI. WHEN EVIDENCE OF TITLE IS PRESUMED.

## VII. RELIEF AND PROTECTION GENERALLY.

## I. TITLE DEEDS.

[See PRACTICE, LIV, a—LANDED ESTATES COURT, ante, p. 993—PRACTICE, LXXXII, SALES JUDICIAL, ante, p. 1094.]

1. When, under a decree, an estate is sold in several lots, and there is not any condition of sale respecting the title-deeds, the purchaser of the largest lot is to have the custody of the title-deeds common to all the lots, on the terms of giving to the purchasers of the smaller lots attested and compared copies, with a covenant for the safe custody of the originals, and their production when necessary.—*Cunyngham v. Hume*, 1 I. E. R. 150. (R.)

## II. WHEN TITLE MUST FIRST BE ESTABLISHED AT LAW, OR ELSEWHERE, BEFORE RELIEF WILL BE GIVEN IN EQUITY.

[See EQUITY, RELIEF IN, ante, p. 256.]

2. A bill prayed an injunction to restrain deft. from proceeding in an ejectment, on the ground that one life in the lease still survived. *Held*, that the bill should be dismissed, as ptfs. had not established their title to the lease.—*O'Donnell v. Nolan*, 4 Dr. & War. 153. (C.)

## III. PLEA OF. See PLEADING, ante, p. 666.

## IV. DISCOVERY OF. See PRACTICE, LXXV, PRODUCTION OF DEEDS, ante, p. 1048.

## V. AS REGARDS RELATIONSHIP OF LESSOR AND LESSEE.—See LANDLORD AND TENANT, ante, p. 489

## VI. WHEN EVIDENCE OF TITLE IS PRESUMED. See PRESUMPTION, ante, p. 1130.

3. A rent, determinable on payment of a fixed sum, was charged upon, and payable out of several denominations of land. There was evidence that the rent had not been paid by, or demanded from the owners of one of the denominations for upwards of a century. There was not any evidence that the rent had not been regularly paid out of the other denominations. *Held*, that the Court would not presume, either that the redemption-money had been paid, or that that denomination had been released.—*Warren v. Bateman*, Fl. & K. 448. (R.)

4. The heir of C. entered into receipt of the rents on C.'s death, in 1830, and so continued until 1848. The demise in the ejectment was in his name; he was put into possession under the *habere*, and remained in possession until 1856.

*Quære*—Whether the title which the heir had then acquired under the statute related back, so that he had a legal title in 1848?—*Phibbs v. Cooper*, 7 I. C. R. 422. (R.)

## VII. RELIEF AND PROTECTION, GENERALLY.

## TOLERATION ACT.

## TOLLS.

## TRADE.

See GOOD-WILL.

## TRADER AND TRADING.

—*Evidence of.* See BANKRUPTCY, VI—BANKRUPTCY, III—STATUTES, CONSTRUCTION OF, II; 1 W. 4, c. 47; 33 G. 2, c. 14; 47 G. 4, sess. 2, c. 74.

## TRANSFER.

— *Of Power.* See POWER, XIII.  
— *Of Property, Injunction against.* See PRACTICE, INJUNCTION—See ASSIGNMENT—POWERS, XIII—RECONVEYANCE, &c.—STOCK.

## TRANSFERABLE SECURITIES.

See BILLS OF EXCHANGE.

— *Shares.* See JOINT-STOCK CO., ante, p. 438.

## TRAVERSE OF INQUEST.

See LUNACY, IV.

## TREASON.

Sec ATTAINDER — FORFEITURE — PLEADING,  
PLEA—STATUTES, CONSTRUCTION OF, II.

## TREES.

See TIMBER—WASTE—STATUTES, II, 87., *ante*,  
p. 1249.

## TRESPASS.

— *Injunction against.* See PRACTICE, INJUNC-  
TION.

## TRIAL.

- *Injunction to stay.* See PRACTICE, INJUNC-  
TION.—See PRACTICE, HEARING, &c.
- *Of Issue at Law.* See PRACTICE, ISSUE AT  
LAW, *ante*, p. 989.
- *Of Issue in Court of Chancery.* See JURIS-  
DICTION, *ante*, p. 464.—PRACTICE, XX, *a*,  
CHANCERY.

## TRUST TERM.

See TERM, III.

## TRUSTS.

- *Injunction against Breach of.* See PRACTICE,  
INJUNCTION.
- *Breach of.* See CHARITY, II.
- *Generally.* See FRAUDS, STATUTE OF, III.  
See LENGTH OF TIME—JURISDICTION.

## I. GENERALLY.

## II. HOW CREATED OR CONSTITUTED.

1. *Express and Imperative Trusts, gene-  
rally.*
2. *By Precatory or Recommendatory  
Words.*
  - a. *When such Words raise a valid  
Trust: what are the Requi-  
sites to raise such a Trust.*
  - b. *When they do not.*
3. *By Parol.*

## III. EXECUTORY.

## IV. IMPLIED.

## V. PRESUMPTION RESPECTING.

## VI. RESULTING.

1. *In general, and what amounts to.*
2. *For the Heir-at-law.*
3. *For the Next-of-kin, &c.*

VII. VOID OR FRAUDULENT: LAPSED OR  
SUBSISTING.VIII. DECLARATION OF. (See also TRUSTS,  
II, 3, BY PAROL).

## IX. CONSTRUCTION OF.

## X. THEIR INCIDENTS.

## XI. ASSIGNMENT OF.

## XII. EXECUTION AND SATISFACTION OF.

## XIII. BREACH OF: CONDONATION OF BREACH.

## XIV. NOTICE OF: ITS EFFECT.

## XV. TO SELL, AND PAY DEBTS.

## XVI. USES AND.

## I. TRUSTS, GENERALLY.

1. A settlement contained a power to ap-  
point new trustees if any of the trustees therein  
named "should become incapable, or unfit to  
act in the trust thereof." *Held*, that bank-  
ruptcy rendered a trustee unfit to act within  
the meaning of that power.

Such a power directed the property to be  
vested in the new trustees jointly with those  
continuing. The continuing trustee happened  
to be a bankrupt. *Held* that, nevertheless, a  
valid appointment of, and transfer of the es-  
tate to the new trustee might be made under  
the power.

The Court never appoints a new trustee  
without a reference to the Master.—*In re  
Roche*, 2 Dr. & War. 287; 1 Con. & L. 306. (C.)

2. The Corporation of B., having power to  
borrow money to a limited amount, and to  
purchase lands for improving their town, bor-  
rowed a larger sum. The Lands Cl. Cons.  
Acts were incorporated with their Acts. K.,  
being served by the Corporation with notice  
to treat for the sale of lands in the borough,  
agreed to sell, but allowed the price to remain  
unpaid. An information, to which K. was not  
a party, was filed against the Corporation.  
They were restrained from applying the  
borough funds to pay specified debts, of which  
the petitioner's claim formed part. He ob-  
tained a decree for specific performance, and  
for payment of the sum due to him in respect  
of the lands sold by him. *Held*, that he was  
not entitled to enforce that decree against  
chattel property of the Corporation, purchased  
out of the borough fund, and which, if sold,  
must, for the purposes of the Corporation,  
have been replaced thereout.

The creditor of a Municipal Corporation  
has not a right to have execution against pro-  
perty of the Corporation subject to a specific  
trust for municipal purposes.—*Keyland v. Cor-  
poration of Belfast*, 6 I. C. R. 161; 2 L. Jur.  
N. S. 189. (C.)

II. HOW TRUSTS ARE CREATED OR CONSTI-  
TUTED.

1. *Express and Imperative Trusts, generally.*
2. *By Precatory or Recommendatory Words.*
  - a. *When such Words raise a valid Trust:  
Requisites to raise such a Trust.*
  - b. *When they do not.*
3. *By Parol.*

II. 1. *Express and Imperative Trusts: generally.*

3. The Bankers Act, 33 G. 2, c. 14, is not  
repealed by the 6 G. 4, c. 42. Therefore,  
upon the stoppage of payment by a Joint-  
stock Banking Company, formed under the  
latter statute, a trust is created in favour of the  
creditors, and affecting all the property of the  
shareholders, under the Bankers Act, which

may be administered by this Court at the suit of any creditor against the public officer of the company, instituted without making the other creditors or shareholders parties; it being stated in the bill that the co-partnership assets are sufficient to discharge the liabilities of the company; and it not appearing that the shareholders have any other liabilities than those of their co-partnership.—*Fawcett v. Hodges*, 3 I. E. R. 232; Fl. & K. 100. (R.)—[Overruled: *O'Flaherty v. M'Dowell*, 2 I. Jur. N. S. 469; (H.L.); 6 H. Lds. Cas. 142.]

1. By marriage articles, the intended husband covenanted with the trustees, that a sum of money should be vested in the trustees, and the survivor of them, and the executors, &c., of such survivor, for ever, upon trusts specified in the articles. The marriage was celebrated; and the husband, with the assent of the trustees, obtained possession of the money. *Held*, in a suit to administer the husband's assets, that the trustees were entitled to rank as specialty creditors of the husband in regard of that sum.—*Jameson v. Furrer*, 3 I. E. R. 846. (E.E.)

2. In 1230, M., Archbishop of Cashel, with the consent of the Dean and Chapter, granted to the Corporation of C. the town of C., and also granted to them, and their tenants, and all the inhabitants of the town, free pasture in all his lands, except meadows. Subsequently the Corporation became seized in fee of the soil of the lands, over which free pasture had been so granted. There was no evidence to show the time at, or the manner in which the Corporation became seized of the soil. *Held*, that as the old right of pasturage in the lands of the Corporation was affected with a trust for the benefit of the inhabitants of C., so the soil of the lands which were substituted for that right was bound by the same trust; and that whether a new right was acquired by usurpation or otherwise.

When lands were held by a Corporation aggregate, upon trusts, and they granted a lease thereof to one of their own body, at a great undervalue, and in derogation of the trust, the lease was decreed to be set aside, and an account of the mesne profits of the lands directed to be taken from the time of the grant of the lease; being less than twenty years.—*Att.-Gen. v. Corp. of Cashel*, 3 Dr. & War. 294; 2 Con. & L. 1. (C.)

3. Trusts for an illegal purpose were created upwards of a century and a-half ago; the subject-matter of the trust was enjoyed by the objects of it; and statutes had been since passed authorising the creation of such trusts at the present day; the Court made a decree confirmatory of them.—*Att.-Gen. v. Drummond*, 1 Dr. & War. 379; 1 Con. & L. 210. (C.)

4. When there is a devise of lands to a Corporation, for the purposes of the Corporation, although the devise is void at Law, it will be supported in Equity, on the ground, that a trust will not be permitted to be nullified for want of a trustee.

*Semble*—That a limitation to trustees to preserve contingent remainders, not expressly confined to the life-time of the tenant for life, will not be cut down to that life if there are contingent remainders which may require protection for a longer period.—*Incorporated Society v. Richards*, 4 I. E. R. 177; 1 Dr. & War. 258; 1 Con. & L. 58. (C.)

5. Real estate having been applied for 150 years on trusts specified by a will which named a trustee, the Court assumed that the will had created an express trust in the heir-at-law.—*In re Gore's Charities*, 4 Dr. & War. 270; 2 Con. & L. 411. (C.)

6. Bequest of personality to "A. and B., to be divided equally," with a request to A. that, "should he die without lawful issue, the property which I bequeath him shall revert back to the sons of B., provided they are prudent and well-conducted." *Held*, that these words were not merely precatory but sufficiently imperative to create a trust in favour of the sons of B.—*In re O'Beirne*, 1 Jon. & L. 352; 7 I. E. R. 171. (C.)

7. Charities are bound by the Statute of Limitations, 3 & 4 W. 4, c. 27.

A. devised his estate on trust to convey it to W. and his sons in strict settlement, subject to and charged and chargeable with annuities for charities, giving a joint leasing power to the trustees; and a direction, applicable to them, to pay the annuities. W. went into possession, and continued so for nearly thirty years after the annuities became payable, without any payment being made on account of them. He and his eldest son re-settled and mortgaged the estate. No conveyance was ever made by the trustees. *Held*, that the legal estate being still in the trustees, there was an express trust for the benefit of the charities within the 25th sec. of the Act; and that, even if the case was to be considered as if the trustees had conveyed, the charge created an express trust within that sec., and therefore time was no bar.

The question when a charge creates an express trust considered.—*Comrs. of Ch. Don. & Beg. v. Wybrants*, 7 I. E. R. 580; 2 Jon. & L. 182. (C.)

8. A sum was lodged in bank in the names of trustees, in trust to manage it during the minorities of A. and B., in such manner as the trustees should think fit for their benefit; and to pay the principal in equal shares on their respectively attaining 21. A. & B. attained 21. One of the trustees being out of the jurisdiction, and having declined to act, a petition was presented that the other trustee might transfer the fund to A. and B. There was no evidence of the trust, save the statement in the petition and verifying affidavit. *Held*, that the Court had not jurisdiction to order the transfer of the fund.—*In re Dunbar*, 8 I. E. R. 71; 2 Jon. & L. 120. (C.)

9. A person having become tenant under the Court, in trust for another, afterwards

denied the trust. Motion for an injunction to put the *c. q. t.* into possession of the lands, refused.—*Conyers v. Crosbie*, 8 I. E. R. 519. (E.E.)

1. In 1786, an estate was assigned to trustees, on trust, to raise by sale or mortgage, £500 for children's portions; and, subject thereto, in trust for the settlor, C. In 1792, C., by a conveyance expressly referring to the settlement, conveyed to A., who paid C. the purchase-money, except £500, for which A. confessed a judgment to the trustees; which sum was not to be called in till the trusts of the settlement were fulfilled. In 1805, A., on his daughter's marriage, secured for her a jointure on the lands. He died, having devised them on trust to pay his debts; and, subject thereto, to a devisee, who, becoming insolvent, acknowledged the £500 as a debt in his schedule. In 1812, the trustees assigned the judgment to X., who had become entitled to the £500 under the settlement. In 1845, A.'s daughter relied on the Statute of Limitations in bar of the £500 as against her jointure. *Held*, that it continued secured by an express trust, and was not barred.—*Blair v. Nugent*, 9 I. E. R. 400; 3 Jon. & L. 658. (C.)

2. A devise of lands to A. for life, subject to all the testator's just debts, legacies, and funeral expenses, with a bequest of his personal property to A., the better to enable her to pay his debts, &c., does not prevent a judgment debt of the testator from being barred by the 40th sec. of 3 & 4 W. 4, c. 27, or create a trust for the creditor within the 25th sec.

The distinction between charges on lands and trusts for debts considered; and the several cases on their effect in reference to the Statute of Limitations reviewed.

Counsel for an incumbrancer, whose charge is stated in the bill, but not proved in the cause, will not be heard against the *ptf.*'s rights.—*Dundas v. Blake*, 11 I. E. R. 138. (C.)

3. By marriage articles between O., the intended husband; B., the intended wife; and J. and T., the trustees; O. covenanted to grant and convey, when requested, to the trustees, all that, &c., chargeable with an annuity of £100 a-year to E., and £300 a-year jointure for B. The articles recited a policy of insurance for £3000 on W.'s life, payable to O., who covenanted that it should be liable to secure the annuities; and that he would within two years effect on his own life an insurance for £5000. He agreed that, if he survived a reversionary interest, these lands should be partitioned amongst the children; and that the amount of the policies should be payable to them; with a general covenant to the same effect. On exceptions to the Master's report—*Held*, that although the words were executory, an express trust was created by the covenants in favour of the issue, to the exclusion of creditors; and that, the amount of the £3000 policy, and the interest in the £5000 policy being bound by the covenants, the Master was right in not treating them as assets, and liable to the claims of

the widow and children as specialty creditors.—*Hedges v. O'Sullivan*, 3 I. Jur. 61. (C.)

4. A widow lodged her late husband's money in bank, with the intent of preserving it for the benefit of her children. *Held*, that a trust was fastened upon it for their benefit; and that she could not recover possession of the money, though, when dealing with it, she had not administered to the intestate.—*Quinn v. Q.*, 4 I. Jur. 178. (C.)

5. By R.'s marriage settlement in 1767, £1500 were secured for portions for the younger children, that sum to be apportioned as R. might think fit. In 1806, R.'s daughter (a younger child) married G. Upon that marriage, R. executed two bonds to secure two sums (£1000 and £500), payable on his death: the former not to bear interest till his death; the latter to bear interest from the date of the bonds. These bonds were accompanied by warrants of attorney, upon which, however, judgments were not ever entered up. A marriage settlement, of even date with the bonds, vested them in B. (son and heir-at-law of R.), and J., as trustees (they being so described in the bonds) on trust, to pay the interest to G. and his wife during their lives, and after their deaths in trust for their children, in such shares as G. should appoint: otherwise equally. No appointment was made. In 1807, B. married. A settlement, then executed, conveyed R.'s estates to trustees for 300 years, on trusts, whereof one was to raise £5000, and apply that sum, first in paying the £1500, the portions for R.'s younger children; then to apply the balance in paying such specialty debts as "are now due and owing" by R.; and to pay the residue, if any, to R. Subject to this term, the estates were conveyed to R. for life; to B. for life; to B.'s first and other sons in t. m. R. died in 1816, and B. entered into possession of the estates. R.'s widow took out probate of his will, and received general assets to the amount of £7500. B. died in 1836. Interest on the money secured to G. was paid during B.'s life, by his agent, and during the life of C., B.'s son, who had succeeded under the settlement of 1807, to the estates. Part of the £5000 was raised in 1844. The £1500, secured by the settlement of 1767, were paid, but the £1500 secured by the bonds were not raised. In 1846 G. died. There was not any evidence that interest had been paid after his death. In 1848 G.'s children filed their bill against C., F. (one of their brothers, who for the purposes of the suit had taken out administration *de bonis non* to R.), and against the possessor of the term. The bill prayed that the money secured by the bonds might be paid out of the term, &c. An enquiry and accounts were directed, and a report made, and confirmed on further directions. On appeal against the original decree and against the decree on further directions—*Held*, that under the special circumstances the suit was maintainable; that, though the personal representative of R. was primarily liable, yet, since the trustees of the bond debt could only sue the actual possessor of the term, since he

must then sue C. as holder of the estate, which was subject to the term, and since C. besides being the holder of that estate, was also representative of B., the surviving trustee of the bond debt under the settlement of 1806, a Court of Equity, seeing that all the parties really interested were before it, would not, especially after an enquiry and report, dismiss the bill for matter of form, and thus create a necessity for such a multiplicity of needless suits.

That the settlement of 1806 created a trust in respect of the bond debt: that that debt was not, within the words of the settlement of 1807, a debt of R. then "due and owing;" but that it would have been so had the trustees performed their duty by entering judgment on the warrants of attorney; and that C., as owner of the estate, could not set up their neglect in this respect as a defence, C. himself being also representative of the surviving trustee, and, as such, bound to obtain payment of the money secured by the bonds. [By Lord Wensleydale].—That these bonds constituted equitable charges on the lands.

That the Statute of Limitations did not bar this suit, an express trust of a charge on land being, by the true construction of that Act, as much saved from its operation as an express trust of the land itself; and, as C. represented his father (the surviving trustee of the bonds), and himself owned the estate out of the term in which these bonds were, under the deed of 1807, to be satisfied, he was at once the hand to pay and the hand to receive, and therefore could not set up the Statute of Limitations as his defence for not performing the trust.

That the right of the *c. q. t.* did not arise till the death of G.; and that that Act did not, in fact, apply to them, because they had brought their suit within two years afterwards. —*Burrowes v. Gore*, 6 H. L. Cas. 907. — [Affg. decrees of the Court of Ch. in Ir.]

1. The deft., V., had acted gratuitously as agent of the ptf. D., transmitting to her the interest of charges to which she was entitled. One charge was paid to V., which D. directed him to invest on a specified real security. He was unable to do so; but, without her authority, lent it to L., for whom he was agent, and who was indebted to him, on the security of a bond, and warrant of attorney to enter judgment. He enclosed the bond and warrant to D. in a letter, in which he stated, contrary to the fact, that the money had been applied to pay off a charge on his estate. L. afterwards, on his son's marriage, conveyed a part of the estate in trust to pay off charges on his estate, another part to the use of his son and his issue; and the lands of C. in trust to secure his debt to V., who in several letters, offered to give D.'s claim priority over his demand on C. L. died, leaving no assets to pay D.'s claim. The Court, on a bill filed by her, declared her entitled to a specific performance of the contract contained in the letters; and that V. was a trustee for her, as to so much of his security on C. as would be sufficient to pay her claim; and ordered that

he should execute a deed declaring the trust. —*O'Beirne v. Cornwall*, 3 I. C. R. 180; 5 I. Jur. 18. (C.)

2. When a policy of insurance is assigned upon trusts, even though the deed contains no express power to the trustee to give receipts, the insurer is not compellable to see to the application of the sum assigned. Payment to the trustee will sufficiently discharge him. —*Ford v. Ryan*, 4 I. C. R. 342. (C.)

3. A., by will, after charging his real and personal estate, which consisted chiefly of slaves in Jamaica, with payment of his debts, bequeathed to executors £2000, in trust to pay the interest thereon to his daughter, M. (the petitioner), for life, after her death the principal to go to her children. He directed that the principal and interest should be raised out of the yearly profits of the estate, and that the person for the time being in possession of the property should pay the charge. Subject to this and some other legacies, he devised his estate to his son, S., and his assigns for ever. S. entered into possession, and continued seized until his death, when he devised the property to his daughter, K., still subject to the above legacy. The respondent having married K., became entitled to the estate in right of his wife, and wrote to the petitioner on the subject of the legacy of £2000, a letter containing the following language: "The property owes you and your family £2000 currency. So long as I am in possession you shall be paid your interest, and when the property yields it, the principal; as I wish never to pocket a farthing till every one is paid." Under the 3 & 4 W. 4, c. 37 (the Slave Compensation Act), the respondent had previously put in his claim for compensation, as owner of the estate in right of his wife, but not in any other character. No counter claims were lodged on behalf of the petitioner, or any person representing her charge, and a large sum of money was awarded to him as compensation. A petition having been presented to establish the charge of £2000 upon the estate, and render the compensation money liable in the hands of the respondent to this demand—*Held*, that the act of the Compensation Commissioners, in awarding this sum to the respondent, did not conclude the rights of the petitioner as against the sum granted to the respondent in lieu of the estate originally liable to that charge.

That the letter written by the respondent to the petitioner amounted to a declaration of trust in reference to the rents and profits of the estate; and that therefore the respondent was liable to satisfy the demand of the petitioner as to the legacy of £2000 out of the sum awarded to him as compensation money. —*McKean v. Gray*, 7 I. Jur. 317. (C.)

4. In 1810, two judgments on a joint and several bond against D. and B., to secure £2200, and in 1812 another judgment to secure £1000, against D., were entered by X., as trustee for the M. Infirmary. In 1819, a joint and several bond to secure £3200, was executed by D. and

B. to X., who gave warrants to satisfy the judgments. In 1823, two deeds were executed by D. and B. By the first they conveyed lands in trust to sell with their consent, or the consent of the survivor, and to stand possessed of the purchase-money, on trusts declared by the second deed, viz., to apply £8275 as D. and B. should appoint; in default of appointment, to pay £3200 due to X. (party to the deed, but not as trustee), "on a judgment against the said D. and B.;" and to pay the surplus after payment of legacies, to B. and his heirs; and, until the sale took place, to pay the rents as D. and B. should jointly appoint; in default of appointment, to keep down the interest on the £3200 and legacies, and to pay the surplus to D. for life, and after his death to B., his executors, &c. No sale was had. In 1826, D. died. In 1827, X. died, without entering judgment on the bond of 1819, and before the judgments of 1810 and 1812 were satisfied. In 1832, B., and the trustees of the deed of 1821, mortgaged to the ptf., who had notice of the deed of 1823, but not of the bond of 1819, and who, without enquiring whether the £3200 had been paid to the M. Infirmary, merely required the judgments of 1810 and 1812, which they supposed to be the judgment referred to by the deed of 1823 to be satisfied. Judgment was entered on the bond of 1819 in 1838, and assigned to A. in trust for the M. Infirmary. A., in a foreclosure suit filed by the ptf., proved the judgment, and was by the final decree decreed to be paid. The executor of X., after the decree, was allowed to prove his claim under the deed of 1823, on the usual terms of making up a report at his own expense.

*Held*, on objections to the report under that order—That the order was irregular; and that the report could not be confirmed on motion, as the effect would be to vary the final decree by reporting to the executor of X., as trustee of the M. Infirmary, in the priority of 1823, the same demand which had been decreed to A., as trustee of the M. Infirmary, in the priority of 1838.—[Reversed: 5 I. C. R. 436; 1 I. Jur. N. S. 442. (C.)]

That a trust was created by the deed of 1823 in favour of X., on which the £3200 was charged on the lands.

That the ptf. had notice that the £3200 was due to the M. Infirmary, under the deed of 1823; and, having neglected to enquire whether it had been paid, could not ward off the claim by reason of the inaccuracy in the description of the security under which it arose.

That X. having executed the deed, though not made a party thereto as trustee for the M. Infirmary, the doctrine of *Garrard v. Lord Lauderdale* (3 Sim. 1) did not apply; and he might have enforced the trust created for him.—[Last three propositions affirmed; 5 I. C. R. 436; 1 I. Jur. N. S. 442. (C.)]—*Gurney v. Lord Oranmore*, 4 I. C. R. 470. (R.)

## II. 2. By Precatory or Recommendaory Words.

- a. When such Words raise a valid Trust: Requisites to raise it.
- b. When they do not.

### II. 2. a. By Precatory or Recommendaory Words: When they raise a valid Trust: Requisites to raise it.

1. In 1839 T. bequeathed the residue of his property to his brothers, A. and B., to be divided equally; with a request to A. that "should he die without lawful issue the property which I bequeath him shall revert back to my nephews, sons of my brother, B." *Held*, that A. was entitled to the interest of the fund during his life only, and that the sons of B. were entitled to the principal.—*In re O'Leirne*, 7 I. E. R. 171; 1 Jon. & L. 352. (C.)

2. V., having bequeathed a farm to P., with a direction in the will that his widow should have her diet and lodging in the house—*Held*, that on refusal by P., the widow could enforce the direction by bill in equity against P.

A bequest to a widow of diet and lodging provided she wished to remain in a certain house—*Held*, not forfeited by her leaving the house. She was entitled subsequently only from the time of demand made.—*Ryan v. R.*, 12 I. E. R. 226. (C.)

3. V. having, under his marriage settlement, a power of appointing £1500 amongst his children (which sum was, in default of appointment, to be divided amongst them equally), and having only two sons, H. and W., appointed to H. £1, and to W. £1, and appointed the residue to W., adding, "I request him to have the same invested on mortgage, or in the purchase of lands, and settled on himself for life, with remainder to his child or children as he may appoint; with remainder to such child or children of my son H. as he may appoint; with remainder to my own right heirs." V., out of his own property, conferred by will other benefits upon W. *Held*, that W. was bound to elect between his rights under the settlement and his rights under the will.

W. having, during his lifetime, done acts which amounted to an election to take under the will, and having died without children—*Held*, that the precatory words constituted a valid trust in favour of the children of H., although they were not objects of the power contained in the settlement.—[*Blacket v. Lamb*, 16 Jur. 142; s. c., 21 L. J. N. S. 46, and 14 Beav. 482, commented on; *Carver v. Bowles*, 2 Russ. & Myl. 304, considered.]—*Moriarty v. Martin*, 3 I. C. R. 26; 4 I. Jur. 321. (C.)

4. W. assigned a leasehold house to J., upon trusts, leaving to W. a resulting interest in the residue of the rents. W. afterwards gave R., a creditor, the following letter:—"I have handed you a policy of insurance as a collateral security for my debt; the premiums on said policy to be paid out of the balance of the profit rent arising from the house assigned to J." On this letter J. endorsed:—"I agree to pay the premium of the within-mentioned policy to R., out of the profit rent

arising from the said house." *Held*, that these documents amounted to a complete declaration of trust, and that no consideration was required to give them validity.

*Semble*—That, if consideration were required, the first letter did not amount to an agreement sufficient to satisfy the provisions of the Statute of Frauds.

*Semble*—An antecedent debt is not, in the contemplation of a Court of Equity, a consideration for a security upon lands.—*Woodroffe v. Johnson*, 4 I. C. R. 319. (C.)

1. R., claiming a charge upon the lands of L., took the benefit of the Insolvent Debtors Act. R. afterwards made several applications to the Insolvent Debtors Court to have his petition dismissed. They were founded on affidavits which stated his intention to apply all his property for the benefit of his creditors. Eventually, the petition was dismissed on the consent of R.'s assignee, and not in any way referring to the affidavits. L. was sold in the I. E. Court; but the creditors of R. did not take any steps to realise out of the proceeds the amount of R.'s claims. R. afterwards assigned his claims to H., for money; H. having no notice of the statements in R.'s affidavits, though he had of the pendency of the insolvent proceedings. *Held*, that he could not be treated as constructively a trustee for R.'s creditors.

The amount paid by H. for R.'s claims was completely inadequate. Some of R.'s creditors obtained charging orders against his claims on the proceeds of L. *Held*, that the creditors who had obtained charging orders were, under the Statute of Fraudulent Conveyances, entitled to avoid the assignment to H., and that at the utmost it could only stand as a security for so much as had been actually paid by him.—*Roche v. Hassard*, 5 I. C. R. 14; 1 I. Jur. N. S. 246. (C.)

2. V. bequeathed to his two sons all his property, real and personal, to have and to hold, in the most absolute manner; and declared his will to be, that they should, at their discretion, and according to their own judgment, allocate to the other members of his family, being his lawfully begotten children, such portions of the property and goods, be the same more or less, as to them should seem fit and suitable, and appointed his sons his executors. *Held*, that, coupling the will with an admission in the petition by the sons of A.'s intention, a trust had been created; and that they were trustees for the other children, as to A.'s entire property, both real and personal.—*Gray v. G.*, 11 I. C. R. 218. (R.)

3. V. bequeathed to his daughters A. and C. £1000 each, to be left at interest by his executors and trustees, and the interest regularly paid to them, and, should they marry, it must be with the consent of their brother. Even in that case, their husbands were to have no control over principal or interest. The receipt of his daughters was to be a sufficient discharge of the interest. Should either or both of his daughters die without

issue, they might by will dispose of £500 each of the £2000 to any of their brothers or sisters, or nephews or nieces, but to no other person; the remaining £1000 to be divided amongst his surviving children, share and share alike; and should his daughters, or either of them, wish to purchase an annuity with their share of the £2000, for their life or lives, with the consent, or under the direction and advice of their guardians, they were allowed to do so. C. died intestate, and without issue. *Held*, that the daughters took life interests only in the £1000. That, as to £500 of C.'s share, a trust was created for the brothers and sisters, and nephews and nieces living at her death, and that they were entitled equally to the £500, in default of appointment. That the brothers of C. who survived her were entitled to the remaining £500; her sisters having pre-deceased her.—*O'Neill v. Montgomery*, 12 I. C. R. 163; 6 I. Jur. N. S. 351. (R.)

4. A testator, being possessed of a chattel reversion and profit rent in a house which he had leased to a tenant, with an option to redeem the rent by payment of £400, bequeathed all his real and personal property to his son and mother, whom he appointed executors, upon trust, to pay £25 a-year to his wife for life out of the profit rent of the house; and directed that if the tenant paid the £400, his executors should place it, together with whatever sum or sums of money might be in the Bank of Ireland to his credit, and whatever sum or sums might appear entered in his name, or in his grandchildren's names, in the Savings Bank, together with whatever cash might be had after paying his just debts, funeral expenses, and legacies, at interest, and pay it to his wife for life, and at her decease divide the principal sum between two of his grand-daughters. The tenant did not pay the £400. *Held*, that the profit-rent of the house, after the wife's death, was cash applicable to the trusts of the will.

*Semble*—The testator's interest in the house was devised to the executors upon the trusts of the will.—*Taylor v. Bunne*, 13 I. C. R. 383; 7 I. Jur. N. S. 26. (R.)

5. When a discretionary trust is vested in trustees, the Court will not interfere with the exercise of the discretion, if it be not capricious or improper, though a suit be instituted to administer the trust funds.

If the trustees do not concur, the Court will distribute the trust funds among the parties equally.

When one of two trustees, in whom a discretionary trust is vested, was resident in Australia, the Court would not act on a scheme for the distribution of the fund approved of by his solicitor in the suit, and the other trustee.—*Gray v. G.* 13 I. C. R. 404. (R.)

## II. 2. b. When they do not.

6. V., seized in fee, devised the lands to W., for life; remainders over, and expressed his



particular desire that his executors, while managing his affairs, and W., when he entered into receipt and management of the rents, should continue B. in the receipt and management thereof, and should likewise retain and employ him in the receipt, agency, and management of the rents of such other lands as should be purchased in pursuance of the directions in his will, at the fees usually allowed to agents. *Held*, not a trust for B.; and that the devisees were not bound to retain him as agent at the usual fees.—*Shaw v. Lawrence*, 1 Dr. & Wal. 512; 5 Cl. & F. 129; Ld. & G. temp. Plunket, 558.—[Rev. on this point, Ld. & G. temp. Sug. 154. (C.)]

1. F. was seized of real estate, subject to a mortgage of £4000, over which J., F.'s daughter, had a power of appointment amongst her children. F. was also possessed of large personal estate; and, by will, desired that all his debts, which he stated to be very trifling, should be paid out of his assets by his executrix. He then bequeathed all his property, real and personal, to J.; and earnestly recommended that if S., the son of J., should, during his life, adopt and follow such line of conduct as should merit her full approbation, she should appoint the £1000 to him, and should add £16,000 from F.'s personal property, also all his landed property; all of which he wished her to grant to S., by deed, or by will, conditionally, and if he conducted himself, so as to merit and possess her full approbation, and pursued her advice, but not otherwise. If he should misconduct himself, and not merit her entire approbation, and not obey her as his mother and guardian, she might dispose of all the properties in such manner, and to whom she thought fit. *Held*, that upon the true construction of the whole will, which was very lengthy and informal, the words of recommendation did not create an absolute trust in favour of S.

The rule with respect to precatory words in a will is, that there must be a complete withdrawal of discretionary power from the legatees, or there is no trust created. *Held*, that F. intended the £4000 to be continued on the security of his estate, and not to be paid off out of the personalty.—*Lefroy v. Flood*, 4 I. C. R. 1; 6 I. Jur. 273. (C.)

2. V. devised to his wife his house at G., and declared it to be "his earnest wish that his sister should reside at G., with his wife, during her life." *Held*, that there was not any trust created in favour of V.'s sister.—*Graves v. G.*, 13 I. C. R. 182. (C.)

### II. 3. By Parol.

3. Circumstances under which a parol trust of real estate will be enforced. A., B., and C. were tenants of lands. A. took a lease of the entire in the common form, describing them as in possession of A., B., and C. It was alleged that he took the lease upon trust for the benefit of B. and C. as to the portions in their possession. He sub-leased to B. his portion, subject to special covenants;

and allowed C. and his representatives to continue in possession, paying him the same acreable rent which he was himself subject to. They paid the tithe rentcharge. Parol acknowledgments were proved by A., that he would execute a lease to C. when called on; and that the original lease was as good for the occupiers as for himself. He devised the profit rents of the other parts, but did not notice the part in possession of C.'s representatives. They were evicted by his heir. *Held*, that there was no trust or contract to give C. an estate in the lands, which could be enforced in equity.—*Donohoe v. Conrahy*, 8 I. E. R. 679; 2 Jon. & L. 688. (C.)

4. A. being about to leave this country, endorsed a promissory note not yet due to B., and directed B. to recover the sum thereby secured, and to hold it until A. should write for it; but if A. should die before the amount was recovered, then to hold the amount in trust for M. It was subsequently arranged between A. and B., that B. should retain out of the sum secured by the note the amount of a debt due from A. to B. A. died before the amount was paid to B. *Held*, that an irrevocable trust was not created in favour of M.

That A.'s personal representative was entitled to recover at Law, but not in Equity, from B., the amount recovered by B. on foot of the note, subject to a deduction for the debt due by A. to B.

Principles relating to the creation by parol of trusts of personalty.—*Maguire v. Dodd*, 9 I. C. R. 452; Dr. Rep. temp. Napier, 604. (C.)

5. A testator having declared, by parol, to his residuary legatee, trusts, to which he wished £2000 to be applied, afterwards by codicil, stated that he had instructed the residuary legatee as to the disposition of his property. *Held*, that the parol trusts could be enforced against the personal representative of the residuary legatee.—*Attorney-General v. Dillon*, 13 I. C. R. 127; 7 I. Jur. N. S. 251. (C.A.)

### III. EXECUTORY TRUSTS.

6. On petition, the Court will not remove a trustee who, having accepted the trust, refuses to act. A bill must be filed, of which the costs will be cast on the trustee, if it appears that his refusal was improper.—*Aron*, 4 I. E. R. 700. (E.E.)

7. Executory trusts defined, and the principles laid down on which Courts of Equity act in cases of executory trusts.—*Boswell v. Dillon*, 6 I. E. R. 389; Dr. Rep. temp. Sugden, 291. (C.)

### IV. IMPLIED TRUSTS.

8. Real estate having been applied, for a century and a half, upon trusts specified by will, the Court assumed that the will created a trust, and that the heir of the testator became a trustee; and, the present heir not being known, the case was held to be within the 11 G. 4 & 1 W. 4, c. 60, s. 23.—*In re Gore's Charities*, 2 Con. & L. 411. (C.)

1. H., being entitled to a lease for years determinable on three lives, of the lands of K., devised it to his wife for life, and, after her death, to his son, W., and his grandson, G., and the longest liver of them. Shortly afterwards he surrendered the lease and took a new lease of K. By a codicil made after the surrender and acceptance of the new lease, he directed his executors to pay out of a fund the head rent of P., and fulfil any payment he might thereafter appoint; and "relinquished the settlement made on G. on that occasion." By a second codicil of the same date he vested £4500, in trust to pay the head rent of K., during his wife's life, and after her death to extend the interest in K., if that could be accomplished. The trustees took no steps to extend the interest, although it could have been accomplished, until after the expiration of the lease, when it could not be done. *Held*, that the first codicil did not revoke the devise of K.; that W. and G. were entitled to the £4500; and that it did not go to the next-of-kin of H.—*O'Shea v. Howley*, 7 I. E. R. 56; 1 Joh. & L. 391. (C.)

2. S. was entitled, with her brother and four sisters, to a lease for 31 years, as one of the next-of-kin to her mother, one of whose personal representatives she was. The landlord made a lease for 51 years, expressed to be made in consideration of the surrender of the former lease. It described the lands as late in the possession of the mother, and then in the possession of S. and one of her sisters, her co-administratrix. An endorsement on the lease stated that it was made in trust for herself and her brother and sisters. S. married, and the landlord leased to her husband the same lands for 40 years, to commence after the expiration of the 51 years. *Held*, that the new lease was a graft.

Although a ptf. is bound to prove his whole case at the hearing, yet, if there be no failure of title, but an omission in the proof of it, the Court may, in its discretion, direct a reference to the Master to enquire into it.—*McAlister v. Walsh*, 8 I. E. R. 250. (C.)

3. A father, by lease and release, conveyed lands to his son in consideration of natural love, and, "to entitle him to a wife and fortune now in contemplation," to hold "to the separate use" of the son, "his heirs and assigns for ever." It was not proved that any particular marriage was then contemplated. The son survived the father, but died unmarried. *Held*, that the deed vested the fee-simple absolutely in the son.

The deed was executed by both father and son, but was kept by the father alone, and found among his papers when he died. It was registered by him nine months after its date, he being an attorney. The son and he lived on good terms. The father received the profits of the estate, and alone made new leases, of which the son was cognizant, and to which he assented. The son occasionally received money from tenants, which the father allowed credit for. The father made a power of attorney to third persons to collect the rents.

*Held*, that the deed being originally an advancement, none of these circumstances affected the son's title, and that it was not inoperative either as a secret conveyance, or as creating a trust by implication for the father.—*Alleyne v. A.*, 8 I. E. R. 493; 2 Jon. & L. 544. (C.)

4. Ptf.'s bill stated that A., by deed, conveyed lands to trustees to the use of B., for life; remainder to his issue male: that those lands were held "under leases or agreements for leases, for lives renewable for ever, or on terminable leases, or agreements for terminable leases," the dates and particulars of which ptf. could not set forth, because they and the other muniments of title were lost, or were in possession of deft., to whom B. delivered them on selling his interest therein to him. Ptf., as first tenant in tail, sought a discovery of the deeds; that renewals, obtained by B. in his own name, might be decreed a graft on the original leases; and for an injunction to stay waste. On demurrer: *Held*, that the reasonable construction of the statement was, that the lands were held by A., when the deed was executed; and that the statement of A.'s title was not open to demurrer, because the principle, which excuses a ptf. from setting out a deft.'s title, ought to excuse him from setting out the title of the party under whom ptf. derives, so long as deft. wrongfully withholds from him possession of the title deeds.

*Semle*—Such an objection cannot be made on a general demurrer for want of equity.

*Held*, that the surviving trustee was not a necessary party.—*Hill v. Mill*, 9 I. E. R. 164. (C.)

5. V. devised lands of Q., in trust, as soon as conveniently might be after his decease, to sell and dispose of them, and that the money arising from the sale, together with the rents and profits of the lands, until sold, should be considered as part of his personal estate, and should be applied and disposed of in the same manner as his personal estate. He gave his personal estate upon trust, to pay his funeral expenses, debts, and legacies, and, in the next place, that the yearly amount of his personal estate thereby directed to be laid out in the purchase of lands, and the yearly rents and profits of the lands which should be purchased with such personal estate, or any part thereof, should be applied for the payment of his debts and legacies, until paid off and satisfied. As to the residue of his personal estate, upon trust, to lay out in purchasing lands of inheritance in fee-simple, to be conveyed and assured to his grandson T. and his heirs, subject to a charge for renewing chattel leases; and directed a term for years to be created of such purchased lands for that purpose: and upon trust, that until a proper purchase could be had, the trust-money should be laid out at interest, and be applied towards discharging the purchase: and directed his trustees to renew his chattel leases, which he bequeathed to T. for life. V. died in 1771, and from that to 1837 T. continued in possession of Q. and V. of the chattel leases. From 1820 to 1837 he paid

large sums for renewal fines. *Held*, that the accumulation of the rents of Q. was to cease at the end of a year from V.'s death, and that the rents from that period to 1820, when the trust to raise the renewal fines arose, belonged to T.; but that, subsequently to 1820, the rents were to be set off against the renewal fines.—*Smith v. Dungannon*, 3 I. C. R. 316; 5 I. Jur. 137. (C.)

1. In 1840, C., having a charge by judgment for £1500 upon the lands of X., applied to B. for £1500, to enable him to purchase said lands in Chancery. B. consented, on the terms of a conveyance being made to R. as a trustee for B. as well as for C. R. became the purchaser for £3000, of which £1500 were paid by B. in cash; R.'s promissory note was given for the remainder. By deed of the 2nd June 1840, X. was conveyed to R., without any declaration of trust on the face of the deed.

C., having got R.'s promissory note accepted as cash, subsequently, by sundry payments, reduced his debt of £1500 to B. to £900.

By deed of the 9th July 1844, reciting the deed of the 2nd June 1840, and that C. purchased X. from B., save so far as it should stand as a security to B. for £900, it was declared that X. was vested in R., in trust, in the first instance, by sale or mortgage, to pay B. £900, with interest and costs; then in trust for C., his heirs and assigns, for ever. This deed was not registered until the 2nd Dec. 1852.

In 1852, L. obtained a judgment against C., for £60, and registered it as a mortgage against X. on the 13th Nov. 1852.

In 1843, a judgment obtained against C., in 1836, was assigned to W., and by him duly re-docketed in 1844, and afterwards registered in 1850.

In 1854, the lands were sold in the I. E. Court, on the petition of L.; and on the settlement of the final schedule of incumbrances the Commissioners placed B.'s claim of £900 after the claims of L. and W., on foot of their respective judgments. *Held*, on appeal, that the original transaction should be regarded as C.'s own purchase, B. lending him £1500; that R. was trustee for C., and for no other person; and that the judgments obtained against C. became, in the order of their priority, available against the trust estate; that B.'s claim to priority, founded on the recitals in the deed of 1844, could not be sustained; that B. was entitled to such priority only as was given him by the deed of 1844, and its subsequent registration in Dec. 1852; and that his claims should be postponed to the claims of L. and W.—*In re Cooke*, 6 I. C. R. 480. (C.A.)

2. A Purchase by a receiver, of a jointure charged upon the lands over which he was receiver, declared a trust for the benefit of those entitled to the estate.

The receiver over the estates of L. purchased from L.'s widow a jointure charged on the estate. In a suit instituted by an incumbrancer on the estate to set aside this purchase, the widow declaring herself satisfied with the terms of the arrangement, the purchase was upheld as regarded her; but was

declared a trust for those beneficially entitled to the estate. Form of decree.—*Boddington v. Langford*, 15 I. C. R. 558, note. (C.)

#### V. PRESUMPTION RESPECTING.

[See IV. IMPLIED TRUST.]

#### VI. RESULTING TRUSTS.

1. *In general: what amounts to.*

2. *For the Heir-at-law.*

3. *For the Next-of-kin, &c.*

##### VI. 1. *In general: what amounts to.*

3. Lands held for lives renewable for ever were conveyed, for all the estate of the tenant, to trustees, their heirs and assigns, for the lives in the lease. The deed contained a declaration that the names of the trustees were made use of as trustees for B., and that the grants therein contained were for his sole use and benefit, and for no other use, intent, or purpose.—*Held*, that B. took the entire equitable interest in *quasi* fee.—*McClintock v. Irvine*, 10 I. C. R. 480; 5 I. Jur. N. S. 317. (C.)

4. By marriage settlement, two sums of £1000; one the property of the husband, the other that of the wife, were vested, in trust to pay the interest from time to time, as received, or to permit the wife to receive and take "the said two several sums of £1000 respectively, and all interest, benefit, and advantage arising, or to arise therefrom," to her separate use; the two several sums to be so received and taken in full for her jointure, and in bar of dower; and if the husband survived her, to permit him, during life, to receive the two several sums, and all interest, &c., derivable therefrom, with power of appointing them among the issue of the marriage, to the husband; in default of appointment, to such issue, in equal shares; in default of issue surviving at the husband's death, those sums were to be disposed of as he should appoint, provided that when the husband acquired property in lands producing £200 a-year, and settled a jointure of £200 a-year on the wife, subject to the same limitations as those sums were declared subject to, it should be lawful for him to receive those sums for his own use. No issue of the marriage survived the husband. He predeceased the wife, without having settled any jointure, or made any appointment of the fund. *Held*, that the wife took only the interest of the fund for her life.

That the husband was entitled to the interest of the fund for his life, with a general power of appointment over the principal.

That no appointment having been made by him, there was a resulting trust in favour of the administrator of the husband as to £1000, and a similar trust to the wife's executor as to the other £1000.—*In re Lane's Trusts*, 14 I. C. R. 528. (R.)

5. By a marriage settlement, reciting that the intended wife was entitled to the lands of X., and to part of the lands of Y., and of the lands of Z. in remainder, and was also entitled

to £600; and that it had been agreed that these properties should be vested in a trustee upon trusts, first, to secure a jointure for her; the intended wife conveyed the lands of X. and Y. to the use, as to X., of the husband for life; remainder to her own use for life; remainder in trust for the issue of the marriage; and it was agreed that she was to have, during her natural life, all the property that the husband might have or be entitled to, and that he would not sell or mortgage any of the properties during her life without her consent first had and obtained under her signature. *Held*, that there was a resulting trust, as to the lands of Y., for both husband and wife, in her right.

That the husband was entitled to the lands of Z. for life, with remainder to the wife for life.—*Elliott v. Kempston*, 15 I. C. R. 120. (R.)

#### VI. 2. For the Heir-at-law.

#### VI. 3. For the Next-of-kin, &c.

1. C., a Roman Catholic lady, residing in Dublin, transferred a sum of stock, equivalent to about half of her property, to the Roman Catholic Archbishop of Dublin, and the superior of the Order of Jesuits in Ireland, upon trust, for the ladies of the convent of N. One of these trustees had been C.'s confessor until within two years before the transfer. Her confessor at that period was under the religious control of that trustee. The trustees took no personal benefit from the transaction. The affidavits in answer denied all exercise of spiritual influence over C. *Held*, that the Court would not, in favour of the administrator of C., declare such transfer affected with a resulting trust.

That the trust was declared with sufficient precision.—*Kirwan v. Cullen*, 4 I. C. R. 322. (C.)

#### VII. VOID OR FRAUDULENT: LAPSED OR SUBSISTING.

2. In all cases of direct trust, the rule is settled, that length of time does not bar.

Nor is this case within the exception stated by counsel for the ptf. to the rule, that time does not bar as between trustee and c. q. t.—viz., that it does not apply to cases of constructive trusts. The true meaning of that exception is, that where, as in cases of fraud, the interposition and decree of a Court of Equity are necessary to declare the trust; there, lapse of time, without preferring a suit for the purpose, will bar the claim. It is so stated, and the true ground of the exception put by Lord Redesdale, in the case of *Hovenden v. Lord Annesley*, 2 Sch. & Lef. 633.—*Scott v. Knox*, 4 I. E. R. 410, 411. (C.)

3. V., by will, bearing date the 12th Feb. 1862, bequeathed to F., and E. his wife, all her property, "trusting to their charitable and pious recollection of the spiritual wants of me and mine." On behalf of the Crown,

it was contended that this was a valid disposition of the property for charitable purposes, and that a scheme should be settled by the Court for that purpose. By the next-of-kin it was insisted that the trust was uncertain and void. *Held*, that the trust was void for uncertainty, and that the next-of-kin was entitled to the property.—*McCarthy v. The Att.-Gen.*, 9 I. Jur. N. S. 4. (M.O.)

4. V. bequeathed £500 to two R. C. priests, or their survivor, to be applied as they should deem best for the maintenance and education of two priests of the order of St. D. in Ireland. *Held*, that the bequest was null and void, as being opposed to the 10 G. 4, c. 74; and should accrue to the residue of V.'s personal estate.

V. bequeathed £500 to another R. C. priest, on a secret trust disclosed to him by V. during his life. The trust was—to apply that sum towards redeeming the rent of the church of the D. Friars in Cork. *Held*, that the bequest, being given on an invalid trust, was void; and could not be carried out *cy-pres*.—*Simms v. Quinlan*, 17 I. C. R. 43; 10 I. Jur. N. S. 41. (C.A.)—[Varying the Rolls decision, 16 I. C. R. 191; 9 I. Jur. N. S. 404.]

#### VIII. DECLARATION OF.

5. A party having been expressly named a trustee in a will under which a question existed whether he was not beneficially interested—*Held*, that his representatives were trustees within the 4 & 5 W. 4, c. 27, s. 25; and that, though a constructive trust would be barred by this statute, and might, before the statute, have been barred by length of time, yet that principle only applied to cases in which the trust did not arise on the face of the instrument, but was to be made out by evidence.—*Salter v. Cavanagh*, 1 Dr. & Wal. 668. (R.)

#### IX. CONSTRUCTION OF.

6. £4000 were vested in trustees on, trusts, with power to invest it in land or in government securities in England. The trustees invested the money in bills and other private securities in Ireland. £1200 remained unaccounted for by them. *Held*, that though, from the nature of the trusts, none of the c. q. t. had a present right to any part of the principal, yet the sum unaccounted for was a debt due in equity, and demandable from deft. as a defaulting trustee.—*Waller v. Fowler*, S. & Sc. 274. (R.)

7. Testator bequeathed a leasehold for years, upon trusts, and gave money to his executor to extend the interest in the lands, if it could be accomplished. The executor did not make any attempt, during the continuance of the term, to obtain an extension of the lease. After it had expired, the Master reported that an extension of the interest could have been obtained. *Held*, that the money should go according to the trusts of the land.—*O'Shea v. Howley*, 1 Jon. & L. 391; 7 I. E. R. 56. (C.)

1. A power to trustees to lay out money "in the public stocks or funds in Great Britain, or on any mortgage of freehold or leasehold estates, or any other real securities in England, Wales, or Ireland," does not authorise them to lend it on the security of a judgment, since the 3 & 4 Vic., c. 105, s. 22.—*Johnston v. Lloyd*, 7 I. E. R. 252. (C.)

2. V. devised the lands of A., of which he was seized in fee, to his nephew, R., for life; remainder to his first and other sons in tail; remainder to his daughters in tail; and left the fee undisposed of. He gave the residue of his properties, freehold and personal, of whatever nature and kind he might die possessed of, to his brother T.; and if his brother T. should survive him, requested and desired that he should convert all the personal property into fee-simple property, and at his decease leave the same entailed on his son R., in the same manner as he had himself entailed A. *Held*, that the freehold, as well as the personal property undisposed of, was bound by the direction in the residuary clause.

Rules as to construing wills from presumed intention.—[On re-hearing, *Tennent v. T.*, 7 I. E. R. 361; 1 Jon. & L. 379. (C.)]—[On hearing, *Dr. Rep. temp. Sug.* 161. (C.)]

3. £800 due to C. were in 1814 secured by an annuity of £100, issuable out of the lands of D., *habendum*, till the debt and interest should have been paid. In 1815, C. assigned the annuity, together with the balance then due of the annuity; and, being entitled to £2000, charged upon lands of which he was tenant for life, as a further security, assigned £800, part of the £2000, upon trust, if the annuity should be unpaid for 41 days, to call in from time to time, and receive such parts of the £2000 as should suffice to satisfy the arrears, and apply the same in payment thereof; after payment, in trust for C. *Held*, a continuing trust—not one to be executed once for all; and that, upon non-payment of the annuity for 41 days, a present right to receive the £800 did not accrue within the 3 & 4 W. 4, c. 27, s. 40.—*Heenan v. Berry*, 2 Jon. & L. 303. (C.)

4. A. being indebted, by debts which did not affect his real estates, conveyed by deed poll real estates, upon trust, to raise money "for the purpose of paying all debts due by him to any person whatsoever, and which then affected his said estates thereby conveyed." A. was then indebted upon bonds, with warrants, &c.; but no judgments had been entered. *Held*, that the trust included his bond debts, but not those of simple contract.

Parties' acts cannot be allowed to affect the construction of deeds.—*Douglas v. Allen*, 2 Dr. & War. 213; 1 Con. & L. 367. (C.)

5. The ptf. was attorney for T. and H. in two actions, brought by them against G. and his son. P. owed £3000 to another son of G. The actions were compromised on the terms mentioned in the following deed. The deed

recited that, for P.'s accommodation, it was agreed that T. and H. should accept £1000 in full for their demand, with the costs of the actions, and that P. should set off the £1000 against so much of the £3000 debt; that T. and H. should accept a security for the £1000 on estates in W. of another member of the G. family, who was indebted to P., and a collateral security by mortgage of P.'s own property; and that P. should pay T.'s and H.'s costs of the actions, amounting to about £400, which should be secured by his bills, and collaterally by the last-mentioned mortgage; and recited mortgages of the W. property for £1000 to X. in trust for T. and H., and of P.'s property for £1400 to H., and that the £1400 secured by the latter was intended as a further security for the sum secured by the mortgage to X., and for the costs of T. and H., and of getting X.'s mortgage executed. It was declared that H. should be possessed of the £1400 on trust, first, to better secure the £1000 to X.; secondly, to secure to the ptf., described as "E. S., gentleman, attorney for the ptf.s. in said actions," the costs of them, £100 to be paid in three months, and the rest after taxation; thirdly, the expense of executing X.'s mortgage. The ptf. was not a party to, and did not execute the deed. P. gave a promissory note to T. and H. for £100, which they endorsed to the ptf., and P. paid. The rest of the costs not being paid, the ptf. filed the bill to recover them, by enforcing the trusts of the deed. *Held*, that he was not a c. q. t., and could not sustain such a bill.

The cases to which the doctrines of *Garard v. Lord Lauderdale*, 2 R. & M. 451, and *Ellison v. E.*, 6 Ves., 656, are respectively applicable, defined, and distinguished.—*Simmonds v. Palles*, 8 I. E. R. 335; 2 Jon. & L. 489. (C.)

6. Damages for breach of a lessor's covenant for quiet enjoyment broken after the lessor's death. *Held*, a debt within a trust in his will to pay "all such just debts of every kind as he should happen to owe at his decease;" the context showing an intent to include any debt payable out of his personality. *Semble*—Even without the latter circumstance.—*Bermingham v. Burke*, 9 I. E. R. 86; 2 Jon. & L. 699. (C.)

7. When a testator, in the introductory part of his will, directs that all his just debts shall be paid, and then devises his lands, subject to that payment, to trustees, to convey, &c., a trust is created by the will, for payment of debts; the lands being vested in the trustees to raise their amount, by the execution of a trust. The right of a judgment creditor is not affected by the 3 & 4 W. 4, c. 27, s. 40; or, if it be, is taken out of that sec. by the saving of the 25th sec.

*Aliter*—If a mere charge upon lands, in the hands of the owner beneficially entitled, creating a liability, but not a trust.—*Hunt v. Bateman*, 10 I. E. R. 360. (E.E.)

8. By deed of family settlement, in 1794, lands in D. were settled upon A. for life;

remainder to B. for life; remainder to C. for life; remainder to his first and other sons in tail. E. was the eldest son of C.

By deed of family settlement, in 1818, lands in L., including a terminable lease of S., were conveyed to trustees for 1000 years, subject thereto, as to the freeholds, to A. for life; remainder to C. for life; remainder to E. for life; remainder to his first and other sons in tail. The chattels were to be held on analogous trusts. The trusts of the term were declared to be, first, to pay scheduled debts, and subject thereto until the expiration of the lease of S., or the end of 99 years from the date of the deed, if seven persons therein named should so long live, whichever should first happen, to raise £3500 per annum, and accumulate it by compound interest; and, at the end of the trust for accumulation, to invest the proceeds in lands, to be settled to the like uses as the freeholds. The deed provided that if the lease of S. should expire before the end of the 99 years, one moiety of the produce of the accumulations should be accumulated till the end of the 99 years; and provided that if, at the expiration of the lease of S., or at any time thereafter, and before the end of the 99 years, the person who, for the time being, should be entitled to L., should be also, under the limitations of the deed of 1794, entitled to D., the trustees immediately thereupon should raise £2000 per annum, and accumulate that, and the whole produce of the accumulations, till the end of the 99 years. The deed further contained a power for A., B., and C., to revoke all the uses and trusts therein, except the 1000 years' term, and the trusts for paying debts; and to limit new uses and trusts. By deed of 1819, executed on the marriage of C. with V., the uses of the deed of 1818 were varied, by introducing, before all the limitations of the deed of 1818, except the 1000 years' term, and the trust for paying debts, a term of 1200 years, to raise £20,000, for a specified purpose; a trust to raise a jointure of £1000 per annum for V., and a term to raise portions for younger children. A. died; B. died without issue; C. and E. joined in suffering a recovery of D.; and eventually this property was, by a deed of 1846, to which C. and E. were parties, limited to raise debts incurred by them, subject thereto to provide an annuity of £3000 per annum for E., subject thereto to C. for life; remainder to E. for life; remainder to his first and other sons in tail; remainders over. The S. lease expired in 1853, in the life of C. and E. *Held*, that the jointure and portions provided by the deed of 1819 were charges upon the accumulations provided by the deed of 1818.

That, notwithstanding the re-settlement of D. by the deed of 1846, C. was, at the time of the expiry of the S. lease, seized of D. under the deed of 1794; and that the trust for raising £2000, and for accumulating the produce of the accumulations, took effect.—*Londonderry v. L.*, 4 I. C. R. 361. (C.)

1. V., seized in fee of three estates, devised one of them, called the Tempo estate, to his

daughter L. for life; remainder to her issue in tail; in default of such issue, to his nephew Robert James; remainder to Robert James's issue in tail; with several remainders over. The ultimate reversion in fee remained undisposed of. V. then devised his other two estates to his other daughters in strict settlement, but made no disposition of the ultimate reversion in fee. V., being seized of divers freehold lands, and possessed of considerable personal property, devised various parts of the former to different persons; and, bequeathing some pecuniary legacies, concluded his will thus:—"I leave and bequeath the rest, residue and remainder of my properties, both freehold and personal, of whatsoever nature and kind, I may die possessed of, to my brother Robert; and, if my said brother Robert shall survive, I request and desire that he shall convert all the personal property into fee-simple property, and at his decease leave the same entailed on his son Robert James, in the same manner as I have myself entailed the Tempo estate." *Held*, that the freehold estates which passed under the residuary devise, as well as the residuary personal property, were within the trust to entail. That this trust should be executed, by giving a life estate to Robert James; with remainder to his sons and daughters in tail, according to the limitations of the Tempo estate.—*Tennent v. T.*, Dr. Rep., temp Sugden, 161. (C.)

2. V. bequeathed his real and personal property in trust to sell, and, after payment of his debts, &c., to invest the produce in bank shares, and pay annuities; and bequeathed the residue of his property upon trust to pay the interest to A. for life. The decree in a suit to administer the assets directed that the trustee should hold the bank shares (subject to payment of the annuities), upon trust, from time to time, to invest the dividends in the purchase of other bank shares or of government stock, &c., and accumulate them, from time to time, in the nature of compound interest, until a fund was created which (with other property specified) would be sufficient to pay V.'s outstanding liabilities and debts, and should yield an annual sum sufficient to pay a contingent liability which the assets might be subject to, by reason of a breach of trust committed by V.; and that the trustee should be possessed of the residue, and such accumulation, upon trust, to pay the annuities, &c., and subject thereto to pay the dividends to A. *Held*, that the decree was erroneous in directing the accumulation of the dividends of the residue.

*Semble*—The proper decree would have been to have directed the sale of so much of the bank shares as would have been sufficient to answer the breach of trust, and to have invested the produce in £3 per cent. stock, and transferred it to a separate credit, and that the dividends should be paid to A. for life; and that so much of the dividends of the unsold bank shares as would be equivalent to the amount of the annuities should be paid to the respective annuitants, and the surplus dividends to A.; and if the dividends of the

bank shares should be insufficient to pay the annuities, that the dividends of the stock should be applied for that purpose during A.'s life, and the surplus dividends, if any, should be paid to him.—*Abrahall v. Hamilton*, 10 I. C. R. 51. (R.)

1. L., on his marriage, gave a bond and warrant to the trustees of his settlement, upon trust, "when the trustees should think fit and expedient so to do," to levy the amount, and hold it for the uses of his settlement. No judgment on the bond was ever entered, and the amount of the bond was lost. *Held*, that the discretion conferred upon the trustees was not absolute, but to be controlled by the Court; and that the circumstance, that enforcing the bond might have been injurious to L.'s credit as a trader, and have lost him various situations, did not justify them in omitting to enforce the bond.—*Luther v. Bianconi*, 10 I. C. R. 194; 5 I. Jur. N. S. 138. (C.)

2. By marriage settlement executed in 1797, reciting that W., the intended husband, was entitled to real estate on the decease of his father, and to sums in the English funds, and sums, &c., as residuary legatee of his grandmother, W. covenanted with the trustees that he would, as soon as he could after the execution of the settlement, transfer to them the sums of money, and invest in such funds as should be thought most advisable, in the names of the trustees, such further sum, the interest of which should amount to £600 a-year, free from all deductions, in trust for W., for life; after his death, upon trust, to pay the interest to A., his intended wife, as a jointure; with power to W. to revoke the trust of the fund so to be invested, on conveying to the trustees real estate of the value of £600 a-year, to be held on the same trusts. W. died in 1798, leaving one son, who died in 1812. In 1799 and 1801 W.'s executors transferred to the trustees of the settlement £4 per cent. stock, then producing £600 a-year, which was, by Acts of Parliament, ultimately reduced to £3 per cent. stock, and became insufficient to pay the £600 a-year. *Held*, that A. was not entitled to have the deficiency made good out of the assets of W., the covenant having been performed by the transfer of stock, which, in 1801, produced £600 a-year.

W., by will, after directing his debts to be paid and bequeathing legacies, left all the residue of his estate to his executors, in trust, to pay the interest to his wife, A., for life. *Held*, that the reversionary interest in the stock transferred to the trustees to answer the jointure passed by the residuary bequest, no intention to exclude it appearing by the will.

*Held also*, that A. was entitled to have the reversionary interest sold at the end of one year from W.'s death, and the proceeds invested, and the dividends paid to her for life.

That not having been done, the Court directed an enquiry to ascertain what sum in stock could have been purchased with the value of the reversionary interest of that period; and that so much of the assets should be set apart, and the dividends which would

have been payable to A., if the investment had been made, should be paid to her. *Held*, that A. was not barred in 1859 by the Statute of Limitations, or by *laches*, there being a subsisting fund liable to her demand.

A portion of the residuary property consisted of stock which was set apart to meet a life annuity, which determined in 1829. In a suit to administer the assets of W., the dividends of the stock which accrued after the death of the annuitant were decreed to be paid to A. and her second husband. *Held*, that A. was not entitled to any relief against the assets by reason of the stock not having been sold a year after the death of W.—*Napier v. Staples*, 10 I. C. R. 344. (R.)

3. Lands, held for lives renewable for ever, were conveyed for all the estate of the tenant, to trustees, their heirs and assigns, for the lives in the lease. The deed contained a declaration that the names of the trustees were made use of as trustees for B., and that the grants therein contained were for his sole use and benefit, and for no other use, intent, or purpose. *Held*, that B. took the entire equitable interest in *quasi* fee.—*M'Clintock v. Irvine*, 10 I. C. R. 480; 5 I. Jur. N. S. 317. (C.)

4. By marriage settlement of 1794, A. conveyed specified lands of which he was seized in tail in remainder, together with all other lands, &c., which he was then or thereafter might be possessed of or entitled to, in reversion, remainder, or otherwise howsoever, to trustees, to the use of himself for life, remainder as he should appoint among the issue male of the marriage, remainder over; and covenanted to do any act, or execute any conveyance, if required, of and concerning the specified lands, or any other lands or premises of which he should at any time thereafter be possessed or entitled unto, &c., for the further, better, more perfect, and absolute carrying out the settlement, and the true intent and meaning of the parties thereto, into full legal and perfect execution. In 1819 a judgment was recovered against A. In 1839 he became entitled, as heir-at-law of his brother, to other lands not specified in the settlement. In 1859 A. died. *Held*, that the trusts of the deed of 1794 attached to the latter lands on their acquisition by A., without any further act by him, and that his eldest son, claiming under that deed, was entitled to hold them discharged of the judgment.

The case of *Britton v. M'Donald*, 5 I. E. R., disapproved of and qualified.—*Stack v. Roysse*, 12 I. C. R. 246; 7 I. Jur. 114. (R.)—[Affirmed: 13 I. C. R. 212; 7 I. Jur. N. S. 249. (C.A.)]

5. Marriage articles recited that the intended wife was entitled to legacies, which though not reduced into possession, were computed to amount to £2000. It was agreed that, in consideration of the wife's fortune, the husband should execute a bond, conditioned for the payment of £2000, with warrant of attorney to confess judgment, which should be vested in trustees, in trust that they should, when they thought fit, call in the amount, and in-

vest the sum so realised in the funds or on mortgage, and permit the husband to receive the interest for life, or until he should become bankrupt or insolvent, or enter into a composition with his creditors; and after his decease, or on his becoming bankrupt, &c., permit the wife to receive the interest for her separate use for life; after her decease, in trust for the issue of the marriage. The articles contained a covenant with the trustees, that if, at any time during the coverture, any real or personal estate or property should descend to, or devolve on, or become vested beneficially in the wife, or any person in trust for her, the husband would do all necessary acts to vest same in the trustees, upon the aforesaid trusts. The trustees paid two of the legacies recited in the articles, which came to their hands, to the husband, who was a trader, while he was solvent; but did not enter judgment on the bond until three years after the marriage, when he was insolvent, though they registered the warrant of attorney. *Held*, that the covenant did not apply to the legacies recited in the articles; and therefore the trustees were not guilty of a breach of trust in paying them to the husband.

That as the husband had no land on which the judgment could be attached, the trustees were not guilty of a breach of trust by not entering the judgment forthwith.—*Macken v. Hogan*, 14 I. C. R. 285. (R.)

#### X. THEIR INCIDENTS.

1. In a vast variety of cases, Courts of Equity, in dealing with titles, and in the rules regulating their proceedings in suits respecting real estates, decline to recognise the legal rights of judgment creditors as a fixed criterion of title; and regard the trusts of the legal estate as affording a protection against that legal power, and an answer to any objection resting on the possible exercise of it. All trust estates are exempt, in the view and according to the rules of a Court of Equity, from the judgments of the trustee. His charges and incumbrances, however they may affect the legal estate, are in this Court of no value, and there is but one class of persons who, by dealing with a trustee, can retain what they acquire, that is, purchasers for valuable consideration without notice.—*Leake v. L.*, 5 I. E. R. 366. (R.)

2. *C. q. trusts* under an invalid devise, who remain in possession without acknowledgment of title for more than twenty years, and thus bar the right of the heir-at-law, do not thereby acquire the legal estate in the devised lands, which vests in the trustees, subject to the trusts of the devise.—*Kernaghan v. M'Nally*, 12 I. C. R. 89. (C.A.)

3. In a marriage settlement of 1812, the husband covenanted with the trustees that his heirs, executors, &c., would, from and after his death, pay to his widow, if she survived him, an annuity of £40, and pay the trustees a sum of £400 for the children of the mar-

riage. The husband became indebted to one of the trustees, who, in 1828, entered up judgment against him for £600, and effected a policy of insurance upon the husband's life, for a similar amount. The judgment was subsequently assigned to B., who also became the purchaser of a judgment, obtained against the husband in 1834 for £200; on which occasion a policy of insurance had been effected on the life of the husband.

In 1860 the property comprised in the settlement was sold in the L. E. Court. Upon settling the final schedule of incumbrances, a Judge of that Court declared that the jointure of £40 per annum, and the sum of £400 for the children, were entitled to priority over the judgment of 1828, and that the judgment of 1834 had been satisfied by the payment of the amount reserved by the second policy above mentioned. *Held*, upon appeal, that both the judgments should have precedence of the jointure and of the £400.

That the provision made in the settlement for the widow and children was only to affect such property as the settlor should leave after payment of his just debts.

That the trustee was not, as a trustee, disqualified from dealing with the settlor, even though such dealing might have the effect of injuring the provision for the widow and children.

And that, where such transactions have been, with full knowledge of the state of facts, acquiesced in by *c. q. trusts*, for a long period, it would be dangerous, and against public policy, to allow them to be re-opened.—*In re M'Kenna's Estate*, 13 I. C. R. 239. (C.A.)

#### XI. ASSIGNMENT OF.

#### XII. EXECUTION AND SATISFACTION OF TRUSTS.

4. Testator bequeathed a leasehold for years, upon trusts, and gave a sum to his executor to extend the interest in the lands, if that could be accomplished. The executor did not make any attempt, during the continuance of the term, to obtain an extension of the lease. After it had expired, the Master reported that an extension of the interest could have been obtained. *Held*, that the money should go according to the trusts of the term.—*O'Shea v. Howley*, 1 Jon. & L. 391; 7 I. E. R. 56. (C.)

5. When two or more persons are appointed trustees, and one or more renounce and disclaim, the trust may be executed by the others.

*Semble*—Legatees, whose legacies are charged on real estate, are necessary parties to a bill for a sale of such estate in cases not provided for by the 24th, 25th, and 26th G. O.

*Semble*—A deft. who has answered the original bill may demur to the whole amended bill, if the objection for the first time appears on the bill as amended.

V. directed three trustees named in his will, out of the residue of his real and freehold



estates, in aid of his personal estate, by sale, mortgage, or perception of the rents and profits, to levy legacies for his children, A., B., and C. One trustee renounced. A bill was filed for an administration of the real and personal estates of V., and to make them liable for a breach of trust, to which the two acting trustees were parties, and which charged A., B., and C. to be out of the jurisdiction, but did not pray process against them. On a demurrer for want of parties—*Held*, that the legal estate being in the two acting trustees, the case was within the 24th G. O., and that A., B., and C. were not necessary parties to the suit.—*Bayly v. Cumming*, 10 I. E. R. 405. (R.)

1. A., in consideration of £2632 advanced by B., his son, in pursuance of an agreement entered into previously, by deed, dated the 21st Nov. 1844, settled his fee-simple estates in strict settlement, and conveyed the lands of C. and K., which he held under a f.-f. grant, to trustees, to sell, and apply the proceeds to pay debts affecting the fee-simple estates, incurred before T. Term 1842; and to take an assignment of those debts, to secure £6000 for A.'s younger children.

The £2632 were secured by a judgment entered up immediately before the execution of the deed of 1844. A schedule to that deed contained a considerable number of judgment debts, entered up after T. Term 1842, but before the judgment securing B.'s advance. *Held*, that upon the construction of the deed of 1844, the trusts of the deed were intended to have priority to B.'s judgment. [Hargreave, C., dissenting.]

C. and K. were held under a f.-f. grant, subject, as to K., to a lease for three lives, all of which, at the execution of the deed of 1844, were alleged to be dead. The deed provided that B. should take proceedings to recover actual possession of K. B. took proceedings for that purpose; but on investigation it appeared that one life was still in being. *Held* (Hargreave, C., *dubitante*), that the proviso was a condition precedent to the carrying out of the contract intended by the deed of 1844; and that, as it had never been fulfilled, B. was not bound to carry out the trusts of the deed.—*In re Blake*, 7 I. C. R. 65. (I.E.C.)

2. When a discretionary trust is vested in trustees, the Court will not interfere with the exercise of the discretion, if it be not capricious or improper, though a suit be instituted to administer the trust funds.

If the trustees do not concur, the Court will distribute the trust fund among the parties equally.

When one of two trustees in whom a discretionary trust was vested resided in Australia, the Court would not act on a scheme for distributing the fund, approved of by his solicitor in the suit and by the other trustee.—*Gray v. G.*, 13 I. C. R. 404. (R.)

### XIII BREACH OF TRUST.

3. Trustee of married woman's separate property, without power of anticipation, joining in a lease for which a fine was paid, and

received by a third person—*Held*, a breach of trust, although the *femme covert* (then a minor) joined in the lease.—*Booth v. Purser*, 1 I. E. R. 34. (C.)

4. A trustee of a money fund, in violation of his duty, lent the trust-money to F. upon the security of a judgment; F. at the time not being aware that it was trust-money. Subsequently F., at the request of the c. q. t., and by direction of the trustee, paid the interest to the c. q. t., who was entitled to it during her life. The trustee afterwards threatened to issue execution on the judgment. F. stated to the c. q. t. that if she did not interfere to protect him against the demand of the trustee, he would be obliged to pay him; and she not having done so, F., as he alleged, paid the money to the trustee, who thereupon satisfied the judgment on record. Upon a bill against F. and the trustee, filed after the decease of the tenant for life, by the person entitled absolutely to the trust fund, it was decreed that F. should pay the money with interest.

The moment a borrower of money becomes aware that it is trust-money, he becomes a trustee of it.—*Sheridan v. Joyce*, 7 I. E. R. 115; 1 Jon. & L. 401. (C.)

5. When a renewable lease is vested in trustees, upon trust to pay the rent and renewal fines, they are guilty of a breach of trust if they permit the tenant for life to take and use the rents, and neglect to take out renewals as the lives fall in.

When, under the provisions of a settlement, the trustees are to renew, and pay the renewal fines out of the rents and profits, and they neglect to renew, and the tenant for life takes the rents, he will be liable to the trustees for any damages they sustain in consequence of their breach of trust.—*Townley v. Bond*, 4 Dr. & War. 240; 2 Con. & L. 393. (C.)

6. A creditor on foot of a paramount charge, went into possession of the debtor's estate under his will, of which she was a trustee, and by which she took some benefit. The will directed the payment of a puisne mortgage out of another fund. She did not pay it, and paid the rents to and for the benefit of the c. q. trusts, without paying it or other puisne incumbrances. In a creditor's suit—*Held*, that she could not be charged with anything beyond the sums appropriated to her own use, as against the principal or interest of her own demand, for the benefit of a puisne creditor, especially as he had been a solicitor, and had advised her, though as a friend and without payment, in the application of the rents.—*Boyd v. Murdock*, 7 I. E. R. 607; 2 Jon. & L. 203. (C.)

7. The ptf. was solicitor for D. At the time of his death D. was indebted to him for costs. On D.'s death he became solicitor for his executor, the deft., who being indebted to the ptf. for the costs of D., and further costs as executor, handed over to him the title deeds of leasehold premises of D. which had been left on special trusts, together with a letter making an equitable mortgage. There were

applicable to the costs funds, which were misapplied. *Held*, that the executor having committed a breach of trust in mortgaging, the solicitor dealing with him was affected by it, and could not recover without an enquiry as to the state of the assets.

*Semble*—He was in no better condition than the executor himself would be.

After a decree to account, a minor deft. attained his age. On a re-hearing, at his application, new enquiries were directed, though there was no new answer filed, and the minor, after coming of age, had contested the case under the former decree.—*Purcell v. Ruckley*, 12 I. E. R. 55. (C.)

1. By settlement on the marriage of A. a power of appointing a trust fund in favour of children was limited to him. A. having a daughter, B., appointed portion of the fund to her. C., a trustee of the settlement, transferred the money into the name of B., who, in the presence of C., transferred it into the name of A. A bill was filed by another *c. q. t.* under the settlement, against the personal representative of C., praying that C. might be charged with a breach of trust in having abetted a fraud on the power of appointment. *Held*, that C. was not responsible.—*Balfie v. Colgan*, 3 I. Jur. 149. (C.)

2. An executor lent £4100 of his testator's assets, on the security of a property, worth then between £60,000 and £70,000, and incumbered to the amount of £27,000. The solicitor for the borrower was employed for the executor. No opinion of counsel was taken on the title, and no searches were made, as these measures had been taken on two occasions within seven years, on other loans. The security having turned out defective in value, the executor was decreed to bring in the money.

Observations on the impropriety of the same solicitor being employed for lender and borrower, in loan transactions.—*Waring v. W.*, 3 I. C. R. 331; 5 I. Jur. 85. (C.)

3. In 1811, H. executed a bond, in which his heirs were not bound, and on which he paid interest until his death in 1820. H., by will, left all his property to W., and directed that all his just debts, legacies, and funeral expenses should be paid by W., whom he appointed executor. W. proved the will, and aliened the lands in 1821, without receiving a pecuniary equivalent. He paid interest up to 1849, under a mistaken belief of their liability. A cause petition was filed in 1853, to recover the amount of the bond, from the representatives of W. *Held* (affirming the order of the M. R., 2 I. C. R. 648), that the claim against W., being founded on a breach of a trust created without a specialty executed by him, was a simple contract debt, and as such barred by the Statute of Limitations, 10 Car. 1, sess. 2, c. 6, s. 3 (*Ir.*)—[*Dunne v. Doran*, 13 I. E. R. 546, supported.]—*Brereton v. Hutchinson*, 3 I. C. R. 361. (C.)

4. The executor of a trustee having been ordered to invest a sum in stock, to the credit

of a cause, and having neglected to do so for two years, during which the funds fell—*Held* (affirming the Master's order) that he was bound to pay the price of the sum in stock on the day on which he was ordered to invest it, with interest, at £3½ per cent. only, from that day.—*Geraghty v. G.*, 3 I. C. R. 414; 6 I. Jur. 335. (R.)

5. When a trustee, at the instance and with the concurrence of one of his *c. q. trusts*, invests trust funds in an unauthorised security, whereby loss occurs, the trustee cannot compel the concurring *c. q. t.* to indemnify him from that loss, unless so far as the *c. q. trust's* interest in the trust fund may extend; or unless there be a special contract to indemnify the trustee.—[*Trafford v. Boehm*, 3 Atk. 440, explained.]—*Browne v. Maunsell*, 1 I. Jur. N. S. 197; 5 I. C. R. 351. (C.)

6. When trustees, in good faith, invest on a security not in strictness justified by the instrument creating the trust, but which is practically secure, and from which no loss to the trust fund occurs, they will not be decreed to pay the costs of a suit to compel them to bring in the fund so invested.

In this case the Court refused the trustees their costs, and directed the petitioner's costs to be paid out of the fund.—*Fitzgerald v. F.*, 6 I. C. R. 145; 2 I. Jur. N. S. 89. (C.)

7. An unregistered judgment of 1847 was, by deed of 1849, assigned to a trustee upon trusts declared by a marriage settlement of equal date. The *c. q. t.* having wished for some further security, the judgment of 1847 was in 1851 registered as a mortgage against lands belonging to the conuzor, before the passing of the 13 & 14 Vic., c. 29. Neither the *c. q. t.* nor the trustee was aware of the want of proper registration. The judgment was not properly registered until 1854. *Held*, that the trustee was liable to make good any loss occasioned by the want of due registration.—*Lester v. L.*, 6 I. C. R. 513; 2 I. Jur. N. S. 313. (C.)

8. A. was trustee of a settlement, part of the trust fund being secured by bond. B., the executor of the obligor, with the assent of A., lent the sum secured by the bond, and all the assets of his testator, on mortgage of an estate, which, in consequence of the depreciation of property at the time, was sold in the I. E. Court for a sum insufficient to reach the mortgage. In a suit by the *c. q. t.* of the settlement and the legatees of the testator, A. and B. were ordered to bring into Court the amount secured by the bond, in equal shares; and B. was ordered to bring in the remainder of the assets, without prejudice to any proceeding by A. against B. on foot of the bond. *Held*, that A. could not in Equity recover from B. the moiety of the sum secured by the bond, which he had paid into Court under the decree.—*Montgomery v. Waring*, 6 I. C. R. 533. (R.)

9. By the Baths and Wash-houses Act, 9 & 10 Vic., c. 87, the Town Council of a borough,

or the Commissioners of a city or town, are empowered from time to time to contract for the purchasing or renting of any lands necessary for the purposes of the Act, and to contract for the purchase or lease of any baths already or thereafter to be built and provided in any such borough, or such city or town, and appropriate them to the purposes of the Act. It provided that the baths and wash-houses so purchased or leased should be deemed to be within the Act as fully as if they had been built or provided by the said Council or Town Commissioners. "Lands" are defined by the Act to mean lands, tenements, or hereditaments, of whatsoever nature or tenure. The Town Council of a borough contracted to purchase baths and wash-houses which had been commenced by a private society, and were held under a sub-lease of a portion of lands comprised in a lease of a portion of lands demised by the owner of the fee, and which were thus subject to two rents in addition to the rent reserved by the sub-lease. *Held*, that the Town Council were empowered to purchase such an interest, if the title were good; but, the title being bad, the Court refused to enforce specific performance of the contract, which would be a breach of trust by the Town Council.—*Mulholland v. Mayor of Belfast*, 9 I. C. R. 204. (R.)—[*Affd.*: 9 I. C. R. 292; Dr. Rep. temp. Napier, 539. (C.A.)]

1. L., on his marriage, gave a bond and warrant to the trustees of his settlement, upon trust, "when the trustees should think fit and expedient so to do," to levy the amount, and hold it for the uses of his settlement. No judgment on the bond was ever entered; and the amount of the bond was lost. *Held*, that the discretion conferred upon the trustees was not absolute, but to be controlled by the Court; and that the circumstance that enforcing the bond might have been injurious to L.'s credit as a trader, and have lost him various situations, did not justify them in omitting to enforce the bond.—*Luther v. Bianconi*, 10 I. C. R. 194; 5 I. Jur. N. S. 138. (C.)

2. In order to let in evidence of wilful default by a trustee, there must be specific allegations of default.

A general charge of wilful omission to let lands is not sufficient to lay ground for evidence of any particular omission.—*Lambert v. L.*, 10 I. C. R. 500. (C.)

3. An insolvent having committed a breach of trust, the *c. q. trustent* made with him an arrangement whereby they were paid part of their debt, and received for the remainder the best security he could give. *Held*, a condonation of the breach of trust; and that they should not be allowed to oppose.—*In re Lynch*, 6 I. Jur. N. S. 143. (B.)

4. In Ireland, a loan of trust funds, on a second mortgage, is not of itself, and in the absence of other incumbrances, a breach of trust.

A sum charged upon lands was, by marriage settlement, assigned upon trust, to pay the interest to A., the husband, for his life,

and, after his death, in trust, to pay the wife, B., a jointure of £200 a-year, provided that it should be lawful for A., with the written consent of the trustees, to call in the trust fund, and lay out and dispose of the same in the purchase of an estate of inheritance or freehold for a term of at least three lives, or of a lease for a term of years, whereof 99 years should be unexpired, or otherwise advantageously; which purchase or disposal, when so made, should be settled and vested to the several uses, &c., thereinbefore mentioned, in respect to said sums. Portion of the fund was paid to the surviving trustee, who lent it to A., on a release being executed by A., B., and C., their son, and acknowledged and enrolled under the Act Abolishing Fines and Recoveries. *Held*, after the death of A., in a suit by B. to replace the trust fund, that the release as to her was inoperative.

Money, subject to be invested in lands, in the 3 & 4 W. 4, c. 92, s. 68, means money directed to be so invested.—*Smithwick v. S.*, 12 I. C. R. 181; 6 I. Jur. N. S. 282. (R.)

5. Personal estate was by settlement vested upon trust, for R., a married woman, for life, without power of anticipation; if no issue, and M., the husband, survived her, as R. should appoint; if R. survived, for her absolutely. W., acting trustee at the instance of R., applied the settled property in discharge of M.'s liabilities. M. died. By R.'s request, W. took no steps to realise M.'s assets. R. married again, after the lapse of some years. Her settlement recited her wish to give credit to W. for all payments made by the trustees at her request, in breach of trust. *Held*, that R. had lost her right to make the trustee liable.—*Rutherford v. Maziere*, 13 I. C. R. 205; 7 I. Jur. N. S. 210. (C.)

6. Executors are not relieved from the consequences of a breach of trust, by presenting a petition under the 13 & 14 Vic., c. 89, s. 11.

A special case should be framed thus:—A statement of the facts, followed by a series of interrogatories, signed by a counsel on each side.—*In re Trusts of Guinness's Will*, 8 I. Jur. N. S. 24. (R.)

7. Marriage articles recited that the intended wife was entitled to legacies, which had not been reduced into possession, but were computed to amount to £2000. It was agreed that, in consideration of the wife's fortune, the husband should execute a bond, conditioned to pay £2000, with warrant of attorney to confess judgment, which should be vested in trustees, in trust, that they should, when they should think fit, call in the amount secured, and invest the sum so realised in the funds or on mortgage, and permit the husband to receive the interest for life, or until he should become bankrupt or insolvent, or enter into a composition with his creditors; and after his decease, or on his becoming bankrupt, &c., to permit the wife to receive the interest for her separate use for life, and, after her decease, in trust, for the issue of

the marriage. The articles contained a covenant with the trustees that if, at any time during the coverture, any real or personal estate or property should descend or devolve, or become vested beneficially in the wife, or any person in trust for her, the husband should do all necessary acts to vest same in the trustees, upon the aforesaid trusts. The trustees paid two of the legacies recited in the articles, which came to their hands, to the husband, who was a trader, while he was solvent, but did not enter judgment on the bond until three years after the marriage, when he was insolvent, though they registered the warrant of attorney. *Held*, that the covenant did not apply to the legacies recited in the articles, and therefore the trustees were not guilty of a breach of trust in paying them to the husband.

That, as the husband had no land on which the judgment could be attached, the trustees were not guilty of a breach of trust by not entering the judgment forthwith.—*Macken v. Hogan*, 14 I. C. R. 285. (R.)

1. A will directed that no part of the testator's property, except the interest in a house, should be sold or disposed of for ten years only, if thought advisable by the executors, and bequeathed his property to his son, a minor. The executor sold the interest in the house to the respondent, who had notice of some restriction on the executor's power to sell. There were not any debts. In a suit to impeach the sale—*Held*, that the respondent was bound to prove that the sale, being a breach of trust, was at full value.—*M'Mullen v. O'Reilly*, 15 I. C. R. 251. (R.)

2. A fund was vested in trust for A. for life; and, after his death, in trust, for his son B. The trustees allowed A. to receive it. A. died, leaving assets, and bequeathing personal property, far exceeding in value the trust fund, to B., subject, nevertheless, to life interests, and having devised to B. real property, expressly in satisfaction of the trust fund claimed by him. B. filed a petition against the trustees, to compel them to replace the fund, and claiming a right to elect to take it against the devise. *Held*, that A.'s personal representative was a necessary party to the suit.

In a suit to compel trustees to replace a fund wrongfully paid to a person entitled to a life interest in it, he or his personal representative is a necessary party, notwithstanding the 28th G. O. of the 27th March 1843.—*Burrows v. O'Brien*, 15 I. C. R. 423. (R.)

3. It is a breach of trust for a trustee of a term in a settlement to secure portions to assign the term for the principal, unless he, at the same time, receives all arrears of interest then due.—*Cox v. Leigh*, 10 I. Jur. N. S. 185. (R.)

4. Moneys clothed with trusts were lodged by the trustee in the hands of his banker,

who was fully aware that they were trust-moneys. The trustee afterwards withdrew them, in order to apply them to purposes foreign to, and in breach of the trusts; the bankers having knowledge that a breach of trust was contemplated when they paid out the moneys. *Held*, that the bankers participated in the breach of trust, and must replace the moneys.—*Johnson v. Gray*, 11 I. Jur. N. S. 81. (C.)—[*Rev'd*: L. R. 3 H. L. (E. & I. App.) 1.]

5. In a suit against an executor for a breach of trust committed by his testator, a decree declared him liable for the breach of trust, and directed an account of the assets. The executor was reported a creditor against the assets for a debt of a firm of which the testator had been a member. After the filing of the bill, but before decree pronounced, the executor assigned the debt. The final decree ordered him to pay the sum found due in respect of the breach of trust; and afterwards a sequestration was obtained to attach a sum carried to his separate credit on account of the debt reported due to him. *Held*, that the debt having been assigned *pendente lite*, the ptf. was entitled on the final allocation to be paid the sum decreed to him in preference to the executor's assignees.

A judgment at law was obtained against the endorsee of a bill of exchange. In a suit to administer the acceptor's assets, the report found the full amount of the debt. Afterwards, the endorsee paid several sums on account of the debt. The assets proving deficient, the debts were decreed to be paid rateably. *Held*, that the sums paid by the endorsee should be deducted from the amount reported, in calculating the rateable proportion of the assets to which the creditor was entitled.—*Cummins v. C.*, 16 I. C. R. 156. (B.)

#### XIV. NOTICE OF BREACH OF TRUST: ITS EFFECT.

[*See NOTICE, ante*, p. 641.]

6. A purchaser, with notice implied or constructive, from a trustee, will be bound by the trust, although there has been a fine levied to him, and five years' non-claim.—*Thompson v. Simpson*, 2 Dr. & War. 459, 486. (C.)

7. T., a trustee, lent trust-money on mortgage to M. By an arrangement, on the marriage of M.'s daughter, a valuable leasehold interest was granted by M. out of the mortgaged premises, and put into settlement, T. being the person who managed it, and being the solicitor who prepared the lease and settlement. Neither husband nor wife was informed of the mortgage. Afterwards, T., with his co-trustee and their c. q. t., filed a bill to foreclose the mortgage, and sell, discharged of the lease, if necessary. *Held*, that the parties deriving under the settlement must be fixed with notice of the mortgage and trust; and could not, even as against T., rely on his conduct as a defence, or object to his being a co-ptf.

*Quere*—If notice had not been shown, would such an equity against a trustee be a defence?—*Twycross v. Moore*, 13 L. E. R. 250. (C.)

#### XV. TRUST TO SELL, AND PAY DEBTS.

1. The execution of a trust-deed for (amongst other purposes) paying creditors, does not constitute a creditor, who became so after its execution, and who was not a party thereto, a *c. g. t.* entitled to require the trustee to execute the trusts.

A. executed a trust-deed, appointing B. trustee for specified purposes, one of which was to pay creditors; another was to raise a sum by mortgage to satisfy a claim for rent due in respect of A.'s lands, and payment of which was then about to be enforced by ejectment. C. advanced money to B., who there-with satisfied this claim. B. afterwards gave C.'s solicitor a letter written subsequently to, but dated before the day on which the advance had been made. In that letter, B., appearing to ask for an advance, stated:—"I will consider such advance as raised by me under the power given me, and will, whenever you please, exercise that power by securing such advance in the best manner I am empowered by the deed." B. never executed a security. C. filed a bill against him to carry the trusts into execution, and charge the estates under the deeds with payment of his advance. *Held*, that the bill was unsustainable, since C., not being a party to the deeds, could not enforce execution. That the letter could not make him a *c. g. t.* under the deeds, as it purported only to give him a mortgage of the estates for the life of the tenant for life, whose death had prevented the mortgage being effected.—*La Touche v. Earl of Lucan*, 2 Dr. & Wal. 432; 7 Cl. & F. 772; West, 477.—[Rev. 2 Dr. & Wal. 271. (C.)]

2. When a party creates a trust by deed to pay debts, which deed is executed by some of the creditors, the estates thereby conveyed become so bound by the trust, that the Court will execute them at the suit of a creditor who has not signed the deed; provided he has not by his acts repudiated it, but has acquiesced in it.—*Field v. Lord Donoughmore*, 1 Dr. & War. 227. (C.)—[Rev. on re-hearing the decree of Lord Plunket, reported 2 Dr. & Wal. 630. (C.)]

3. A. was indebted, but none of his debts affected real property. By deed poll he conveyed some of his real estates, on trust, to raise money "for the purpose of paying all debts due by him to any person whatsoever, and which then affected his said estates thereby conveyed." A. was then indebted on bonds with which he had given warrants of attorney. No judgments had been entered. *Held*, that the trust included his bond, but not his simple contract debts.

The parties' acts cannot be allowed to affect the construction of deeds.—*Douglas v. Allen*, 2 Dr. & War. 213; 1 Con. & L. 367. (C.)

4. In 1793, C. executed his bond with warrant of attorney, and in 1779 devised his real estates in trust to sell and pay his debts, and subject thereto to his co-heiresses and their heirs. He died in Feb. 1804, and in March 1804 the obligee in the bond caused judgment to be entered on it as of the preceding Term. In 1826, the co-heiresses of C., for value, conveyed his real estate, subject to his debts, to W. and his heirs. The judgment of 1804 was not revived or redocketed pursuant to the 9 G. 4, c. 35. *Held*, nevertheless, that it was a valid charge affecting the real estate of C. in the hands of W.—*Cockburne v. Wright*, 6 L. E. R. 1; Long. & T. 443. (E.E.)

5. A person who had borrowed money from a trustee without notice of the trust, and after notice of the trust repaid it, as alleged, under threat of legal proceedings, to the trustee, decreed under the circumstances to pay it to the *c. g. t.* notwithstanding the alleged previous payment.

A witness proved a letter to have been duly posted, and properly directed. The receipt of it was positively denied in the answer. The copy tendered in evidence had a defective direction at the foot of it.

*Quere*—How far admissible in evidence?—*Sheridan v. Joyce*, 7 L. E. R. 115; 1 Jon. & L. 401. (C.)

6. A. being seized for life of estates X. and Y., remainder to his son B. in tail, they joined in suffering a recovery, and conveyed the estates to trustees as to Y. in fee, on trust to sell, and out of the proceeds to pay incumbrances affecting the estates and debts of A., and subject thereto to the use of A. in fee, and as to X. to uses which were revocable. P. was a judgment creditor of A., but neither he nor any other creditor was a party to the deed. C. being himself a creditor of A., agreed to purchase Y., the purchase-money to be applied by him in payment of the debts. By a deed, to which the trustees and A. and B. were named parties, it was conveyed to him in fee in consideration of the purchase-money, to be paid and applied by him in discharge of the scheduled debts, among which was P.'s judgment. The uses of X. were revoked by A. and B., and it was conveyed to indemnify C. The trustees not having executed the purchase-deed afterwards conveyed the legal estate to C., but it was declared that they should not be answerable for the title or application of the purchase-money. P.'s judgment was not paid; but a sum which had been retained to meet it was afterwards paid by C. to A. with the consent of B. *Held*, that P., not having been a party to any of the deeds, could not sustain a bill to raise the judgment under the trusts of them.

That the conveyance to C. was substantially an execution of the trusts of the first deed, and therefore defeated the ultimate fee limited to A., and consequently the judgment never was a lien on more than A.'s life estate.

*Semble*—That the purchaser of an equitable estate, who got a transfer of the legal estate before execution issued on a judgment, would

not (before the 3 & 4 Vic.) be subject to the judgment, although he had express notice.—*Browne v. Cavendish*, 7 I. E. R. 369; 1 Jon. & L. 606. (C.)

1. A debtor assigned his house and business, in trust, to pay his debts; retaining to himself the management of the business under the superintendence of the trustees, who, on his failing to perform his covenants in the trust-deed, were thereby empowered, after giving him three months' notice, to sell the house and business. Such a notice was given, but waived by consent of the creditors and trustees assembled at a general meeting. Afterwards, without further notice, the trustees sold the house and business. *Held*, that the sale was unlawful and unauthorised.—*Tomney v. White*, 3 H. L. Cas. 49.

2. V. devised all his property, real and personal, to X., Y., and Z., on trusts therein-after mentioned. He then directed that his just debts should be paid by his executors thereafter named, as soon as conveniently might be after his decease, and nominated X., Y., and Z. his executors. *Held*, that there was a trust created to pay debts.

Two counsel only are to be heard on each side in this Court.—*Bentley v. Robinson*, 10 I. C. R. 287; 5 I. Jur. N. S. 7. (C.A.)

3. V., tenant for life of his estate, bequeathed to a trustee, whom he named one of his executors, all rent, and arrears of rent, which might be due to him at his death, upon trusts, and, as to the residue, in trust for minors, who were afterwards made wards of Court. He authorised his executor or executors to pay and satisfy any debts owing, or claimed to be owing, by and from him or his estate, and any liabilities to which he or his estate might be subject, and to accept any compensation or any security, real or personal, for any debt or debts owing to him or his estate, and to allow such time for the payment of any such debt, or compensation for a debt, either with or without taking security for it, as should be reasonable, and also to compromise and compound or submit to arbitration, and settle all debts, &c., and, generally, to act in relation to the premises in such manner as he or they should think expedient, without being liable for any loss which might be occasioned thereby; and gave power to his trustee to give receipts, and exempted him from liability for involuntary loss. *Held*, that the trustee or the executors were not authorised by the will to sell the arrears of rent.—[Affirmed: 13 I. C. R. 137; 7 I. Jur. N. S. 89. (C.A.)]

The executors sold the arrears, which amounted to £49,709. 9s. 6d., to the remainderman for £20,000, payable in four annual instalments. *Held*, having regard to the circumstances of the estate, and the remedies which the executors and the remainderman respectively had to recover the arrears and the accruing rent, that the executors were not chargeable with the entire amount of the

arrears recovered by the remainderman.—[Reversed: 13 I. C. R. 137; 7 I. Jur. N. S. 89. (C.A.)]

The executors, having acted improvidently, and without the sanction of the Court, were charged with £25,000, the sum for which it would have sanctioned the sale of the arrears at the time when it was made. Executors are not to be charged with debts which there is reasonable ground for believing they would not have recovered.

*Semble*—The remainderman should have been a party to a suit to charge the executors of the tenant for life with the arrears of rent sold to him.—*Alexander v. A.*, 12 I. C. R. 1. (R.)

#### XVI. USES AND.

[See also, ESTATE, ante, p. 269.]

#### TRUSTEE RELIEF ACTS.

[See TRUSTEE I, 1, APPOINTMENT OF.]

#### TRUSTEES.

- *When necessary Parties.* See PLEADING, PARTIES.
- *Becoming Lunatic.* See LUNATIC, VIII.
- *Interest in case of.* See INTEREST PECUNIARY, I.
- *Infant Trustee.* See INFANT, IV.
- *Undue Advantage taken, or Purchase made by.* See FRAUD, VII.
- *And Executor.* See EXECUTOR, IX.
- *Costs of and by.* See PRACTICE, COSTS.
- *Payment into Court by.* See PAYMENT INTO COURT.
- *Appointment of Receiver over.* See PRACTICE, RECEIVER. See HUSBAND AND WIFE—INFANT, IV—STATUTES, CONSTRUCTION OF, II, 91.

[See Trustee Relief Act, 11 & 12 Vic., c. 68; Trustee Act 1850, 13 & 14 Vic., c. 60; repealing 11 G. 4 & 1 W. 4, c. 60; 4 & 5 W. 4, c. 23; and 1 & 2 Vic., c. 69). See also Trustee Extension Act, 15 & 16 Vic., c. 55; Law of Property and Trustees Relief Amendment Act, 22 & 23 Vic., c. 35; Law of Property Amendment Act, 22 & 23 Vic., c. 38; Trustees and Mortgagees Act, 23 & 24 Vic., c. 145.

General Orders under these Acts, Oct. 8, 1848; Feb. 24, 1853; May 2, 1853. See Reilly on Summary Petition, 417–421.]

#### I. APPOINTMENT AND CONSTITUTION OF.

1. *In general, and under Powers and under the Statute.*
2. *By the Court.*

#### II. ACCEPTANCE OR DISCLAIMER OF TRUST BY.

#### III. RELEASE, REMOVAL, AND DISCHARGE OF.

#### IV. RIGHTS, POWERS, DUTIES, AND PRIVILEGES OF.

1. *Generally.*
2. *Investment of Trust Fund—Management of Trust Property.*

3. *Discretionary Powers of—How controlled.*

- a. *In general, and when controlled by the Court.*
- b. *When not.*

## V. DISABILITIES OF.

1. *Purchases, &c., of Trust Estates by.*
2. *As Witnesses.*

## VI. LIABILITIES OF.

1. *In general.*
2. *For each other and Third Parties.*

## VII. THEIR ACCOUNTS, ALLOWANCES, AND COSTS.

## VIII. BANKRUPTCY, INSOLVENCY, OR ABSCONDING OF: GOING ABROAD, OR REFUSING TO CONVEY.

## IX. TRUSTEE AND CESTUI QUE TRUST.

1. *In general.*
2. *Lien and Rights of Trustee as against Defaulting Cestui que Trust.*

## X. TO PRESERVE CONTINGENT REMAINDERS.

## I. APPOINTMENT AND CONSTITUTION OF.

1. *In general, and under Powers.*
2. *By the Court.*

I. 1. *Appointment and Constitution of: generally, and under Powers and under Statutes.*

[Surviving or continuing trustee may appoint new trustee; 23 & 24 Vic., c. 145, s. 27. 53rd G. O., Oct. 8, 1848, and May 2, 1853.]

1. The Court will not appoint a new trustee under the 1 W. 4, c. 60, s. 22, in the place of a person who, though named as trustee, has not accepted the trust.—*In re Quinlan*, 1 Jones, 549. (E.E.)

2. The Court would not appoint a new trustee under the 1 W. 4, c. 60, s. 22, when the old trustee had acted and was within the jurisdiction, but refused to act any longer.—*In re Hosaford*, 1 Jones, 550. (E.E.)

3. A.'s interest in leasehold lands having been set up for public sale under writs of *fi. fa.*, C., his attorney (being the real ptf. in one of the writs, but not pressing the sale). attended; made the largest bidding; was declared the purchaser; and paid the purchase-money, which was not more than enough to satisfy the writs prior to his own, and the expenses. A., alleging that C. had bid as his agent, and had purchased in trust for him, claimed the benefit of the purchase. C. denied A.'s allegations; but offered to give up the purchase, if A. would pay him the purchase-money, and the other demands which C. had on him. A. was not able to raise the purchase-money then, and C. dealt with the lands as his own for ten years. At the expiration of that time, A. filed a bill charging that C. had bid for and purchased the lands as his agent, and in trust for him: that C., at and after the sale,

said so in conversations with friends of A.; and that they, on that understanding, did not bid. All these allegations were positively denied by C. in his answer. Conversations, such as those charged in the bill, were proved by S., a witness for A., to have taken place between S. and C.

On C.'s undertaking to release A. from all demands, the Ld. Ch. of Ireland pronounced a decree dismissing the bill; and afterwards pronounced another decree varying the former one, and directing an issue to ascertain the value of A.'s interest in the lands at the time of the sale. On appeal—*Held*, that both those decrees were erroneous.

That an enquiry concerning such value was immaterial; and that, the material question being whether C., in bidding for and purchasing the property, was acting on A.'s behalf, C. might take an issue to try that question but that C., if he declined to take that issue, should be declared a trustee for A.

That A.'s equity against C. if C. had, in the transaction of the purchase, acted on his behalf, was not affected by the lapse of ten years: there not being any acquiescence by A., and C. having been aware of his rights.

That an attorney, if not acting as such for his client on a particular occasion, may throw off that character, and exercise his rights as an independent man.—*Austin v. Chambers*, 6 Cl. & F. 1.—[This case is not reported in the Court below; but see it, in subsequent stages:—3 Dr. & War. 178; Dr. Rep. temp. Sugden, 85. (C.)]

4. This Court will not appoint a new trustee under the 1 W. 4, c. 60, s. 22, instead of a person who appears never to have accepted the trust, and who refuses to act.—*Mitchell v. Nixon*, 1 I. E. R. 155. (R.)

5. The Court made the usual order of reference to a Master to appoint new trustees of the will under the 1 W. 4, c. 60, s. 22, the devise to the trustees being to them and the survivors of them, and the heirs and assigns of such survivor; and it appearing that the trustees named were both dead: that they had not acted, but had not declined: that they had not been called on to act: and that the survivor's heir-at-law was resident in Canada.—*In re Legg*, 1 I. E. R. 374. (E.)

6. The Court has not power to appoint new trustees under the 1 W. 4, c. 60, unless a case of disability in the present trustees is established.—*In re Pennefather*, 2 Dr. & War. 292. (C.)—*Harte v. Lord French*. *Ibid*, 292.

7. The mere refusal of the trustee to act in the trusts will not bring the case within the 1 W. 4, c. 60.—*In re Hartford*, 1 Con. & L. 394; 2 Dr. & War. 292. (C.)

8. The 1 W. 4, c. 40, does not apply to a case in which the event upon which the appointment of new trustees is sought has been provided for by the settlement.—*In re Laffan*, 1 Con. & L. 395. (C.)

1. It will not be directed by the Court, that in a deed appointing new trustees under the Court, a power to appoint new trustees when required shall be inserted.—*Att.-Gen. v. Madden*, 2 Con. & L. 519. (C.)

2. The interest of a money fund, vested in two trustees, was payable to H. and his wife, for their lives, remainder, as to the principal sum, to F. and his wife. The deed contained a power to appoint a new trustee in case of the death of one of the trustees. One of them died. *Held*, that a bill by F. and his wife, to appoint a new trustee, was maintainable, although there was no proof that the other parties had refused to appoint under the power.—*Finlay v. Howard*, 2 Dr. & War. 490. (C.)

3. The infant tenant in tail of lands decreed to be sold for an equitable charge is a trustee under the 8th and 18th sections of the 1 W. 4, c. 60.—*Peyton v. M'Dermott*, 6 I. E. R. 220. (R.)

4. When lands are decreed to be sold in a mortgage suit, the mortgagor's infant heir-at-law is not a trustee within the 8th or 18 section of the 11 G. 4 & 1 W. 4, c. 60.—*Godard v. Macaulay*, 6 I. E. R. 221. (R.)

5. When it did not appear that the old trustee, though incapable of managing his affairs, was a lunatic, the Court would not appoint a new trustee under the 22nd sec. of the 1 W. 4, c. 63.—*In re Wakeford*, 1 Jon. & L. 2. (C.)

6. In petition cases, under the Trustees Act, arising from trustees being out of the jurisdiction, it should be sworn where the trustee is, as service will be required when the absence is only in England.—*Ex parte Hughes*, 6 I. E. R. 559; 1 Jon. & L. 32. (C.)

7. The heir of a trustee of the lessee's interest in a lease for lives renewable for ever, having been applied to to accept a renewal to him, refused to execute the conveyance. *Held*, that the 8th sec. of the Trustees Act, 11 G. 4 & 1 W. 4, c. 60, did not extend to such a case.—*Fitzgibbon v. Lewis*, 6 I. E. R. 560. (C.)

8. A fund, consisting of govt. stock, was vested upon trusts, for a husband and wife, and their issue. One of the trustees, J., had left this country in 1821, and had not been heard of since 1822; it was, on the petition of the other trustee, referred to the trustee to enquire and report whether J. was possessed of the trust fund, alone or jointly with any person, and upon what trusts, within the 1 W. 4, c. 60; and if so, whether J. was within the jurisdiction; or whether there is any power in the settlement to appoint new trustees: and in case of the Master's reporting in the negative as to the two last matters, then to approve of a fit person to be a trustee

in the room of J.; and of a person in the room of J. to convey to such new trustee, upon the trusts of the settlement. Costs were refused to the petitioner.—*In re Chambers*, 3 Dr. & War. 476. (C.)

9. When a deed gives the power of appointing new trustees to a particular person, the Court is bound to adopt his nominee, unless he refuses to nominate any but a person wholly unfit. Therefore, when the power of appointing trustees was given to H. and J., and the survivor of them, and J. died, and H. nominated new trustees, but in consequence of the interference of R., who had become entitled to J.'s interest under the deed, it was necessary to file a bill to procure a conveyance of the legal estate; and the Master, under the reference made at the hearing, entered into a general enquiry as to the relative fitness of the nominees of H. and R., and selected the nominee of the latter—*Held*, that he was wrong, although the reference had been made in general terms to select a proper person as trustee.

Rules of the Court as to controlling the appointment of trustees in such cases.—*Kennedy v. Turnley*, 6 I. E. R. 399; Dr. Rep. temp. Sug. 415. (C.)

10. When trustees have presented a petition for the purpose of lodging money in Court under the 11 & 12 Vic., c. 68, it is not necessary to present a second petition to have the costs ascertained. The trustees should retain the probable amount of the costs; and, if upon taxation any balance remains in their hands, it may be lodged in Court by side-bar order.—*In re Desmond*, 2 I. Jur. 21. (R.)

11. The Court will appoint a person to execute a conveyance of premises vested in a lunatic trustee, pursuant to 11 G. 4 & 1 W. 4, c. 60, s. 5; but where any trusts remain to be discharged, will require the report of a Master on the subject.—*In re Coffey*, 2 I. Jur. 139. (C.)

12. The Court has not power to order service of a notice of a petition, under the Trustee Relief Act out of the jurisdiction. When the parties interested resided abroad, the Court ordered the petition to stand over until a cause petition should be filed.—*Ex parte Crawford*, 2 I. C. R. 573. (R.)

13. If A., executor and residuary legatee, promises to pay legacies directed by the testator to be paid, and consequently omitted from the will, Equity will enforce the undertaking, and declare A. a trustee for the legatees.—*Sharry v. Garty*, 2 I. Jur. 187. (C.)

14. The practice of the I. E. Court is, to recognise only the actual bidder when he bids in his own name. When he bids, with consent, in another person's name, the Court holds both accountable, unless the bidder has previously declared to the Court that he bids only as a trustee.—*In re Stirling's Estate*, 3 I. Jur. 229. (I.E.C.)



1. One who gets into his possession trust money, which he knows to be such, becomes a trustee, and must account for it.—*Bowen v. Lindsay*, 5 I. Jur. 129. (C.)

2. A trustee, seeking to lodge money in Court under the Trustee Relief Act, must in all cases set forth in his affidavits a succinct account of his reasons for so doing, at the peril of costs.—*Ex parte Hillis*, 6 I. Jur. 26. (R.)

3. A petition to appoint new trustees should be entitled in the matter of the trusts of the settlement and of the Act.—*Therry v. T.*, 6 I. Jur. 61. (R.)

4. A testator bequeathed stocks, shares, and funds to trustees, for E. for life, and then for her children. A suit was instituted to administer the will; the assets were lodged in Court. E. had three children, A., B., and C. In 1837, B. by marriage settlement conveyed £3000 as her one-third share of the trust funds to trustees for her children. The funds in Court were apportioned in 1848, and £1795. 10s. 11d. were transferred to B. as her share, and the respective portions of the different stock and shares were set out in the order. The trustees of the settlement of 1837 declined to act. The Master's certificate found the foregoing facts, and that it was advisable to appoint new trustees, and to vest in them the portions of stocks and shares so apportioned, amounting to £1955. 10s. 11d., and the right to sue for same; that these stocks and shares were subject to the settlement of 1837; and annexed to his certificate the form of an order which he approved of for that purpose. *Held*, that the Court could not vest in the new trustees the specified portions of stocks and shares so apportioned, amounting to £1955. 10s. 11d., or the right to sue therefor. An order was made appointing new trustees under the Act, and vesting in them the right to sue for the £3000, or the one-third share of the securities mentioned in the settlement of 1837.—*In re Grant's Trusts*, 6 I. Jur. 197. (R.)

5. Parties having, by order of the Court, been declared trustees for others within the Trustee Acts of 1850 and 1852, the Court subsequently made an order vesting their interest in those others.

*Semble*—That the Court will not, under 4 & 5 W. 4, c. 78, order the Master to execute a deed, conveying real property, for a married woman.

A notice of motion must be properly entitled in the matter of the statute under which the application is made.—*Foster v. Higgins*, 2 I. Jur. N. S. 75. (R.)

6. A. devised the lands of G., whereof he was seized in fee, to P., B., and H., successively in strict settlement; and the lands of C., whereof he was seized in tail, to M. Upon the deaths of P. and B., H. entered into receipt of the rents of both properties. The will had appointed P. guardian of M. But

M., when H. entered into receipt of the rents of both properties, continued to reside with, and to be maintained by him. In a correspondence she was described as being "in his possession." *Held*, that H. had made himself a trustee for her, of one or other of the properties, and was bound to exercise for her the right of election.—*Morgan v. M.*, 2 I. Jur. N. S. 166. (C.)

7. The respondent alleged that the petitioner, who was the respondent's uncle, in consideration of the respondent's continuing his studies for the bar, and not returning to literary pursuits, as he wished to do, gave him this cheque:—"Strabane, Oct. 3rd, 1857. To the managers of the Bank of Ireland. Pay to Thomas Neilson Underwood, Esq., the sum of £1701. 8s. 2d., placed to my credit by Messrs. Arbuthnot, Latham & Co., merchants, London.—Thos. Neilson." The respondent handed this cheque to his aunt to keep; and the petitioner added that he would give respondent another sum to invest in land, for the use of the respondent and his aunt. On the 17th March 1858, the petitioner placed to the respondent's credit £6200, which satisfied him touching the sincerity of the petitioner's promises. In order, as the respondent alleged, that the purpose for which those moneys were given might be known, in the event of anything happening to him during the petitioner's lifetime, the respondent prepared, and the petitioner signed, this memorandum:—"Having given to my nephew, Thos. Neilson Underwood, a cheque for £1701, and also put to his credit there a sum of, in all, about £5000, I expect him, and he has agreed to invest the same in profitable land, paying at the least £5 per cent., with a house in which I can reside with my sister, if she wishes to leave Strabane, and with him, when he pleases; and until he obtains what I wish and require, he is to put the money now in his own name in some safe place, which will give him interest, to supply his house, and enable him to prosecute his studies for the Profession in London, as is my wish and desire.—Strabane, April 24th 1858.—Thos. Neilson."

The respondent, on the 21st Jan. 1859, invested these sums, in his own name, in the purchase of £8830. 12s. 8d. consols, in reliance on the above memorandum, and made several abortive attempts to purchase land.

The petition prayed that the respondent should be declared possessed of the moneys in trust for the petitioner, to whom they should be transferred; and for an injunction to restrain any other transfer, and to prevent the respondent receiving the dividends, and to set aside the memorandum as obtained by surprise, fraud, and undue influence. The respondent's case was, that the moneys were gifts to him. *Held*, that neither of the sums was a gift.—*Neilson v. Underwood*, 5 I. Jur. N. S. 255. (C.)

8. When the personal representative of a mortgagee assigns the mortgage, the heir

of the mortgagee being out of the jurisdiction, the assignee may, under the 19th sec. of the Trustee Act, 1850, obtain an order vesting the legal estate. The relief given by that section is not confined to the case of re-conveyance to the mortgagor.—*In re Quinlan's Trusts*, 9 I. C. R. 306. (C.A.)

1. When an executor parts with any portion of his testator's assets, under circumstances which must be reasonably taken to make the purchaser aware that they were sold, not for the benefit of the estate, but for that of the executor, the purchaser holds them as if, respecting them, he himself was the executor.—*Walker v. Taylor*, 6 I. Jur. N. S. 376. (H.L.)

2. Four judgments affecting B.'s estate were purchased by A., his solicitor, for less than the amounts due thereon. Two of them were assigned to A. by a deed, in which B. joined. A., shortly after B.'s death, bought the third; and the fourth, while he had carriage of the proceedings in a suit to administer B.'s estate, sold in the I. E. Court. On settlement of the final schedule—*Held*, that A. could not stand thereon as a creditor respecting the judgments for more than he paid, with interest, and the costs of the assignments.—*In re Johnstone's Estate*, 7 I. Jur. N. S. 36. (L.E.C.)

3. Right of executrix's husband, out of the jurisdiction, to execute an assignment, vested in another person under the Trustee Relief Act, 1850, s. 22.—*In re Trusts of Tisdall's Will*, 7 I. Jur. N. S. 189. (R.)

4. Costs of appearing by counsel at the argument are not allowed to a trustee who has brought in the fund under the Trustee Relief Act, when all the beneficiaries are free from disability, and the case has been fully argued on their behalf, although the contrary practice prevails in England.

The costs of lodgment, and of the motion for costs, will be given.—*Lockhart's Trusts; ex parte Lady Lockhart*, 11 I. Jur. N. S. 245. (R.)

5. When, in the inception of a trust, the funds are vested in two trustees, one of whom then dies, the survivor is entitled to have the advice and co-operation of a new trustee, before dealing with the principal of the trust funds in any way which involves a question of discretion.—*Livesey v. O'Hara*, 14 I. C. R. 12. (C.)

6. A tenant applying for a f.f. grant or renewal is bound to pay rent and fines due before his landlord's title to the reversion accrued. As to such rent and fines, the landlord is a trustee for those entitled.—*Courtenay v. Parker*, 16 I. C. R. 320. (R.)

7. In 1818, J., by will, reciting that he was possessed of lands held under an agreement for a lease for 999 years, and called Waters's lot, devised them in trust for the sole use of

his daughter H. (then unmarried), and her assigns. In 1822, H. married; but Waters's lot was not affected by the settlement then executed. In 1823, J. died. A lease was afterwards made to H.'s husband, and his executors, &c., of Waters's lot, for the residue of the 999 years. In 1864, the husband died, having devised Waters's lot to parties other than H., who survived him. *Held*, that the interposition by J., of trustees in the devise for H.'s sole benefit, excluded her husband's marital right, and that he was a trustee of the lease for H.—*Massy v. Hayes*, 11 I. Jur. N. S. 241. (C.)

#### I. 2 By the Court.

[Power of the Court to appoint new trustees; 13 & 14 Vic., c. 60, s. 32, &c.; 15 & 16 Vic., c. 55, ss. 8, 9, 10.]

8. A trustee of chattels real and of stock, having acted in the trusts, died, and appointed executors resident within the jurisdiction, who proved his will, but never acted, and refused to act in the trusts, which were still continuing. *Held*, that the Court had jurisdiction to appoint new trustees under the 1 W. 4, c. 60, s. 22.

The original trustee having committed a breach of trust, the Court appointed new trustees; the executors of the old trustee undertaking to replace the trust fund.—*Muley v. Smith*, 4 I. E. R. 497; Long. & T. 241. (E.E.)

9. The Court never appoints a new trustee without a reference to the Master.—*In re Roche*, 2 Dr. & War. 287; 1 Con. & L. 306. (C.)

10. Form of order for the appointment of a new trustee under the 1 W. 4, c. 60, in the room of a trustee who resided out of the jurisdiction, and the trust fund consisting merely of government stock in the Bank of Ireland.—*In re Chambers*, 3 Dr. & War. 498. (C.)

11. A person was named as a trustee in a marriage settlement of 1821, but did not execute or act in the trusts of it. After the death of his co-trustee, he, in 1844, refused to act in the trusts. The Court, upon the petition of the tenant for life, under the 1 W. 4, c. 60, s. 22, refused to appoint a new trustee in his place. After such a lapse of time, it must, in a petition matter, be presumed that the trustee accepted the trust.—*In re Uniacke*, 1 Jon. & L. 1. (C.)

12. The petitioner's marriage settlement authorised the appointment of new trustees in case of the death of either or both of the old ones. One trustee died. The petition prayed the appointment of two new trustees. This prayer was supported by a medical certificate that the surviving trustee was not capable of managing his own affairs; and by an affidavit, that he could not act in executing the trusts, or execute a deed assigning the trust-property to himself and a new trustee, jointly. It did not appear that his illness amounted to lu-

nacy. *Held*, that the Court had not jurisdiction to do so.—*In re Wakeford*, 1 Jon. & L. 2. (C.)

1. Stock was vested in the names of three trustees in trust for the benefit of a lunatic for life; after her death, for her children. The last surviving trustee having died, his widow and executrix refused to prove the will. On petition, the Court appointed new trustees, and directed that they should obtain a limited administration to him in order to procure a transfer of the stock to themselves.—*In re Needham a lunatic*, 6 I. E. R. 557; 1 Jon. & L. 34. (C.)

2. When a deed declaring trusts contained a power to appoint new trustees in case of death, desire to be discharged, or refusal to act of the trustees, and one trustee went to America, and his residence could not be discovered—*Held*, that a new trustee might be appointed under the 11 G. 4 & W. 4, c. 60, s. 22, on petition.—*In re Ledwich*, 6 I. E. R. 561. (C.)

3. Stock was vested in trust to pay the dividends to persons successively entitled for life. One of the trustees had acted by joining in a power of attorney to receive the dividends, but a new power of attorney being necessary, he refused to join in giving it, or in receiving the dividends. There was a power to appoint new trustees vested in the acting trustee of the deed. A petition was presented by the person entitled to the first life interest, to have a trustee appointed to receive and pay over the dividends. *Held*, not a case within the 11 G. 4 & 1 W. 4, c. 60, s. 10.—*In re Byrne*, 6 I. E. R. 563; 1 Jon. & L. 535. (C.)

4. When a bill is filed to appoint new trustees, the amount of the property being small, the Court will order the Master to appoint the trustees at once under the reference, without the necessity of coming back to the Court.—*Clinton v. Watkins*, 7 I. E. R. 489. (B.)

5. A marriage settlement vested a judgment in trustees, and declared that if the wife should, with her husband's consent, think it advisable to call in the sum thereby secured, the trustees should permit her to use her discretion respecting its re-investment.

One trustee having died, and the other being out of the jurisdiction, the wife, with her husband's consent, called in the money. They assigned the judgment to the lender. The surviving trustee refused to execute the assignment, and desired to be discharged from the trusts.

The Court, thinking that the parties' real object was, not to continue the money in settlement; but, under colour of the power, to get it out of settlement, refused to appoint new trustees.—*In re Molony*, 2 Jon. & L. 391. (C.)

6. When a trustee, who did not labour under any disability, declined to act, an application

by petition for a new trustee was granted, although some of the *c. q. t.* were minors, the funds being small.—*Plunket v. Smith*, 8 I. E. R. 523. (E.E.)

7. The Court refused to appoint a new trustee on petition, when the parties' object was to convey an estate to a purchaser pursuant to a contract for sale to which the old trustee ought to have been, but was not a party.—*In re Lloyd and Wife*, 3 Jon. & L. 255. (C.)

8. In considering whether mixed trustees, or trustees of a particular religious denomination or class, of charity estates vested in a Municipal Corporation, should be appointed under the 3 & 4 Vic., c. 108, s. 11, the Court will regard the constitution of the trust, and how it has been exercised, and how matters stood when the Act came into operation in the borough. When the usage has been to apply the charity estate exclusively for the benefit of persons of a particular religious denomination, and such application is not clearly inconsistent with the constitution of the trust, the Court will appoint trustees of that religious denomination only.

Upon a petition to appoint trustees under the 3 & 4 Vic., c. 108, s. 112, the Court has jurisdiction to determine the charity's character only so far as is necessary for the purpose of appointing the trustees; but not conclusively.—*In re The Charity Estates of Drogheda*, 3 Jon. & L. 422. (C.)

9. V., a member of the Church of England, bequeathed money to educate the poor; and appointed two executors, members of his own church, to carry the trusts of the will into execution. *Held* (*per Brooke*, Master in Chancery), that under an order of reference to him to appoint new trustees, he was bound, acting for V., to appoint trustees of the church to which V. belonged.

The other four Masters in Ch. concur in the abstract point, that the Masters in Ch., under an order of reference to appoint new trustees to execute a trust in favour of a charitable object, under the will of a Christian testator, should, if possible, appoint those who are of the same church as that to which the testator belonged.—*The Attorney-General v. Fitzgerald*, 3 I. Jur. 37. (C.)

10. Under the Ch. Reg. Act, the Court will not entertain a petition solely to appoint trustees.—*Gabbett v. Lloyd*, 3 I. Jur. 286. (C.)

11. A., the personal representative of the surviving trustee of a judgment, permitted proceedings to revive the judgment to be taken in his name; but afterwards refused to join in any receipt for the money due on foot of the judgment. The *c. q. t.* of the judgment served on A. a notice, calling on him either to act in the trust, or to resign the trusteeship. A. gave no answer to this notice. On petition filed to remove A. and appoint a new trustee. *Held*, that A. must pay the costs of the suit.—*Wren v. Swanton*, 6 I. C. R. 233. (C.)

1. The Court will not sanction the appointment of a person as trustee of a settlement, when that person takes an interest as *c. q. t.* under the settlement.—*In re M'Cook's Trusts*, 2 I. Jur. N. S. 74. (R.)

2. In a partition suit, the parties' shares being very minute and complicated, the Court, to save expense, instead of directing mutual conveyances, declared each party trustee as to the shares allotted to the others; and then vested the entire trust estate in one new trustee under the Trustee Act, with directions to pay each party his allotted share.—*Boyce v. Woodroffe*, 5 I. Jur. N. S. 57. (C.)

3. The Court of Ch. has not jurisdiction to relieve the Commissioners of Charitable Donations and Bequests from the trusts imposed upon them by Act of Parliament, and to appoint new trustees in their stead.

*Quære*—Has the Court power to frame rules for the management of a charitable institution under the control of the Commissioners of Charitable Donations and Bequests, when a scheme framed by the Commissioners for the administration of the charity is already in operation?—*In re Fanning's Charity*, 15 I. C. R. 384. (C.)

4. Two trustees of real estate appointed under the Trustee Acts, instead of three named in the will creating the trust, under special circumstances, the will not containing a power to appoint new trustees.—*In re Boyle's Trusts*, 17 I. C. R. 247. (R.)

## II. ACCEPTANCE OR DISCLAIMER OF TRUST BY.

5. A person, to whom, with others, a term of years had, in 1810, been bequeathed in trust, and who was appointed, with the other trustee, an executor of the will, was, in 1844, presumed to have accepted the trust, though he had never acted in it, the will having been proved by the other trustees, saving his right, and he never having disclaimed.—*In re Needham*, 1 Jon. & L. 34; 6 I. E. R. 557. (C.)

6. When, stock being invested in the Bank of Ireland in the name of a trustee who declines to act, new trustees are appointed whom the order of appointment declares entitled to a transfer; *Semle*—The former trustee must, without further order, make the transfer.—*Burgh v. Hickman*, 3 I. Jur. 198. (C.)

## III. RELEASE, REMOVAL, AND DISCHARGE OF.

[See 11 & 12 Vic., c. 68; enabling trustees to get rid of a trust by lodging trust funds in Court; also 15 & 16 Vic., c. 60; 15 & 16 Vic., c. 55. Gen. Orders, Oct. 8, 1848; Feb. 24, 1853, and May 2, 1853. Reilly on Summary Petitions, 417, 421, and 424.]

7. *Quære*—Can a trustee, who has accepted the trust, and has not committed any breach

of trust, get discharged by filing a bill, if no other fit person can be found to act, and the *c. q. t.* will not consent to his discharge?—*Ardill v. Savage*, 1 I. E. R. 79. (C.)

8. A. was nominated trustee and executor of a will. Upon a petition presented for his removal, under 1 W. 4, c. 60, s. 22, stating that the will had been produced and shown to A., and read by him previously to its having been executed by the testator in his lifetime; and that A. had thereupon approved thereof and consented to act as such trustee, but that, subsequently to the testator's death, he had declined to interfere in the trusts of the will, the Court made an order for his removal, and referred it to the Remembrancer to approve of a proper person to be appointed trustee in his place.—*Crook v. Ingoldstey*, 2 I. E. R. 375. (E.E.)

9. In a suit concerning trust property, no prayer for the removal of trustees is necessary to give the Court jurisdiction to remove them.—*Att.-Gen. v. Drummond*, 2 Con. & L. 98; 3 Dr. & War. 162. (C.)

10. A release to one trustee in respect of a breach of trust committed in the investment of part of the trust funds—*Held*, to be a release to the other trustee, the release operating as an acceptance of the securities upon which the funds had been invested.—*Blackwood v. Burrows*, 2 Con. & L. 459; 4 I. E. R. 609; 4 Dr. & War. 441. (C.)

11. The Court will not, upon petition, remove a trustee who has accepted the trust, but refuses to continue to act. A bill must be filed for the purpose, the costs of which will be cast on the trustee, if it appears that he has improperly refused to act.—*Anon.*, 4 I. E. R. 700. (E.E.)

12. Stock was vested in two trustees for the benefit of a married woman, with power to lend it on private security at the request of the husband and wife. The wife had a power to appoint new trustees in case of refusal, &c., or whenever she should think it expedient. The husband and wife applied to the trustees to lend the money on a security which one of them disapproved of. The wife appointed another trustee, but the former trustee refused to transfer the fund until satisfied of his safety. On a petition presented under the 1 W. 4, c. 60, s. 10—*Held*, that the case was not within that Act.—*Pepper v. Tuckey*, 7 I. E. R. 572; 2 Jon. & L. 95. (C.)

13. When a trustee, who did not labour under any disability, declined to act, an application by petition for a new trustee was granted, although some of the *c. q. t.* were minors, the funds being small.—*Plunket v. Smith*, 8 I. E. R. 528. (E.E.)

14. A trustee, entitled to be discharged from his trust, must show that some other person is ready to accept the trust. If no person is ready to accept it, the Court may be obliged

to keep the trustee before it, and not discharge him. It will, however, take care that the trustee shall not suffer thereby.—*Courtenay v. C.*, 9 I. E. R. 329; 3 Jon. & L. 519. (C.)

1. The Charitable Bequests Act, 7 & 8 Vic., c. 97, authorising the Commissioners of Ch. Don. to sue for devises or bequests withheld, concealed, or misapplied, and to apply them according to the devisor's intention, gives the Commissioners such an interest as entitles them to file a bill to remove a testamentary trustee for a charity, and to appoint new trustees. The proceeding need not be by information, and such relief will be granted on account of the mere personal unfitness of the trustee.

Form of decree to remove a trustee who may still be entitled to a control as to the objects of the charity.—*Comrs. of Ch. Don. v. Archbold*, 11 I. E. R. 187. (C.)—[Rev'd.: 2 H. L. Cas. 440.]

2. A., the personal representative of the surviving trustee of a judgment permitted proceedings to revive the judgment to be taken in his name, but afterwards refused to join in any receipt for the money due on foot of the judgment. The *c. q. t.* of the judgment served on A. a notice, calling on him either to act in the trust, or to resign the trusteeship. A. gave no answer to this notice. On petition filed to remove A., and appoint a new trustee—*Held*, that A. must pay the costs of the suit.—*Wren v. Swanton*, 6 I. C. R. 233. (C.)

#### IV. RIGHTS, POWERS, DUTIES, AND PRIVILEGES OF TRUSTEES.

##### 1. Generally.

##### 2. Investment of Trust Fund—Management of Trust Property.

##### 3. Discretionary Powers of Trustees; how Controlled.

##### a. In general; when Controlled by the Court.

##### b. When not.

#### IV. 1. Rights, Powers, &c., generally, of Trustees.

8. *Quære*—Is a trustee of leaseholds, settled to a married woman's separate use, bound to see that the head rents are paid, or, otherwise, does he become liable as for wilful default, if the premises are evicted for non-payment of rent?—*Booth v. Purser*, 1 I. E. R. 40. (C.)

4. By marriage settlement £5000 were vested, upon trust, to permit the wife, if she survived her husband, to receive the interest thereof during her life; and if no issue of the marriage, in trust for the husband absolutely, with power to the trustees, with the consent of husband and wife, to invest the money in government, or on real security. The money was afterwards, with consent of husband and wife, lent upon mortgage. The husband died without issue, and by will bequeathed his

interest in the £5000 to A. upon trusts, and appointed him his executor. The wife married B.; and upon her marriage the interest on the £5000 was assigned to A., upon trust, to pay the yearly interest on the £5000 to the wife for life. A. covenanted with the wife that he, his executors, &c., would stand possessed of the premises assigned to him upon the trusts. The £5000 were paid to A. out of the produce of a sale had in a suit in which he was a deft.; and A. represented to B.'s wife that he had invested the money upon government security. He paid her interest according to the rate it would have borne if it had been so invested. The money was not in fact so invested, but was applied by A. to his own use. *Held*, in a suit to administer A.'s assets, that the new trustee of B.'s last marriage settlement was entitled to rank as a specialty creditor for the difference between the amount of the interest actually paid by A., and interest upon the £5000, calculated at 4 per cent.; and also (there being a deficiency of the assets to pay the £5000, which was a debt by simple contract) as a specialty creditor for any future deficiency in the interest, calculated at 4 per cent.—*Jameson v. Farrer*, 3 I. E. R. 346. (E.E.)

5. Two persons, in whom were vested, under an Act of Parliament, the right to the tolls and profits arising from a road for fifty years, conveyed, by deed, the same, and all their estate and interest therein, to A., B., and C. (the deft.), upon trusts therein mentioned; and subject thereto, in trust, for A., B., and C., their executors, &c., as tenants in common, for their own use, for the residue of the fifty years. The deed contained a provision, that if any of the trustees should be unable to join in the direction and superintendence of the road, it should be lawful for any two of the trustees to act of themselves in the management of the road, and in all other things relating to the execution of the trusts. The interests to which A. and B. were entitled under the deed having become vested in the ptf., and C. (the deft.) having taken upon himself the exclusive control and management of the road, and insisted upon his right thereto, and also upon being paid a salary for his trouble and supervision. *Held*, upon a bill filed by the ptf. disputing such right, that the deft. C. was entitled to have the sole management of the road, but that his claim for salary could not be maintained.—*Taylor v. T.*, 4 Dr. & War. 124. (C.)

6. If the infant refuses to execute the conveyance, the Master will be directed to do so in his name, under the 1 W. 4, c. 60, s. 8.

*Semble*—The 4 & 5 W. 4, c. 78, s. 8, does not apply to infants.—*Peyton v. M'Dermott*, 6 I. E. R. 220. (R.)

7. An *elegit* on foot of a judgment will not be issued in the names of new trustees appointed under the Trustee Act, 1850, unless they become parties to the record. They should make themselves parties thereto by

suggestion, or by reviving the judgment in their own names, before seeking to issue the *elegit*.—*M'Cullagh v. Rogers*, 4 I. Jur. 75. (R.)

1. When, in the inception of a trust, the funds are vested in two trustees, and one of them dies, the survivor is entitled to have the advice and co-operation of a new trustee before dealing with the principal of the trust funds in any way which may involve a question of discretion.—*Livesay v. O'Hara*, 14 I. C. R. 12. (C.)

#### IV. 2. Investment of Trust Fund: Management of Trust Property.

2. A., upon his daughter's marriage, executed his bond and warrant to the trustees of the settlement, *habendum*, upon trust, *inter alia*, if the wife died during her husband's life, leaving no issue of the marriage her surviving, or if the surviving issue should all die under age, then the money secured by the bond should not be called in; but the bond and warrant should, after the wife's decease without issue, and whether the husband was then dead or not, be given up to A., his heirs, executors, &c., to be cancelled. It was provided that the money so secured should not be called in during A.'s life; but that, on his death, the trustees might, with the husband's approbation, and, after the husband's death, with the wife's approbation, call in the money. *Held*, that the trustees were bound to accept payment of the money secured by the bond from A.'s executor, although the husband and wife objected to its being paid in.—*Kempland v. Humphries*, 2 Jones, 726. (E.E.)

3. A trustee appointed by will to manage estates (with a salary) during the continuance of a tenancy for life, took a lease at a very low rent, and in consideration of faithful services, from the tenant for life. It exceeded the power of leasing given to the tenant for life. *Held*, that this lease was fraudulent and voidable in the hands of a purchaser for value, who had constructive notice of the nature of the lease, in favour of those claiming the estates after the tenant for life.—*Ker v. Lord Dungannon*, 1 Dr. & War. 541; 1 Con. & L. 360; 4 I. E. R. 348. (C.)

4. Two persons in whom were vested, under an Act, the right to the tolls and profits arising from a particular road, for fifty years, by deed of 1827, conveyed them, and all their estate and interest therein to A., B., and C. (the deft.), on specified trusts; subject thereto, in trust for A., B., and C., and their executors, &c., as tenants in common, for their own use, for the residue of the fifty years. The deed provided that if any of the trustees should be unable to join in directing and superintending the road, any two trustees might act for themselves in managing it, and in all other matters relating to the execution of those trusts. The interests of A. and B. under the deed became vested in the ptf. C. took on himself the exclusive control and management of the road, and insisted

on his right to do so, and to be paid a salary for his trouble, &c. Ptf. filed a bill disputing that right. *Held*, that C. was entitled to the sole management of the road, but that his claim for salary was unsustainable.—*Taylor v. T.*, 4 Dr. & War. 124. (C.)

5. Stock was vested in the names of three trustees, in trust for the benefit of a lunatic for life, and, after her decease, for her children; the last surviving trustee having died, his widow and executrix refused to prove his will. The Court, upon petition, appointed new trustees, and directed that they should obtain a limited administration to the last surviving trustee, for the purpose of procuring a transfer of the stock to themselves.—*In re Needham a lunatic*, 1 Jon. & L. 34; 6 I. E. R. 557. (C.)

6. A power to trustees to lay out money "in the public stocks or funds in Great Britain, or on any mortgage of freehold or leasehold estates, or any other real securities in England, Wales, or Ireland," does not authorise them to lend it on the security of a judgment, even since the 3 & 4 Vic., c. 105, s. 22.—*Johnston v. Lloyd*, 7 I. E. R. 252. (C.)

7. An executor who invested part of his testator's assets in bank stock instead of government stock—*Held*, not accountable for the entire loss thereby occasioned; but only for the difference between the actual loss and the loss which would have been sustained had the money been invested in government stock.—*Hynes v. Redington*, 7 I. E. R. 405; 1 Jon. & L. 589. (C.)

8. By deed reciting that a sum was due on simple contract by the firm of A., B., C., and D., X. assigned it to A. and B. It was declared that they should stand possessed of it upon trusts. The money was misapplied. *Held*, a specialty debt of A. and B. not binding heirs.

Specialty debts in which heirs are not bound have no priority over simple contract debts in the administration of real estate under the 3 & 4 W. 4, c. 104.

Probate to one of several executors vests the property in all; so that on the death of him who proves, the survivor represents the deceased for all purposes without further probate, and without any further acceptance of the office.

When a co-executor, who had not proved, after the death of him who proved, gave a power of attorney to sell a small part of the testator's assets, which was not acted on, and had not further intermeddled—*Held*, a sufficient election to accept the office of executor, so that he could not afterwards renounce.

One of a firm, of which all the members owed a sum vested in two of the partners on trusts, and who had notice of the trusts, retired from the firm leaving ample assets to pay that sum, which continued lent to the new firm, and was applied in breach of the trusts, with knowledge of A. *Held*, that he was responsible to the *cestui q. t.*; for that the

mere retiring and leaving sufficient assets did not discharge his liability, unless they distinctly adopted the new firm as a substituted security for the old one.

A sum being lent on simple contract to a firm, who promised to give a bond for it, was vested in trustees, with power to vary the securities. The fund continued to be lent to the same firm. *Held*, a breach of trust.—*Cummins v. C.*, 8 I. E. R. 723; 3 Jon. & L. 64. (C.)

1. An action of covenant was brought against a trustee, who lodged the amount claimed in Court, and filed an interpleader bill, which, on demurrer, was dismissed with costs. *Held*, that he was entitled to have the money returned, without deducting the costs.—*Doyle v. Dumoncel*, 11 I. E. R. 517. (R.)

2. To indemnify a trustee or executor, who lodges funds in Court under the Trustee Indemnity Act (11 & 12 Vic., c. 68), they must be lodged to the credit of a particular trust. The Court will not make an order when they have been improperly lodged.

Practice under this and the corresponding English Act.—*In re Godfrey's Trust*, 2 I. C. R. 105. (R.)

3. A marriage settlement vested money in two trustees, A. and B., upon trust. By A.'s representation B. was induced to join in placing the trust fund differently from the terms of the trust. On a bill filed by B. against A. praying a restoration of the fund for the purposes of the trust—*Held*, that it was enough that danger might arise to the trust fund to entitle B. to maintain the suit. The Court will presume danger when the trust fund is not in its proper place.—*Atkinson v. Loddell*, 2 I. Jur. 89. (C.)

4. A person indebted to the estate of an intestate, paid his debt to a person authorised by a deed executed by the administratrix to hold the property of the intestate. Her husband, as trustee for her children, was aware of such deed being executed, although no party to it. On a bill filed, charging that the money was paid by the debtor to his son-in-law, who was in embarrassed circumstances, and praying that an account might be taken of the personal estate of the intestate, and the debtor decreed to pay the amount he owed, notwithstanding any payment to the trustee; *Held*, that in the absence of any fraud, and the trust deed having been executed *bona fide*, the debtor was justified in paying the person therein named to receive the amount, and was not bound to see to the application of such money; and that payment to the appointee of the personal representative was payment to such representative.—*Kane v. Musin*, 2 I. Jur. 201. (C.)

5. When, stock being invested in the Bank of Ireland in the name of a trustee who declines to act, new trustees are appointed, whom the order of appointment declares entitled to

a transfer; *See*—The former trustee must make the transfer without further order.—*Burgh v. Hickman*, 3 I. Jur. 198. (C.)

6. When a trustee has in his hands funds to administer, his right is to lodge them in Court under the Trustee Relief Acts, without regard to the effect which the lodgment may have on the liability of other parties as to the payment of costs.—*In re Mussenden's Trust*, 4 I. Jur. 389. (C.)

7. A trustee seeking to lodge money in Court under the Trustee Relief Act, must in all cases set forth in his affidavit a succinct account of his reasons for so doing, at the peril of costs.—*Hillis, ex parte*, 6 I. Jur. 26. (R.)

8. Under the 13 & 14 Vic., c. 60, s. 31, the Court of Ch. will order that stock standing in the Bank to the credit of A. and B., trustees of a marriage settlement, be transferred to the credit of A. and of C. (appointed a trustee in the room of B., gone abroad to evade his creditors); and that a person be named in the place of B. to execute the deeds assigning the trust funds to A. and C.

*See*—The application is properly made to the Lord Chancellor and not to the M. R.—*Read v. M'Neale*, 5 I. Jur. 273. (C.)

9. New trustees of stock, appointed under the 35th sec. of the Trustee Act 1850, called on the person entitled to it to transfer it. He declined doing so—*Held*, that the 23rd sec. entitles them on the expiration of 28 days after such application to apply for an order on the proper officer of the Bank to transfer.

The new trustees are the parties to apply, and the Court has jurisdiction to entertain the application on motion.—*Ex parte Hopkins*, 5 I. Jur. 369. (C.)

10. V. bequeathed stocks, shares and funds to trustees for E. for life, and then for her children. A suit was instituted to administer the will, and the assets were lodged in Court. E. had three children, A., B., and C. In 1837 B., by marriage settlement, conveyed £3000 as her one-third share of the trust funds to trustees for her children. The funds in Court were apportioned in 1848, and £1955. 10s. 11d. were transferred to B. as her share, and the respective portions of the different stock and shares were set out in the order. The trustees of the settlement of 1837 declined to act. The Master's certificate found the foregoing facts; that it was advisable to appoint new trustees, and to vest in them the portions of stocks and shares so apportioned, amounting to £1955. 10s. 11d., and the right to sue for same; that these stocks and shares were subject to the settlement of 1837; and annexed to his certificate the form of an order which he approved of for that purpose. *Held*, that the Court could not vest in the new trustees the specific portions of stocks and shares so apportioned, amounting to £1955. 10s. 11d., or the right to sue therefor. An order was made

appointing new trustees under the Act, and vesting in them the right to sue for the £3000, or the one-third share of the securities mentioned in the settlement of 1837.—*In re Grant's Trusts*, 6 I. Jur. 197. (R.)

1. The legal estate of a mortgage was vested in two trustees, one of whom was out of the jurisdiction. The Court, in order that the mortgage might be re-conveyed to the mortgagor, pursuant to a decree in a foreclosure suit, made an order under the Trustee Relief Act, that the mortgage should vest in the other trustee solely, and directed the costs of the petition to be costs in the suit.—*Corker v. Ryan*, 3 I. C. R. 562; 6 I. Jur. 288. (R.)

2. A., executrix and trustee of £400, lent them on unauthorised security. D., a solicitor, acted for A. in negotiating the loan. D. was aware of the nature of the fund, and that the loan was a breach of trust. The borrowers were D.'s clients; and he omitted to disclose to A. facts within his knowledge, which showed that the loan was in danger of being lost. About one-fourth of the fund was received by D. for his own use, in part as payment of money previously owed him by the borrowers, and in part as costs and commission in relation to the loan. The entire sum was lost by the insolvency of the borrowers. *Held*, on a cause petition, filed by the *c. q. t.*, that D., by his conduct, had incurred the liability of a trustee, and was bound to make good the fund.—*Alleyne v. Darcy*, 4 I. C. R. 199. (C.)

3. When a settlement gives the wife surviving the husband a power to appoint by will, in default of direction, limitation, or appointment by the husband, the legal effect of such provision is, to give the wife a power to appoint, in respect of any portion unappointed by the husband, or not completely or validly appointed by him.

A father, having a power of appointment among all his children, by will, purporting to appoint the whole fund, excluded one child, and appointed a portion of the fund to grandchildren, not objects of the power. *Held*, that the appointment was valid, so far as it related to the portion of the fund appointed to the children.

But having given other legacies by the will to the children, in whose favour he had appointed—*Held*, that they were bound to elect in favour of the grandchildren.

*Quære*—Whether the Court has jurisdiction to decide a question on a petition under the Trustee Relief Act?

*Semble*—The Court has not jurisdiction, under the Trustee Relief Act, to order service of notice of the petition on parties residing out of the jurisdiction.

The prayer of a petition, and notice thereof, under the Trustee Relief Act, should specify the exact order which is sought for, and the precise portions of the fund which are to be transferred to the several parties entitled to it.—*Ex parte Bernard*, 6 I. C. R. 133; 2 I. Jur. N. S. 226. (R.)

4. P., by will, executed in Bath, in 1818, gave £1000, in trust, to be placed out at interest of £5 or £6 per cent., and the interest paid to M. for life, with remainder to M.'s daughters. In 1823, P.'s executors invested £1000 Irish in government stock, to meet that legacy. M. received the dividends on the stock, without complaint, up to 1854. *Held*, that, admitting the devise to be of £1000 British, the personal representative of M. had no right to charge the representatives of P.'s executors with the difference between the dividends paid and the dividends on £1000 British, invested in stock or invested at £5 or £6 per cent.—*Hamilton v. H.*, 7 I. C. R. 516; Dr. Rep. temp. Napier, 217. (C.)

5. Upon the marriage of J., managing director of a Joint-stock Bank, with E., £10,000 were assigned, upon trust, for E., for life, for her separate use; remainder to J. for life; remainder to the issue of the marriage. The money was in the Bank in the trustees' names; and deposit-receipts for that amount were issued in their favour. The money was immediately paid by the Bank to J.'s brother; and the deposit-receipts, endorsed by only one trustee, were taken up. To one trustee J. then sent an ordinary receipt for the £10,000, which, according to the practice, need not be periodically produced to the Bank. This receipt, signed by the then manager, falsely stated that the money was then in the Bank. Letters, leading to the same conclusion, were afterwards written by J. As each gale of interest fell due, E. sent to the trustees a draft which, when returned signed, was handed by E. to J., by whom the amount was supposed to be received. Twelve years after the money was paid out, the Bank stopped payment. *Held*, that the Statute of Limitations was not a bar to a suit by one of the trustees to recover the money.—*Wheatley v. M'Dowell*, 3 I. Jur. N. S. 285. (C.)

6. By marriage settlement, personal property was assigned upon trust for the separate use of the intended wife for life; remainder for her issue, as therein mentioned; in default of issue, to "transfer the sum to, and to the use of the intended wife, her executors, &c., to and for her and their own use and benefit." *Held*, that the limitation in default of issue did not create a trust for the separate use of the wife. Part of the fund comprised in the settlement consisted of a life annuity, and a policy of insurance on the life of the *c. q. vie* of the annuity. There was no direction in the settlement to pay the premiums on the policy; but the trustee paid them out of the income of the settled property, which was payable to the separate use of the wife. *Held*, that it was the duty of the trustee so to apply the income, and that no lien in favour of the separate estate of the wife was created upon the policy or its proceeds for the amount paid to keep up the policy.—*Darcy v. Croft*, 9 I. C. R. 19; 4 I. Jur. N. S. 81; Dr. Rep. temp. Napier, 403. (C.A.)



1. The Court will give advice to trustees, under the 22 & 23 Vic., c. 35, s. 10, in relation to the management of trust property, only while it remains vested in them, and under their control; but not as to any assignment or disposition of it which might render them liable for a breach of trust.—*In re Thomas's Trusts*, 5 I. Jur. N. S. 299. (C.)

2. G. and H., trustees of a settlement, on solicitation of D., tenant for life of the settlement, lent the trust funds on a security which totally failed. G. was a solicitor. In the transaction, no other solicitor was employed for the lenders, and no sufficient investigation of the title was made. *Held*, that the trustees were compellable to replace the trust fund.

That, both being solvent, H. was bound to replace one moiety, and G. the other moiety.

That G. was not entitled to be indemnified by the tenant for life, the *onus* of investigating the title having been cast upon him.

That H. was entitled to be recouped by the tenant for life the amount of his moiety.—*French v. Graham*, 10 I. C. R. 522. (C.)

3. The Court declined to give any directions as to an investment by trustees, the petition being prevented by only one of two trustees, and the Court considering that one trustee could not safely execute the power under which it was proposed to make the investment.—*Ex parte Kane*, 6 I. Jur. N. S. 354. (R.)

4. The petitioner, a widow, was entitled for life to the income of a fund settled in new £3 per cent. stock, with remainder to her children. The Court ordered the fund to be transferred to Bank of Ireland stock; and that the petitioner should pay the costs of the petition and transfer.—*Ex parte Tufnell*, 7 I. Jur. N. S. 95. (C.)

5. When a policy of assurance is assigned to a trustee, who, either by express terms or fair construction, has a power to give receipts, the company ought not to refuse payment to the trustee.—*Curtin v. Jellicoe*, 13 I. C. R. 180. (C.)

#### IV. 3. Discretionary Powers of: how controlled.

- a. Generally: when controlled by the Court.
- b. When not.

#### IV. 3. a. Trustees' Discretionary Powers in general: how controlled by the Court.

6. A trustee filed a cause petition to recover portion of the trust property. This petition was dismissed. The trustee was by an order of the Court removed from being trustee. *Held*, that he could not maintain an appeal from the order dismissing his own petition.—*Leach v. Wallace*, 9 I. C. R. 147. (C.A.)

7. The discretion of trustees touching the time of sale directed by an instrument to be

had "with all convenient speed," can only be exercised in the reasonable hope that the property will increase in value.—*Dowell v. D.*, 8 I. Jur. N. S. 317. (L.E.C.)

#### IV. 3. b. When Discretionary Powers not controlled by the Court.

8. Stock was vested in two trustees for the benefit of a married woman, with power to lend it on private security at the request of the husband and wife. The wife had a power to appoint new trustees in cases of refusal, &c., or whenever she should think it expedient. The husband and wife applied to the trustees to lend the money on a security which one of them disapproved of. The wife appointed another trustee, but the former trustee refused to transfer the fund until satisfied of his safety. On a petition presented under the 1 W. 4, c. 60, s. 10—*Held*, that the case was not within that Act.—*Pepper v. Tuckey*, 7 I. E. R. 572; 2 Jon. & L. 95. (C.)

9. A trustee, being by will invested with an unlimited discretion as to the quantity of estate which he may give to the c. q. t., though he give but a nominal share to one, the Court will not enquire into his reasons for so doing, unless it be alleged that he has been actuated by corrupt or dishonest motives in the distribution.—*Boulger v. Smith*, 3 I. Jur. 249. (C.)

#### V. DISABILITIES OF TRUSTEES.

1. Purchases, &c., of Trust Estates by.
2. As Witnesses.

#### V. 1. Their Disabilities: Purchases, &c., of Trust Estates by.

[See also TRUSTEES, IV, 2—INVESTMENT OF TRUST FUND.]

10. V. bequeathed chattels real, upon trust to permit his grandson to receive the rents for life, and after his death to permit the person who, for the time being, would take by descent as heir male of his grandson, to receive the rents until some such person should attain twenty-one: then to convey the same to such person so attaining twenty-one; but if no such person, then to permit the persons successively who would take as heirs male of V.'s son, to receive the rents until some such person should attain twenty-one, and then to convey to the first such person so attaining twenty-one. At V.'s death his grandson was one of his next-of-kin. He made a lease, not warranted by the leasing power in the will, of part of the lands, to one of the trustees, who was also agent, both to the testator and his grandson, of the property, and took an annuity under the will given to him for his services in that capacity. That lease was expressed to be made partly in consideration of the services rendered by the lessee. In five years after date it was assigned by the son of the lessee to a third person, for a large sum. The eldest son of V.'s grandson had attained twenty-one in his father's life; and upon his

father's death set up a representative to the surviving trustee under the will, got a conveyance from him, and brought an ejectment against the assignee of the lease, who filed a bill to restrain him. *Held*, that although the limitations after the life estate given to V.'s grandson were void as being too remote, yet that the trustee under that will could not take from the tenant for life a lease which was contrary to the terms of that will, and could not be permitted to question the validity of the limitations in it.—*Ker v. Lord Dungannon*, 4 I. E. R. 348; 1 Dr. & War. 541; 1 Con. & L. 360. (C.)

1. Though trustees, acting under a competent tribunal, are protected, that protection does not extend to persons receiving payment out of a fund for themselves. Though the decision has long been acted on, it is no protection to such persons against the claims of others not bound by it.—*Foster v. M'Mahon*, 11 I. E. R. 287. (C.)—[See also *Richards v. Bayley*, 6 I. E. R. 551.]

2. A., a minor, married. On her marriage a settlement was executed, conveying lands to her for life, remainder to her children, and, in default of issue surviving her husband and wife, to the husband in fee. The husband died. A. survived her children. A. married a second husband—her life estate being again settled on herself by the trustee of the first marriage. A. and her husband, subsequently, by an acknowledged deed, conveyed for value their entire interest in the settled lands to her trustees. She subsequently acquired the fee by a voluntary conveyance from the heir of her first husband. *Held*, on petition by the children of the second marriage against the trustee to set aside his purchase, that their mother having contracted to give a fee was bound to make that contract good out of the subsequently acquired fee; and that as she could not in her life have set aside this deed, neither had her representatives any equity. That the settlement on the first marriage was voidable only, and was confirmed by the settlement on her second marriage.—*Jones v. Heard*, 5 I. Jur. 325. (C.)

3. On M.'s marriage, in 1826, with R., £1500 charged on the lands of C. and F., belonging to M.'s father, were vested in trustees for the benefit of the children of that marriage. In 1837, those lands, and the lands of T., were upon the marriage of M.'s brother, J., conveyed upon trust for the children of that marriage. J. died in 1842, having by will expressly desired that his children should not be made wards of Court; and having appointed R. as executor, and as guardian of his children's fortune. R. entered into receipt of the rents, &c., of those lands, which, in 1852, were sold in the I. E. Court. R. having been authorised by his trustees to bid at the sale, was declared purchaser of T. for £1850; and by his direction T. was conveyed to the trustees of the first marriage settlement. The conveyance stated that it had been ascertained that £1850 were due to those trustees, and authorised

them to retain the purchase-money in discharge thereof. R. appointed the lands to his eldest son, who mortgaged them. The wards of R., after attaining age, filed a petition praying to have the sale of T. set aside; and to have R. declared a trustee for them of T., subject to the charge of £1500. The mortgagees were made parties by amendment. *Held*, that the sale, though made to R. merely as trustee for his wife and children, could not be sustained, since he was guardian of the property, and that he was a trustee for the minors, subject to the mortgage.—*Irwin v. Robertson*, 11 I. Jur. N. S. 285. (C.)

#### V. 2. As Witnesses.

[See PRACTICE XXXVIII, 27, EVIDENCE, WITNESSES, *ante*, p. 944.]

4. In a marriage settlement of 1812, the husband covenanted with the trustees that his heirs, executors, &c., would, from and after his death, pay to his widow, if she survived him, an annuity of £40, and pay the trustees a sum of £400 for the children of the marriage. The husband became indebted to one of the trustees, who in 1828 entered up a judgment against him for £600, and effected a policy of insurance for a similar amount against the husband's life.

The judgment was subsequently assigned to B., who also became the purchaser of a judgment against the husband in 1834 for £200, on which occasion a policy of insurance had been effected on the life of the husband.

In 1860, the property comprised in the settlement was sold in the L. E. Court. Upon settling the final schedule of incumbrances, a Judge of that Court declared that the jointure of £40 per annum, and the sum of £400 for the children, were entitled to priority over the judgment of 1828, and that the judgment of 1834 had been satisfied by the payment of the amount reserved by the second policy above mentioned. *Held*, that the trustee was not, as a trustee, disqualified from dealing with the settlor, even though such dealing might have the effect of injuring the provision for the widow and children.—*In re M'Kenna's Estate*, 13 I. C. R. 239. (C.A.)

#### VI. TRUSTEES' LIABILITIES.

##### 1. In general.

##### 2. For each other, and for Third Parties.

#### VI. 1. Trustees' Liabilities in general.

[See also TRUSTEES IV, 2—INVESTMENT OF TRUST FUND.]

5. £4000 were vested in two trustees, in trust to pay the dividends to F., and C. his wife, for life; after the survivor's death, to pay over the principal to the children, in such shares as the tenants for life should appoint. Through misappropriation, £1200 remained unaccounted for by the trustees. The tenants for life, with their children, by a next friend, filed a bill for an account against the trustees, one of whom absconded; the other was arrested under a *ne exeat*. *Held*, that though,

from the nature of the trusts, none of the *c. q. trusts* had a present right to any part of the principal, yet the deficit was a debt due in equity, and demandable from the deft., the prisoner, as a defaulting trustee, and sufficed to sustain the writ of *ne exeat*.—*Waller v. Fowler*, 8 & Sc. 274. (R.)

1. A trustee of separate property of *femme covert*, without power of anticipation, joining in a lease, for which a fine was paid, and received by a third person—*Held*, to have committed a breach of trust, though *c. q. t.* joined in the lease.

*Quere*—Is the trustee of leaseholds, settled to the separate use of a married woman, bound to see that the head rents are paid; otherwise is he liable as for wilful default, if the premises are evicted for non-payment of rent?—*Booth v. Purser*, 1 I. E. R. 27. (C.)

2. A trustee of leasehold and of stock appointed A. and B. his executors, and died. They obtained probate, but never acted in the trusts. On their refusal to act, the Court appointed new trustees under the 1 W. 4, c. 60, s. 22; the executors undertaking to replace the amount of a breach of trust committed by their testator upon the trust fund.—*Muley v. Smith*, Long. & T., 241; 3 I. E. R. 497. (E.E.)

3. This Court looks upon the equitable right as if it were *the estate*; and if the person who has the legal title thinks proper to desert his duty, and abandon the party whom it was his business to protect, this Court will not only compel him to perform his duty, but in the meantime will give to the *c. q. t.* all the benefit he would have regularly obtained if his trustee had acted properly.—*Malone v. Geraghty*, 5 I. E. R. 549; 3 Dr. & War. 263; 2 Con. & L. 235. (C.)—[*Affid.*: 1 H. Lds. Cas. 81.]

4. If a man, having a fiduciary character in respect of lands, obtain a new interest, that will be bound by the old trust; but, in this case, the Court is asked to go much further, and to hold that what he takes besides the old interest, although in new lands, is bound by the trust, because the new lands are comprised in the same lease with the old lands. There is no such rule in Equity.

If trustees mix up property in an improper manner, so that the trust property cannot be distinguished from their own, they may suffer by their misconduct.—*Acheson v. Fair*, 3 Dr. & War. 524, 525. (C.)

5. An executor purchased up the legacies of several legatees for sums of money less in amount than the respective legacies. *Held*, that this transaction could not be sustained.—*Barton v. Hassard*, 3 Dr. & War. 461. (C.)

6. By marriage settlement, £400, the fortune of the intended wife, were assigned to C. and D. upon trust, to invest it, as soon as conveniently might be, either in some public bank stock or fund, or upon one or more good and sufficient securities, either real or

personal, and in such manner as they should in their discretion think fit.

The money was paid to C. alone, who shortly afterwards lent it to J. upon the security of his bond to both the trustees, with warrant of attorney collateral. The interest was regularly paid during J.'s life, but upon his death the security proved worthless, and the trust fund was lost.

In 1842, D. filed this bill against C., and the husband and wife, seeking a declaration that C. was responsible for the breach of trust, and praying that he might be ordered to bring in the £400, and invest them upon the trusts of the settlement.

The husband had been fully aware of the loan, and had concurred in it, and the ptf., though not active in the breach of trust, had become acquainted with all the circumstances of the transaction shortly after its occurrence. The wife was not in any manner implicated in the transaction. *Held*, that C., though free from any moral blame, was responsible for the consequences of the breach of trust, and was therefore bound to bring in funds sufficient to secure the wife, who had a life estate in the £400, if she survived her husband.—*Buckley v. B.*, Dr. Rep. temp. Sugden. 375. (C.)

7. A husband covenanted to insure his life for £1200, and assign the policy to trustees; and confessed a judgment to them for that amount, to be called in if the policy was not so assigned and kept up. £800, vested in them by the same settlement on similar trusts, were lent by them to the husband on the security of the assignment of a policy of insurance for £800 on his life. No other policy was assigned to them, and no steps were ever taken to enforce the judgment or covenant. In a suit against the trustees after the husband's death—*Held*, that the proceeds of the policy were not necessarily to be considered as obtained in pursuance of the husband's obligation, but that the trustees might apply them for the purpose for which the policy was really assigned; and that their liability for default in not compelling the husband to insure depended on his ability.

A. having passed his bond and warrant to confess judgment thereon to trustees, was discharged as an insolvent under the 3 G. 4, c. 124, returning them for the amount in his schedule. Judgment was afterwards entered on the warrant by them, and assigned to new trustees on the old trusts, by a deed to which A. was a party. *Held*, that this was in the nature of a new obligation, and that the judgment was an available security.—*Ball v. B.*, 11 I. E. R. 370. (C.)

8. A testatrix named A. a trustee of part of her personal estate, and appointed him, her son, and X.'s husband executors. The son and X.'s husband alone proved the will, but A. did not disclaim. The son and X. took life interests in the trust fund, to a part of which the ptf. became, by X.'s appointment, entitled. A. had been the testatrix's agent, and acted in the management of the

assets under powers of attorney from the executors who proved, and from X., and after the son's death from the surviving executor and X., which authorised him to receive the assets for the uses of the will. On A.'s death the deft., his son and executor, acted under a similar power, and continued to do so after the death of X.'s husband. X. and her husband got possession of the entire assets. *Held*, that A. and the deft. were responsible as trustees, and could not protect themselves as being agents only.—*Montgomery v. Johnson*, 11 I. E. R. 476. (C.)

1. Moneys, secured by judgments, the property of the wife, were, by an ante-nuptial settlement, assigned upon trust for her during life, and, if there should be issue of the marriage, upon trusts for their benefit; and, if there should not be issue, then upon trust to permit the wife to dispose of the moneys to such persons as she, whether sole or married, or by any deed or writing, with or without power of revocation, to be by her sealed and delivered in the presence of, or attested by two or more witnesses, should appoint; or, in default of such appointment, gift, or devise, to her next-of-kin under the Statute of Distributions.

There was not any issue. The surviving trustee received a portion of the moneys secured by the judgments, and paid a part thereof to the husband during his life, and the remaining part to the wife after his death. No appointment by deed or writing was ever executed by the wife. *Held*, that the wife took only a life estate with a general power of appointment; and that, as she never had exercised that power with the solemnities specified in the settlement, the payments to her and to her husband were invalid; and that the trustee was bound to replace the fund for the benefit of the next-of-kin of the wife.—*Reid v. Thompson*, 2 I. C. R. 26. (C.)

2. The executor of a trustee, having been ordered to invest a sum in stock, to the credit of a cause, and having neglected to do so for two years, during which the funds fell—*Held* (affirming the Master's order), that he was bound to pay the price of the sum in stock on the day on which he was ordered to invest it, with interest, at £3½ per cent. only, from that day.—*Geraghty v. G.*, 3 I. C. R. 414; 6 I. Jur. 335. (R.)

3. An obligor in a bond, with notice of the trust, appointed one of the two obligees, who were trustees, his executor, and devised his real estate to him, subject to his debts. The executor received personal assets sufficient to pay the bond debt, but wasted them. *Held*, that the debt was not extinguished, and might be enforced against the real estate of the debtor.—*Richards v. Molony*, 2 I. C. R. 1, overruled.—*In re Carew*, 4 I. C. R. 112. (P.C.)

4. By deed of settlement on the marriage of S. and N., securities for money were assigned to B. and F., on trust to invest the

amount of the securities which they might thereafter receive, with the consent of S. and N., on trust for the benefit of S. and N., and their children. F. refused to execute or act under the settlement. The securities were not called in, and the sums due were lost. B., who had executed this settlement, died in 1841. *Held*, that there was not any specialty debt created against B. or his assets, by his omission to call in the amount due on the securities, there not being any express or implied covenant in the deed that he would call them in; and that, six years from B.'s death having elapsed, the remedy against his assets was barred by the Statute of Limitations.

Mere omission to perform a duty arising out of a deed does not create a liability in the nature of a specialty debt, unless there be in the deed words from which a covenant to perform that duty may be implied.—*Newport v. Bryan*, 5 I. C. R. 119. (C.)

5. A., the personal representative of the surviving trustee of a judgment, permitted proceedings to revive the judgment to be taken in his name, but afterwards refused to join in any receipt for the money due on foot of the judgment. The *c. q. t.* of the judgment served on A. a notice, calling on him either to act in the trust, or to resign the trusteeship. A. gave no answer to this notice. On petition filed to remove A., and appoint a new trustee; *Held*, that A. must pay the costs of the suit.—*Wren v. Swanton*, 6 I. C. R. 233. (C.)

6. An unregistered judgment of 1847 was, by deed of 1849, assigned upon trusts declared by marriage settlement of equal date. The *c. q. t.* having wished for some further security, the judgment of 1847 was in 1851 registered as a mortgage against lands belonging to the conuzor, before the passing of the 13 & 14 Vic., c. 29. Neither the *c. q. t.* nor the trustee was aware of the want of proper registration. The judgment was not properly registered until 1854. *Held*, that the trustee was liable to make good any loss occasioned by the want of due registration of the judgment.—*Lester v. L.*, 6 I. C. R. 513; 2 I. Jur. N. S. 313. (C.)

7. An executor, believing that there would be assets sufficient to pay a legacy, became trustee in, and executed the marriage settlement of the legatee, which recited that she was entitled to the legacy. It was agreed that it should be assigned upon trusts. A suit was afterwards instituted for a breach of trust by the testator, which was still pending, and, if established, would exhaust the assets. *Held*, that there was an admission of assets *prima facie* binding on the executor, who was ordered to lodge in Court the amount of the legacy, without prejudice to the executor (the respondent), in the event of there being a decree against him in the suit for a breach of trust by his testator, taking such proceedings as he might be advised to be relieved against the admission of assets.—*Chaigneau v. Bryan*, 8 I. C. R. 251. (R.)—[*Affd.*: 10 I. C. R. 172; 5 I. Jur. N. S. 4. (C.A.)]

1. A trustee of a marriage settlement, by which funds were settled on trust for the husband and wife successively for life, and after their deaths for their children, paid over nearly the whole fund to the husband, who invested it in the purchase of a terminable leasehold interest, producing an income larger than could be derived from a proper investment. The husband died in 1835. On his death, the trustee paid over the residue of the fund to the wife, who, with knowledge of the circumstances, continued to receive the produce of the leasehold until the term expired in 1852. On her death, her children became, under her will, beneficially entitled to her assets, which were more than sufficient to replace the misapplied fund, and one of them became her personal representative. *Held*, that, in a suit by the children claiming under the settlement to compel the representatives of the trustee to bring in the misapplied fund, the latter had a right to have an indemnity from the children to the extent of the amount which their mother had received in rents from 1835 to 1852, in addition to the balance paid over to her.—*Bentley v. Robinson*, 9 I. C. R. 479; Dr. Rep. temp. Napier, 591. (C.)—[Revd.: 10 I. C. R. 287; 5 I. Jur. N. S. 7. (C.A.)]

2. An executor, believing that there would be assets sufficient to pay a legacy, became trustee in, and executed, the marriage settlement of the legatee, which recited that she was entitled to the legacy. It was agreed that it should be assigned upon certain trusts. A suit was afterwards instituted against the executor for a breach of trust by the testator, which suit, if successful, would exhaust the assets. *Held*, in a suit by the *c. q. t.* under the settlement, that there had been an admission of assets, *prima facie* binding on the executor, who was ordered to lodge in Court the amount of the legacy, without prejudice to his taking such proceedings as he might be advised, to be relieved against the admission of assets, in the event of there being a decree against him in the suit for the breach of trust by his testator.

*Semble*—Under the circumstances, the executor was conclusively bound.—*Chaigneau v. Bryan*, 10 I. C. R. 172; s. c., 5 I. Jur. N. S. 4 (C.A.)—[Affirming, 8 I. C. R. 251. (R.)]

3. V., tenant for life of his estate, bequeathed to a trustee, whom he named one of his executors, all rent and arrears of rent which might be due to him at the time of his death, upon trusts; and as to the residue, in trust for minors who were afterwards made wards of Court. He authorised the executor or executors of his will to pay and satisfy any debts owing or claimed to be owing by and from him or his estate, and any liabilities to which he or his estate might be subject; and to accept any compensation or any security, real or personal, for any debt or debts owing to him or his estate; and to allow such time for the payment of any such debt or compensation for a debt, either with or without taking security for the same, as should be reasonable; and also to compromise and compound or submit

to arbitration and settle all debts, &c., and generally to act, in relation to the premises in such manner as he or they should think expedient, without being liable for any loss which might be occasioned thereby; and he gave power to his trustee to give receipts, and exempted him from liability for involuntary loss. *Held*, that the trustee or the executors were not authorised by the will to sell the arrears of rent.—[Affirmed: 13 I. C. R. 137; 7 I. Jur. N. S. 89. (C.A.)]

The executors sold the arrears, which amounted to £49,709. 9s. 6d. to the remainderman, for £20,000, payable in four annual instalments. *Held*, having regard to the circumstances of the estate, and to the remedies which the executors and the remainderman respectively had to recover the arrears and the accruing rent, that the executors were not chargeable with the entire amount of the arrears recovered by the remainderman.—[Reversed: 13 I. C. R. 137; 7 I. Jur. N. S. 89. (C.)]

The executors having acted improvidently and without the sanction of the Court, were charged with £25,000, the sum for which it would have sanctioned the sale of the arrears at the time when it was made.

Executors are not to be charged with debts which there is reasonable ground for believing they would not have recovered.

*Semble*—The remainderman should have been a party to a suit to charge the executors of the tenant for life with the arrears of rent sold to him.—*Alexander v. A.*, 12 I. C. R. 1. (R.)—[On appeal, 13 I. C. R. 137; 7 I. Jur. N. S. 89. (C.)]

4. A marriage settlement recited an agreement to settle all the recited properties of the husband upon trust. The operative part omitted two of the denominations. The intended husband, a solicitor, prepared the settlement. C., the lady's brother, a practising barrister, was a trustee; and the petition alleged that he had professionally approved of the draft settlement on her behalf. After the marriage, the husband, in whose possession the settlement *unregistered* was, mortgaged the omitted lands. It was not proved that C. was aware of the omission before the loss; but, upon learning the husband's dealings with the lands, C. procured from him the settlement, and had it registered. After the husband's death, insolvent, the widow appointed to the son, who sued C., as surviving trustee, to make him liable for the loss resulting from the omission. *Held*, that C. was not liable.

*Semble*—A trustee is not liable for non-registration of the trust deed, when his attention has not been called to its non-registration.—*Macnamara v. Carey*, 11 I. Jur. N. S. 293. (C.)—[Reversed, on appeal, as to non-registration of settlement.]

5. In a marriage settlement, a husband covenanted with his trustees that his heirs, executors, &c., would, from his death, pay his wife a jointure of £40 a-year; and pay them £400 for the benefit of the children, if any. The husband became indebted to one of the

trustees, who entered up judgment against him, and insured the husband's life for its amount. Upon sale of the trust property—*Held*, that the assignee of that judgment was entitled to be placed upon the final schedule of incumbrances in priority to the settlor's wife and children; and that, in considering dealings between a trustee and his *c. q. t.*, the length of time during which the trustee's acts have been acquiesced in, with the knowledge of the *c. q. t.*, is to be taken into account in the trustee's favour.—*Ennis v. Smith*, Jon. & Car. 400, followed.—*In re M'Kenna's Estate*, 6 I. Jur. N. S. 330. (C.A.)

1. By deed, reciting A.'s title to several real estates, and that on a general settlement of accounts under a deed of submission and an award made thereon, A. had been found indebted to B. in a sum, which was to bear interest at £6 per cent.; and that A. had agreed to grant a rentcharge, to pay off that debt.—A. conveyed those estates to C. for 100 years (if A.'s estate should so long continue), in trust to pay the head rents, and reimburse C. all costs, &c.; and in the next place to pay B., a rentcharge towards payment and satisfaction of his debt: and upon further trust to pay the surplus of the rents to A., who covenanted with C., to pay the rentcharge. The deed also gave C., a power to distrain for the rentcharge; and contained a clause of re-entry; a covenant for further assurance; a covenant to insure the life of the surviving *c. q. vie* of one of the estates for the benefit of B.; and a proviso that the deed should not prejudice securities which B. held, and which were intended to be collateral; a clause of cesser on payment of the debt by preception of the rentcharge, and a proviso for reduction of the interest on the debt if the gales of the rentcharge were paid within 21 days after they fell due. *Held*, that the deed created the relation of debtor and creditor as well as that of trustee and *c. q. t.*; and therefore that B., who had gone into possession, was chargeable, in a redemption suit, with wilful default, although no such case was made by the petition.

That B. was also chargeable with the wilful default of a puisne incumbrancer, who went into possession with his assent.—*O'Connell v. O'Callaghan*, 15 I. C. R. 31. (R.)

#### VI. 2. Trustees' Liabilities for each other, and for Third Parties.

2. A judgment creditor filed a bill against the conuzor and prior incumbrancers, without having issued an *elegit*, or showed that he was entitled to issue it; but charging that the lands of the conuzor were an ample fund for satisfying all incumbrances; and praying a sale, and payment out of the proceeds thereof of his own and all prior charges, or that the lands might be sold subject to prior incumbrances; and did not offer to redeem the prior incumbrances. Demurrer, by a creditor made

a deft., whose incumbrance was prior to the 3 & 4 Vic., c. 105, allowed.

*Semble*—When several co-trustees are made defts., one of them may demur alone.—*Kirwan v. Portarlington*, 8 I. E. R. 593. (E.E.)

3. When trustees incur, by reason of their default, a joint liability, which is discharged by one of them, he is entitled to contribution from his co-trustee.

But when that co-trustee had never interfered in the trusts, and circumstances showed that the other trustee had the entire management of them, the Court granted an enquiry as to the amount of contribution to be paid to the petitioner.—*Worthington v. Pakenham*, 3 I. Jur. 221. (C.)

4. When a trustee, entitled to receive purchase-money, gives an order requiring it to be paid to a person named therein, and acknowledges, in the deed of purchase, the receipt of the money; and when the transaction seems to be within the province of the trustee; and the purchaser has no notice of the breach of trust committed; he is not liable for the misapplication of the money.

*Semble*—Parties paying money to trustees having power to give receipts, are not bound to pay it into their hands, or into a bank to their credit. A judgment on the receipt of the trustee is sufficient to discharge the person paying.—*Burris v. Sheppard*, 6 I. Jur. 98. (C.)

5. A. was trustee of a settlement; part of the trust fund being secured by a bond. B., the executor of the obligor, with the assent of A., lent the sum secured by the bond, and all the assets of his testator, on mortgage of an estate, which, in consequence of the depreciation of property at the time, was sold in the I. E. Court for a sum insufficient to reach the mortgage. In a suit by the *c. q. t.* of the settlement and the legatees of the testator, A. and B. were ordered to bring into Court, in equal shares, the amount secured by the bond; and B. was ordered to bring in the remainder of the assets, without prejudice to any proceeding by A. against B. on foot of the bond. *Held*, that A. could not in Equity recover from B. the moiety of the sum secured by the bond, which he had paid into Court under the decree.—*Montgomery v. Waring*, 6 I. C. R. 538. (R.)

6. G. and H., trustees of a settlement, on the solicitation of D., tenant for life of the settlement, lent the trust funds on a security which totally failed. G. was a solicitor. In the transaction no other solicitor was employed for the lenders, and no sufficient investigation of title was made. *Held*, that the trustees were compellable to replace the trust fund.

That, both being solvent, H. was bound to replace one moiety, and G. the other moiety.

That G. was not entitled to be indemnified by the tenant for life, the *onus* of investigating the title having been cast upon him.

That H. was entitled to be recouped, by the tenant for life, the amount of his moiety.—*French v. Graham*, 10 I. C. R. 522. (C.)

#### VII. TRUSTEES' ACCOUNTS, ALLOWANCES, AND COSTS.

1. Three trustees named in the will of a testator were made debtors to an equity suit, and although in the same interest had answered separately. The Lord Chancellor said that circumstances might justify the debts, in putting in separate answers; and directed the Master, in taxing the costs, to allow to the trustees the costs as of one answer only, unless he should find that any one had properly put in a separate answer, and then to allow his reasonable costs.—*Dudgeon v. Corley*, 4 Dr. & War. 158. (C.)

2. Costs given to a trustee up to the decree to account only, when his account had been much reduced in the office.—*Fozier v. Andrews*, 7 I. E. R. 595; 2 Jon. & L. 199. (C.)

3. The rule that a receiver, when he is a party to a cause, shall not have his poundage, applies only to the cases of trustees, executors, owners, and heirs-at-law. Except in those cases, the receiver is entitled to poundage, unless the order of appointment provides that he shall not have it.

A debt, entitled to a reversionary interest, being appointed receiver without any such provision, is entitled to his poundage.—*Beran v. White*, 8 I. E. R. 675. (R.)

4. The rule prohibiting a trustee, a solicitor, from charging costs against his *c. q. t.*, considered. Securities containing such charges set aside when the trust deed did not clearly authorise them, notwithstanding letters recognising the right to charge them, and a petition for taxation presented by the *c. q. t.*, the letters having been written, and securities given under influence, and the latter being imprudent.

The securities set aside against a purchaser for value from the solicitor, with notice.—*Gomley v. Wood*, 9 I. E. R. 418; 3 Jon. & L. 678. (C.)

5. An action of covenant was brought against a trustee, who lodged the amount claimed in Court, and filed a bill of interpleader, which was, on demurrer, dismissed with costs. Held, that the trustee was entitled to have the money returned without deducting the costs.—*Doyle v. Dumoncel*, 11 I. E. R. 517. (R.)

6. A trustee of a church lease expended considerable sums in obtaining renewals and a perpetuity grant, and arranged to purchase the lands in consideration of an annuity to the *c. q. t.*, under an award, in obtaining which there was some concealment, and which though acted on for fourteen years, was never completed. In a suit against the trustee—Held, that the new interest was a graft, and the trustee was bound to account for the entire period.

The cases in which accounts against debtors are limited in point of time, and when not considered.—*Locatt v. Knipe*, 12 I. E. R. 124. (C.)

7. W., having made a settlement with a general power of revocation, made a will, by which, after reciting that he had been induced to execute the settlement contrary to his wishes and intentions, and that it was fraudulently and wickedly obtained from him, he directed the trustees and executors of the will to use their best exertions and to take all steps necessary to have the deed set aside and cancelled; and then disposed of the property included in the deed. Held, a good revocation under the power.

In a suit between claimants under a will and an inconsistent deed executed by the testator, the costs are not to be paid out of the assets, on the ground that the difficulty was created by the testator; but are subject to the ordinary rule in adverse suits.

Costs given against a trustee under the trust deed which was held revoked, when he had also a beneficial interest, and insisted on its validity.—*Irwin v. Rogers*, 12 I. E. R. 159. (C.)

8. A lunatic claimed as heir-at-law of T.; and, estates having been devised by T. to trustees for charitable purposes, by an instrument, the validity of which as a will was impeached, a suit was instituted, and an issue to try the validity of the will directed as necessary for freeing the lunatic's estate from doubts. The trustees were directed to conduct the issue as pifs. The issue was found against the will. Held, that though the trustees were not entitled to their costs under the decree, yet the Court could, upon petition, give them out of the lunatic's estate.—*In re Turnley*, 12 I. E. R. 581. (C.)

9. When trustees, in good faith, invest on a security not in strictness justified by the instrument creating the trust, but which is practically secure, and from which no loss to the trust fund occurs, they will not be decreed to pay the costs of a suit to compel them to bring in the fund so invested.

In this case the Court refused the trustees their costs, and directed the petitioners' costs to be paid out of the fund.—*Fitzgerald v. F.*, 6 I. C. R. 145; 2 I. Jur. N. S. 89. (C.)

10. A trustee, not charged with interest on balances from time to time retained by him, when it did not appear that he applied them to his own private purposes; and it was necessary, from the nature of the trust, that he should retain the balances for its execution.

When a trustee has acted fairly and *bona fide*, he will not be deprived of his costs of a suit against him to compel him to account, merely because a claim made by him has been disallowed in the office, and he has been found by the Master to be a debtor on the account, when the claim made against him by the petitioner has been greatly reduced.—*Norris v. Duckworth*, 3 I. Jur. N. S. 188. (R.)

1. V. devised real estate in trust for her husband for his life, and directed the trustees to sell and convey the property absolutely to him, for a named sum, applicable to the purposes of her will, provided that he declared, within one year after her death, that he accepted the proposal.

*Semble*—The right of pre-emption to the husband was a gift. The trustees, therefore, were not bound to make out title to him, nor were they entitled to receive, out of V.'s assets, and to the prejudice of the persons entitled to the residue, the costs of making out title.

Solicitors having been employed by the trustees to make out the title, the costs were allowed on taxation against the trustees, personally, under the Solicitors Act (12 & 13 Vic., c. 53), ss. 3, 4.—*In re Davison & Torrens*, 17 I. C. R. 7. (R.)

#### VIII. BANKRUPTCY, INSOLVENCY, OR ABSCONDING OF TRUSTEES: GOING ABROAD, OR REFUSING TO CONVEY.

[Powers of the Court in such cases to appoint new Trustees regulated by 13 & 14 Vic., c. 60; 15 & 16 Vic., c. 55, are more fully powers given by 23 & 24 Vic., c. 145, s. 27.]

2. A trustee and executor is not within the 1 W. 4, c. 60, s. 22.—*Clarke v. Wilson*, Hay. & J. 424. (E.E.)

3. When an estate in remainder is vested in trustees, with powers of sale, the *c. q. t.*s are entitled to have the trustees cognizant of the sale, and consulted with reference thereto; but, if they subsequently adopt the sale, and it is acted upon, and the money received under it, the Court will confirm it.—*Blackwood v. Burrowes*, 2 Con. & L. 459; 4 I. E. R. 609. (C.)

4. When the power to appoint new trustees directed the property to be vested in them, jointly with the surviving or continuing trustee, and the surviving trustee had become bankrupt—*Held*, that, notwithstanding, a valid appointment of, and transfer of the estate to the new trustee might be made under the power.—*In re Roche*, 2 Dr. & War. 287; 1 Con. & L. 306. (C.)

5. In petition cases under the Trustees Act, arising from trustees being out of the jurisdiction, the affidavit should state where the trustee is. If he is in England, he must be served.—*Ex parte Hughes*, 6 I. E. R. 559; 1 Jon. & L. 32. (C.)

6. *Semble*—That neither bankruptcy nor occasional residence abroad disqualifies a testamentary trustee, to whom the testator has unconditionally confided a large personal discretion in administering the trusts, together with power to appoint a receiver of the rents of the trust estates.—*Archbold v. Commrs. of Ch. Don. & Beg.*, 2 H. L. Cas. 440.—[Rev. 11 I. E. R. 187.]

7. When a new trustee is appointed in lieu of one of two trustees out of the jurisdiction, a third person should be appointed to concur with the continuing trustee in conveying chattels real, the subject-matter of the trust, to the new trustee and continuing trustee, in order to prevent a severance of the joint tenancy.—*In re Darley*, 6 I. Jur. 41. (R.)

#### IX. TRUSTEE AND CESTUI QUE TRUST.

##### 1. *In general.*

##### 2. *Lien and Rights of Trustee as against Defaulting Cestui que Trust.*

#### IX. 1. *Trustee and Cestui que Trust, generally.*

[As to the liability of Trustee for a breach of trust, *see also* TRUSTEE, II, 2—INVESTMENT OF TRUST FUND, and TRUSTEE, V, 1—PURCHASES BY, &c.]

8. A petition to change the trustees in a settlement ought to be presented by the *c. q. t.*, not by the proposed trustees.—*In re O'Dell*, Hayes, 257. (E.E.)

9. A trustee, who permitted his *c. q. t.* to remain in possession of the trust estate, was sued in covenant by the landlord for rent due by the *c. q. t.* *Held*, that the trustee was entitled to be repaid the amount of rent advanced by him, in priority to other creditors of the *c. q. t.*, who had obtained a receiver over the trust estate.—*Leech v. Mulloy*, 1 I. Jur. 50. (R.)

10. When a trustee, at the instance and with the concurrence of one of his *c. q. t.*s, invests trust funds in an unauthorised security, whereby loss occurs, the trustee cannot compel the concurring *c. q. t.* to indemnify him from that loss, unless so far as the *c. q. t.*'s interest in the trust fund may extend, or unless there be a special contract to indemnify the trustee.—*Trafford v. Boehm*, 3 Atk. 440, explained.—*Browne v. Maunsell*, 5 I. C. R. 351. (C.)

11. Personal estate was, by settlement, vested upon trust, for R., a married woman, for life, without power of anticipation; and, if no issue of the marriage, and M., the husband of R., survived her, as R. should by deed or will appoint; if R. survived, for her absolutely. W., acting trustee of the settlement, at the instance of R. applied the settled property in discharge of M.'s liabilities. M. died; and, by R.'s request, the trustee took no steps to realise M.'s assets. R. married again, after the lapse of some years, and in her marriage settlement recited her wish to give credit to W. for all payments made by him at her request, in breach of trust. *Held*, that R. had lost her right to make the trustee liable for his breaches of trust.—*Rutherford v. Maziere*, 13 I. C. R. 204; 7 I. Jur. N. S. 210. (C.)

12. M., seized and possessed of real, chattel real, and personal property, including pro-



perty in N., held for lives renewable, subject to a lease for 99 years from Feb. 1762, devised all her property to R. and H., whom she named her executors, upon trust, to pay annuities; and, subject thereto, devised her property to other persons. The will empowered the trustees and executors to sell and dispose of any portion of the property as they should think fit, for the advantage of the parties interested. M. died in 1819; H. alone proved the will, and obtained a renewal of N. in his own name, as trustee. In 1824, one of the persons beneficially entitled to N. executed a renewed lease at an increased rent, in the preparation of which H. acted as solicitor.

The devised property having become deficient to pay the annuities, the annuitants, about 1844, went into possession and receipt of the rents and profits of all the devised property. On the expiry of the lease of 1762, the annuitants filed their cause petition against the lessees under the lease of 1824, claiming thereby to hold discharged of this lease. *Held*, that the receipt by the annuitants, from 1844, of the increased rent, did not operate as a confirmation of the lease by them; and that they were entitled to hold discharged from the lease.—*Metcalfe v. Ryves*, 14 I. C. R. 558; 8 I. Jur. N. S. 405. (C.)

1. Trustees for charity permitted to sell land held under lease, the subject of the trust, though subject to a covenant to expend £3000 in building thereon. The landlord's rights were saved, and the title not forced on an unwilling purchaser, on account of the covenant.—*In re The Catholic University*, 11 I. Jur. N. S. 250. (R.)

#### IX. 2. Lien and Rights of Trustee as against Defaulting Cestui que Trust.

2. Where the trustee of a fund settled on a husband until insolvency, and then to the separate use of his wife, at the urgent solicitation of the wife committed a breach of trust by lending part to the husband, and he became insolvent, whereupon the wife claimed the whole fund—*Held*, that the trustee was responsible to her, as during the husband's estate she could not bind the remainder to her separate use.

It is no answer to such a claim that the husband's insolvency was concerted, if that was done merely to evade his debts.—*Semble*, it would be a defence if the insolvency was concerted for the purpose of calling the wife's estate into existence.—*Mara v. Manning*, 8 I. E. R. 218; 2 Jon. & L. 311. (C.)

3. A trustee of a marriage settlement, by which funds were settled on trust for the husband and wife successively for life, and after their deaths, for their children, paid over nearly the whole fund to the husband, by whom it was invested in the purchase of a terminable leasehold interest producing an income larger than would be derived from a proper investment. The husband died in 1835. On his death the trustee paid the residue of the fund to the wife, who, with

knowledge of the circumstances, continued to receive the produce of the leasehold until the term expired in 1852. On her death, her children became under her will beneficially entitled to her assets, which were more than sufficient to replace the misapplied fund, and one of them became her personal representative. *Held*, that in a suit by the children, claiming under the settlement, to compel the representatives of the trustee to bring in the misapplied fund, the latter had a right to have an indemnity from the children to the extent of the amount which their mother had received in rents from 1835 to 1852, in addition to the balance paid over to her.—*Bentley v. Robinson*, 9 I. C. R. 479; Dr. Rep. temp. Napier, 591. (C.)—[Reversed: 10 I. C. R. 287; 5 I. Jur. N. S. 7. (C.A.)]

4. G. and H., trustees of a settlement, on the solicitation of D., tenant for life of the settlement, lent the trust funds on a security which totally failed. G. was a solicitor. In the transaction no other solicitor was employed for the lenders, and no sufficient investigation of title was made. *Held*, that the trustees were compellable to replace the trust fund; that, both being solvent, H. was bound to replace one moiety, and G. the other moiety; that G. was not entitled to be indemnified by the tenant for life, the *onus* of investigating the title having been cast upon him; and that H. was entitled to be recouped by the tenant for life the amount of his moiety.—*French v. Graham*, 10 I. C. R. 522. (C.)

#### X. TO PRESERVE CONTINGENT REMAINDERS.

##### TURBARY, RIGHT OF.

[See also DEED, WORDS—LANDLORD AND TENANT.]

5. A demise of "land, with the bog and mountain thereunto adjoining," does not confer upon the lessees a right to cut turf for sale.—*Chatterton v. White*, 1 I. E. R. 200. (R.)

6. The words "bogs and turf-mosses," in their primary meaning, and when uncontrolled by the context, signify a particular description of land; and a grant thereof will pass the soil and freehold in such descriptions of land.

An exception of bogs and turf-mosses in a lease is not cut down to signify a reservation of a right of turbary merely, but the fact that the grantor also reserves to himself the right of ingress, egress, and regress, to dig for and carry away the excepted premises.—*Boyle v. Olpherts*, 4 I. E. R. 241; L. & T. 320. (E.E.)—[See also, *Massay v. Gubbins*, L. & T. 95.]

7. The Bishop of D., seized in fee in right of his bishopric, demised to J. for twenty-one years, all that territory of land called B., except all royalties, mines, minerals, quarries, and turbaries; with liberty to dig, cut, save, and carry away the same: provided always that J. and his under-tenants actually residing

on the premises shall, notwithstanding the reservation or exception of turbaries, be permitted to cut, save, and take as much turf, each year during the demise, as may be sufficient for their firing, to be burned or consumed on the premises; but J., his executors, &c., and his and their under-tenants, shall not by this proviso have any right to cut or save turf for their firing in other parts of the excepted turbaries, but such as shall, from time to time, be marked out for them by the Bishop of D. J. demised part of the lands to I. for twenty-one years, with a *toties quoties* covenant for renewal, by the description of all that farm in B. which he purchased from R., and then in his possession; excepting and always reserving out of this demise all royalties of what nature or kind soever, as the same are and may be excepted from time to time by the Bishop of D. and his successors, from J., his heirs, and assigns. When this demise was made, I. was in possession of a portion of bog, as part of the farm of B. which he had purchased from R. The estate of J. vested in D., who, in the year 1835, acquired the inheritance in the lands under the 3 & 4 W. 4, c. 37. By the conveyance of the fee, the Bishop of D. granted to him the lands as described in the lease to J., together with "all royalties, mines, minerals, bogs, mosses, and turbaries." The estate of I. vested in his sons, W. and J. I.—W. and J. I. having presented a petition for a conveyance of the inheritance in the lands demised to J., it appeared by the report of the Remembrancer, that during the last fifteen years, D. had used to give to his tenants occupying other portions of the demised lands liberty to cut turf for their own consumption on the portion of bog in the possession of W. and J. I., and that the said under-tenants had cut turf accordingly, without any hindrance by W. and J. I., or the Bishop of D.; and that W. and J. I., and those from whom they derived, had at all times cut turf for their own consumption, and had given permission to such persons as they thought proper to cut turf upon the bog in their possession, without any hindrance by the Bishop of D., J., or D. *Held*, that the soil of the bog in the possession of J., at the time when the lease was made to him passed to him under that demise.

That the petitioners were entitled to a conveyance of the inheritance in the premises demised by the lease to J.; and there ought not to be therein inserted a covenant that it should be lawful for D., his heirs or assigns, to direct any person residing on the territory of land called B., who had no bog within his holding, to resort to the bog in the possession of W. and J. I., for the purpose of cutting turf thereon; and that the persons so directed might cut and carry away such quantity of turf each year as might be necessary for their own consumption, without any hindrance of W. or J. I., their heirs or assigns.

In the conveyance to the petitioners, the same general words were made use of as were contained in the conveyance from the Bishop of D. to the respondent. See also the case of *Dockrill v. Dolan*.—*Irons v. Douglas*, 3 I. E. R. 601. (E.E.)

1. A mere demise of bog, as such, will not give the lessee a right to cut turf for sale, particularly when the demise is of the bog together with other property. But if nothing but bog be demised, and it is not convertible to any other use, same being cut for sale, or if it were at the time of the demise used by cutting it for sale, the lessee may cut turf for sale.—*Coppinger v. Gubbins*, 9 I. E. R. 304; 3 Jon. & L. 397. (C.)

2. Demise of a part of the lands of L., together with the bog in the possession of the lessee, situated in the bogs of L. and R. The lessee was in possession of part of the bog of R., in which he had cut turf for his own consumption, but not for sale. *Held*, that the lease did not confer a right to cut turf for sale on the bog of R.—*Fowler v. Blakeley*, 13 I. C. R. 58. (R.)

3. A house, garden, and parcel of land were demised in 1810. The lands were situated in a large district of bog, where the inhabitants supported themselves by the turbary, and had been used for upwards of 40 years as turbary. A portion of the lands had been reclaimed and cultivated by the tenant. The Court restrained the tenant from cutting turf for sale on that portion of the lands which was devised as "garden," but dissolved the injunction as to the remainder of the lands.—*Stevenson v. Moore*, 7 I. C. R. 462. (R.)

4. J. obtained a Crown grant of 111 acres profitable land in M., with all pasture, turbary, bogs, mountains, to the said premises belonging, or in anywise appertaining. K. and F. obtained similar grants of lands in M. B. obtained a subsequent grant of "one quarter of lands in M., containing 134 acres profitable land, and also a parcel of bog in common unto the above lands, called C., containing 236 acres."

In the Book of Distributions, C. was described as "bog in common to M., 236 acres." C. was, from time immemorial, used for pasture and turbary by the tenants of all portions of M. *Held*, on petition for partition, that the representatives of J., K., F., and M. were tenants in common of C.

The Book of Distributions is admissible evidence in points relating to property derived from the Crown, under the Acts of Settlement and Explanation, at least when the original survey cannot be produced.

Decree for partition, with a reference to the Master to ascertain shares.—*Knox v. Mayo*, 7 I. C. R. 563; Dr. Rep., temp. Napier, 225. (C.)

## TURPIS CONTRACTUS.

See CONSIDERATION, III.

## UNCERTAINTY.

- In Agreement. See AGREEMENT, IV.
- In Objects of Donor's Bounty. See CHARITY, II.
- In Answer. See PLEADING, ANSWER.
- In Will. See WILL, XIV.
- In Plea. See PLEADING, PLEA.

UNCLAIMED DIVIDENDS.  
See BANKRUPTCY, XV—RECONVEYANCE, &c.

UNDER-CLERKS.  
See PRACTICE, OFFICERS OF COURT.

UNDER-LEASES.  
See LANDLORD AND TENANT, V.—LEASE.

UNDERWOOD.  
See TIMBER.

UNDERTAKING TO APPEAR.  
See PRACTICE, APPEARANCE.

UNDUE ADVANTAGE.  
— *By Relations.* See FRAUD, VII.  
— *By Commissioners, Assignees, or Solicitor to Fiat.* See *ibid.*  
— *By Solicitor over Client.* See *ibid.*  
— *By Agent over Principal, or by Servant over Master.* See *ibid.*  
— *By Guardian over Ward.* See *ibid.*  
— *By Trustee or Executor.* See *ibid.*  
— *How affected by Lapse of Time.* See *ibid.*

UNDUE INFLUENCE.  
See AGREEMENT, IV—DEED, VI—FRAUD, VII.

UNIFORMITY.  
See STATUTES, CONSTRUCTION OF, II.

UNREASONABLENESS.  
— *In Agreement.* See AGREEMENT, IV.  
— *In Bond.* See BOND, III.  
— *In Covenant.*

USES.  
— *And Trusts.* See FRAUDS, STATUTE OF, III—TRUSTS, XIV.  
— *Of Fine or Recovery.* See FINES, &c., V.

USHER.  
See PRACTICE, OFFICERS OF COURT.

USUAL.  
— *Covenants.* See LEASE, III.  
— *Powers.* See POWERS, V.

USURY.  
— *And as to Leases connected with Loan.* See LEASE, I—STATUTES, CONSTRUCTION OF, II—INTEREST PECUNIARY, IV—HEIR-AT-LAW, III.

[See 5 & 6 W. 4, c. 41. But, see now 17 & 18 Vic., c. 90.]

1. The circumstances that the re-payment of the purchase-money of an annuity is secured by an insurance on the grantor's life, and that he has covenanted to pay the premiums, do not bring a case within the Usury Statute.—*Manly v. Hawkins*, 1 Dr. & Wal. 363. (C.)

2. It is a defence to a suit instituted to raise the arrears of a rentcharge, that it was granted upon a usurious consideration; and it is not necessary that the debt should file a cross-bill to impeach it.

The Statute of Usury may be pleaded to a suit in equity; and, if so, it may be relied on as a defence in the answer.—*Moher v. Birmingham*, 6 I. E. R. 6. (E.E.)

3. *Quære*—Whether an annuity for a term of years certain, which will, within the term, repay the purchase-money, and more than legal interest upon it, is usurious?—*Kenny v. Lynch*, 8 I. E. R. 207. (C.)—[See s. c., 9 I. E. R. 530; 2 Jon. & L. 319. (C.)]

4. It was agreed between A., B., and C., that B., in consideration of money, should surrender his lease to C.; that C. should make a new lease to A.; and that A. should sub-demise it to B., at a rent equal to £9 per cent. on the consideration money. *Semble*, the agreement is not void for usury.—*Dowling v. Legh*, 9 I. E. R. 413; 3 Jon. & L. 716. (C.)

5. The owner of a leasehold for fifty years unexpired, in consideration of £300, granted an annuity of £45, charged on the leasehold, and assigned the latter to secure the annuity. The annuitant covenanted, at any time on payment of £300, and on getting six months' notice, to reconvey. *Held*, an usurious transaction.—*Kenny v. Lynch*, 9 I. E. R. 530. (C.)—[But see *Wade v. Williamson*, 2 I. C. R. 299. (C.)]

6. A bond, with warrant of attorney to enter judgment, though there be a contemporaneous agreement to pay interest at £12 per cent. for the sum secured, is not void for usury within the exception in the 2 & 3 Vic., c. 37, s. 1, if the debtor has not lands on which the judgment can attach.—*Baker v. Allen*, 10 I. E. R. 226. (R.)

7. When, in consideration of £200, an annuity of £25 was granted out of premises held for a term of years, during which that sum of £200 and legal interest might be more than repaid by receipt of the annuity; and the deed empowered the grantor to re-purchase the annuity on payment to the grantee of £200, and the arrears of the annuity; *Semble*—that such a transaction was not usurious.

*Semble also*, that the decision in *Kenny v. Lynch*, 9 I. E. R. 530, cannot be upheld.—*Wade v. Williamson*, 2 I. C. R. 299. (C.)

## VACATION.

See PRACTICE, VACATION. G. O. (1867),  
256, 258.

## VALIDITY.

- *Of Agreement.* See AGREEMENT, IV.
- *Of Annuity.* See ANNUITY, I.
- *Of Arbitration and Award.* See ARBITRATION AND AWARD, V.
- *Of Assignment.* See ASSIGNOR AND ASSIGNEE—ASSIGNMENT.
- *Of Fiat.* See BANKRUPTCY, VI.
- *Of Bond.* See BOND, III.
- *Of Charity.* See CHARITY, II.
- *Of Condition.* See CONDITION, I.
- *Of Consideration.* See CONSIDERATION, III.
- *Of Copyhold.* See COPYHOLD, IX.
- *Of Covenant.* See COVENANT, I.
- *Of Debts.* See DEBTS, I.
- *Of Deeds.* See DEEDS, I, III, V, VI.
- *Of Fines and Recoveries.* See FINES, &c., VI.
- *Of Agreements under the Statute of Frauds.* See FRAUDS, STATUTE OF, I.
- *Of Gifts and Grants.* See HUSBAND AND WIFE, I.
- *Of Articles before Marriage.* See *ibid.*
- *Of Insurance.* See INSURANCE.
- *Of Lease.* See LEASE, I.
- *Of Limitations.* See LIMITATIONS, I, II.
- *Of Marriage.* See MARRIAGE, I.
- *Of Mortgage.* See MORTGAGE, I.
- *Of Notice.* See NOTICE, I.
- *Of Transactions and Dealings between Parent and Child.* See PARENT AND CHILD, V.
- *Of Plea.* See PLEADING, PLEA, I.
- *Of Execution of Power.* See POWER, I.
- *Of Settlement.* See SETTLEMENT, II.
- *Of Modus.* See TITHES, X.
- *Of Trust.* See TRUST, VII.
- *Of Will.* See WILL, II, III, VI, XIII.

## VALUING ANNUITIES.

See BANKRUPTCY, XIII.

## VALUE OF LANDS.

See PRACTICE, COMMISSION TO ASCERTAIN BOUNDARIES AND VALUE OF LANDS.

## VARIANCE BETWEEN ARTICLES AND SETTLEMENT.

See SETTLEMENT, II.

## VARYING MINUTES.

See PRACTICE, DECREE.

## VENDOR AND PURCHASER.

- *Respecting Interest as between them.* See INTEREST PECUNIARY, I.
- *Payment into Court by.* See PRACTICE, PAYMENT INTO COURT.

— *Incapacity of Purchaser from Fiduciary Position, Fraud, Party to Suit, &c.* See FRAUD, *ante*, p. 352—PRACTICE, SALES JUDICIAL, *ante*, p. 1097.

— *Receiver between.* See PRACTICE, RECEIVER.

See AGREEMENT—PLEADING, PARTIES—PRACTICE, SALES JUDICIAL—FRAUD—NOTICE.

I. GENERALLY: PAYMENT OF PURCHASE-MONEY.

II. ENFORCING CONTRACT BETWEEN—GENERALLY, OR ON CONDITIONS. See *post*, IV.

1. *When and on what Grounds Enforced.*

2. *When not.*

III. RIGHTS OF VENDOR AND PURCHASER BETWEEN THE MAKING OF THE CONTRACT, AND ITS COMPLETION; CONSEQUENCES OF DELAY.

1. *In general; as to Deterioration of Property.*

2. *Consequences of Delay.*

a. *Payment of Interest on Purchase-money.*

b. *Investment of Purchase-money; who is to have the Benefit, or bear the Loss of the Investment.*

IV. OF THE TITLE.

1. *Generally.*

2. *When Purchaser must accept it.*

3. *When not bound to accept it.*

4. *By Assignees in Bankruptcy, &c., and under Trusts to Sell.*

5. *When Title is not made out until after Contracts, or after Institution of the Suit.*

V. WHEN THE PURCHASER MAY, OR MUST TAKE THE TITLE, WITH INDEMNITY, OR WITH COMPENSATION.

VI. ALLOWANCE TO PURCHASER RESPECTING ABATEMENT OF PRICE.

VII. DELIVERY OF POSSESSION; ITS EFFECT AS AN ALLOWANCE OR WAIVER OF OBJECTIONS TO TITLE.

VIII. THE CONVEYANCE, SURRENDER, AND ADMISSION OF PARTIES; THE COSTS OF SAME.

IX. PURCHASER'S AND VENDOR'S COVENANTS.

X. DISCHARGE OF CONTRACT—REFUNDING PURCHASE-MONEY.

XI. BONA FIDE PURCHASER, HOW FAVOURED OR BOUND.

XII. LIEN CONCERNING.

1. *Of Vendor.*

2. *Of Purchaser.*

XIII. OF NOTICE AND ITS EFFECT; OF CHOSES IN ACTION.

1. *What amounts to Notice.*

2. *Effect of Notice, or of its Want.*

3. *Choses in Action.*

XIV. APPLICATION OF PURCHASE-MONEY.

XV. LIFE ESTATES, REVERSIONS, AND OTHER PARTIAL OR LIMITED INTERESTS.

**I. VENDOR AND PURCHASER GENERALLY:  
PAYMENT OF THE PURCHASE-MONEY.**

1. Two judgments of 1797 were obtained against one seized of the lands of B. and S. B. was sold in the I. E. Court, on the petition of a mortgagee of 1845; and, the proceeds of the sale being insufficient to pay the mortgage, an issue was directed by that Court to try whether the judgments had been paid. A verdict found that they had not been paid. The mortgagee was thereupon directed by the Court to pay the sum due on the judgments, and they were assigned to a trustee for her. *Held*, that the judgments were subsisting charges against S., and were not barred by the Statute of Limitations.—*Morris v. Herbert*, 9 I. C. R. 327. (R.)

2. A purchaser from a lessor, who is bound to grant a renewal, is entitled to those renewal fines only which accrued after his purchase.—*De Veaux v. Mara*, 15 I. C. R. 16. (R.)

**II. ENFORCING CONTRACT BETWEEN: GENERALLY, OR ON CONDITIONS. See post, IX.**

1. *When and on what Grounds enforced.*
2. *When not.*

**II. 1. Enforcing Contract between: Generally, or on Conditions: When and on what Grounds enforced: When not.**

3. In Equity there is a marked distinction between what is necessary to resist a suit for specific performance of a contract, and a suit founded on a contract executed.—*Vigors v. Pike*, 8 Cl. & F. 645.

4. A. and B. entered into a verbal treaty for the purchase of premises belonging to A. Being unable to agree on the price, A. wrote to C. that he would take from B. a named sum for the premises, reserving a small part thereof for his sister, if C. approved. B. lodged that sum with C., of which lodgment C. made a memorandum on A.'s letter, adding the remark, that it was "a great price." *Held*, that C. must be deemed A.'s agent; and that, since C. had signed the contract acknowledging the receipt of the purchase-money, A. was bound to perform the agreement.

*Semle*—The signature of the party to be bound satisfies the Statute of Frauds, so as to enable the Court to enforce specific performance.—*Field v. Boland*, 1 Dr. & Wal. 37. (C.)

5. The purchaser of an estate *pur autre vie*, sold under a decree of the Court of Ch. was *Held*, not entitled to be discharged from his purchase when the sole c. q. v. died after the bidding, and before the Master's report could have been confirmed.

In sales under the Court, the purchaser's title relates back to the time of the bidding, as in other sales it relates back to the time of the contract.—*Vesey v. Elwood*, 3 Dr. & War. 74; 2 Con. & L. 47. (C.)—[*Affg.* 5 I. E. R. 184; Fl. & K. 668. (R.)]

6. A., entitled to lands in fee, granted annuities out of them to B., to secure moneys advanced by him. A. subsequently agreed to sell the lands to C., in order to redeem with the purchase-money a leasehold interest under eviction, representing to him that B. would join in the conveyance. A. executed the conveyance to C., but he refused to allow A. to get the purchase-money until B. would discharge the lands of the annuities, which B. refused to do unless he were paid off. A. subsequently sold the lands to C., who had notice of the prior deed. On a bill filed by C., to set aside the sale to B., *Held*, that by C.'s conduct the contract was incomplete, notwithstanding that the deed was executed; and that A. had a full right to sell to another.—*Leader v. Ahearne*, 4 Dr. & War. 495; 2 Con. & L. 534. (C.)

7. A purchase upheld, which was agreed to on the vendor's death-bed, in consideration of an annuity for his life, the vendee having afterwards acquired the legal estate, and the agreement having been in pursuance of a contract made out by letters written some months before the final agreement.—*Barry v. O'Grady*, 9 I. E. R. 550. (C.)

8. A., being in prison as an insolvent, assigned to B. a leasehold interest, for a sum which discharged all A.'s debts, including debts to B. and head rent, but was less than the value. The deed purported to be an absolute sale, but there was an endorsement that if A. paid B. upon a day named the purchase-money, and costs, and all expenses of cropping the farm, B. would re-assign the lands, and the deed should be void. B. also a few days after gave a bond to surrender the premises if paid on the day. The same attorney acted for both parties. *Held*, that the transaction was a mortgage and not a conditional sale.—*Fee v. Cobine*, 11 I. E. R. 406. (C.)

9. In and previously to 1853, J. was indebted to S. by simple contract. At that time J. was possessed of considerable farming stock and household furniture, and of a judgment for £2500, and of leaseholds; he was also seized of a freehold interest in the lands of D. The leaseholds and freeholds were subject to a charge in favour of his sister H. J. was indebted to his sister M., and, in Jan. 1853, assigned to her his farming stock, at a valuation, in part payment of the debt. By deed of the 25th of May 1853, he conveyed to her his interest in D. for £600; and by another deed assigned the judgment. By deed of the 28th June 1853, he mortgaged the leaseholds and household furniture to M. to secure £3200. This mortgage was to be redeemable on the 28th June 1856, and contained a provision that M. should not, when in possession of the lands, be charged with a greater sum than £150 per annum; and that if J. died before the period of redemption, without paying off the sum due, the right to redeem should be at an end. By deed of the 7th Jan. 1854, J., in consideration of the charge in favour of H., conveyed his equity of redemption to a

trustee for her. This purported to be an absolute conveyance, but contained a provision that it should not prejudice the charge. S. obtained a judgment against J. on foot of his demand, on the 29th of April 1854, and registered an affidavit of ownership against J. S. afterwards filed a petition charging that those deeds were executed with intent to defeat and delay creditors; that the property of J., was, if duly applied, sufficient to pay the claims of M. and H., and also the petitioner's debt; and that the whole sum of £3200 was not due from J. to M. The petition prayed that the assignments and conveyance might only stand as a security for so much as was actually due to M., and prayed redemption of the mortgage. M., by her answering affidavit, relied on an account settled by J., on the 28th June 1853, and relied on the conveyance of D. as an absolute sale for £600. Affidavits in reply were filed by the petitioner, alleging that J. was worth more than £3000. *Held*, that the petitioner was not, as claiming under J., bound by the account settled by him, but that not having impeached them by his petition, they were to be treated as binding on him.

That the Court could not allow the conveyance to be conclusively supported as a purchase for value against a creditor, by the fact of payment of the £600.

That the petition having been filed before the period for redemption arrived, the prayer for redemption of the mortgage could not be sustained.—*Staunton v. Donohoe*, 4 I. C. R. 554; 7 I. Jur. 37. (C.)

## II. 2. When not.

1. A purchaser under a decree will not be held to his purchase unless all parties having judgments, &c., appearing on record against the vendor, whether prior or subsequent to the claim to raise which the bill was filed, are brought before the Court, so as to bind their rights.—*Piers v. P.*, 1 Dr. & Wal. 265. (C.)—[*Affg. S. & Sc. 379.* (R.)]

2. An auctioneer in the country set up a property for sale, first in lots; then part of it in batches of some lots together; then the whole at once. He stated that he would receive biddings, and that the Master would declare the purchaser. C. was the highest bidder for a batch of some lots, and afterwards for the whole. *Held*, that he was not entitled to be discharged from his bidding for the lots, though he was misled by the mode of selling, and meant to bid for the entire.—*O'Grady v. Brady*, 11 I. E. R. 400. (C.)

3. Letters patent, under which lands sold by private contract were held, contained covenants by the grantee—first, that he would place three free tenants of English or British race, blood, or name on the premises, each of whom should have 50 acres; or one free tenant, who should have 100 acres for one life; secondly, that he should have on the premises eight cullivers or muskets, and a proper

number of arms to arm eight pikemen for his defence against rebels, &c.; thirdly, a proviso, that if he should demise any part of the premises to the mere Irish for any term exceeding forty-one years or three lives, or if he should demise the premises, limited to be disposed of to any British or English person, to any person being mere Irish, the Crown might re-enter. The particulars of sale described the lands as a valuable fee-simple property, and one of the conditions of sale alluded to the letters patent. It appeared from a statute (10 Car. 1, sess. 3, c. 3), and public documents therein referred to, that the covenants were those inserted in patents at the plantation of Ulster, where the lands were situate. *Held*, that the purchaser, having express notice of the letters patent, was bound by constructive notice of the covenants contained in them.

That the first and third covenants were no longer in force; every subject of the Crown since the Union being a person of British race, name and blood, and there being no person now answering the description of mere Irish.

*Semble*—The second covenant could not be now enforced by the Crown.

By marriage articles, the husband agreed to settle out of the lands of K., in failure of A., his daughter by a former marriage, a jointure on his intended wife, the remainder of the lands on the issue male begotten on the wife; and in failure of issue male, on the issue female; and if A. survived and K. should not be made good, that then K., which was not settled on the former marriage, should be subject to the jointure, and be settled on the eldest son of the marriage; and in failure of the son, on the daughters of the marriage. There was no male issue, but female issue, B., C., and D. *Held*, that K. should be settled on them as tenants in common in tail.

No settlement was executed, and the lands descended to A., B., C., and D., subject to the trusts of the articles in 1763, when B., C., and D. went into possession. In 1783 they levied a fine, and conveyed to a purchaser for value, and covenanted that they were seized in fee. There were several subsequent conveyances for value. In 1847 the lands were contracted to be sold. *Held*, in a suit for specific performance against the purchaser, that the legal title of A. and her heirs to one-fourth of the lands was barred by the Statute of Limitations, as a Court of Law would not notice the executory trusts of the articles, and the several conveyances operated as disseizins.

*Semble*—The equitable title of the heir of A., on failure of issue of B., C., and D. was also barred.

*Held*, that as a fine created no discontinuance in equity, the title was too doubtful to be forced on the purchaser.

A conveyance of all her estate, &c., was obtained from the devisee of the heir-at-law of A., and was held to put an end to the objection; for although the reversion belonged to the heir of the settlor, he must trace title through the daughters, and all their

right was extinguished by this conveyance and the fine.

A recovery was suffered by a tenant for life, and remainderman in tail in 1781. The record stated that the tenant to the præcipe called to warranty the tenant for life, who appeared by his attorney, and warranted the tenant in tail, who appeared in person. *Held*, that the recovery was valid, though the record did not state a summons to warranty, nor a warrant of attorney to authorise the appearance for the tenant for life.

After exceptions allowed to the Master's report of good title in a suit for specific performance, the practice is not to discharge the purchaser, but at the request of the ptf. to refer it back to the Master to review his report, and enquire whether a good title can be made to the lands.

A purchaser relied on the memorial of a deed as creating an objection to the title, and succeeded on an exception founded on it. *Held*, that he could not afterwards object that the deed itself was not produced, although there was no condition of sale to dispense with its production.

The particulars of sale stated that the timber on the estate would be included in the purchase. Title was not made out to the timber on a very small portion of the lands. There being no misrepresentation, the Court referred it to the Master to enquire whether the timber on that portion was material to the possession and enjoyment of the estate.—*Stewart v. The Marquis of Conyngham*, 1 I. C. R. 534. (R.)

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### III. RIGHTS OF VENDOR AND PURCHASER BETWEEN THE MAKING OF THE CONTRACT AND ITS COMPLETION: CONSEQUENCES OF DELAY.

1. *In general; as to Deterioration of the Property.*
2. *Consequences of Delay.*
  - a. *Payment of Interest on Purchase-money.*
  - b. *Investment of Purchase-money: who is to have the Benefit, or to bear the Loss of the Investment.*

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5. The title of the purchaser and his liability refer back to the date of the contract. *Semle*—That if the subject of the contract become diminished in value after that period, and before conveyance executed, the loss will be his.—*Vincent v. Going*, 3 Dr. & War. 75.—[*Rev.* 3 I. E. R. 480; Fl. & K. 250. (R.)]

6. A. in 1838 agreed to sell to B. lands, B. to pay £6000 of the purchase-money at once, and the rest by the 1st of Jan. 1839, on a good title being made out; B. to get possession of L., part of the lands, on the 1st of May 1838, subject to any question of title; the abstract to be delivered on the 1st Nov. 1838, and a good title made out to the satisfaction of B.'s counsel in a month after; B. to execute the conveyance on the 1st of Jan. 1839; and if a good title were not made out by the 1st of Feb. 1839 (which was expressly fixed as of the essence of the contract), B. to be discharged from his purchase. B. paid the £6000 and entered into possession of L., and before

Jan. 1839 requested A. not to press the contract, as he was not in a condition to pay the balance. At the request of B., A. deferred to furnish the abstract until 1844. In August 1845, B. furnished requisitions for searches. The discussion on the title continued until June 1847, when B. stated that he considered himself no longer bound, unless his objections were satisfactorily answered in a month. A. then furnished what he relied on as satisfactory evidence of the point in dispute, and declined to give further searches; and in March 1848 filed the bill for specific performance. *Held*, that though time was originally of the essence of the contract, it was waived by the conduct of the parties. That B.'s right to give notice to rescind the contract could not arise until July 1847, and that the bill was filed within a reasonable time after. That the retention of L. by B. was inconsistent with the rescinding of the contract.—The satisfaction of counsel means reasonable satisfaction. *Gordon v. Mahony*, 13 I. E. R. 383. (C.)

1. The lessee under a lease containing a covenant against assignment, agreed to assign his interest under the lease. On a petition by the purchaser, for specific performance, the respondent alleged that the assent of the lessor to the assignment could not be obtained. *Held*, that a Court of Equity could not give any relief to the purchaser.—*Meara v. M.*, 8 I. C. R. 37. (C.)

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#### III. 2. a. Consequences of Delay.

2. The purchaser of a reversion expectant on a lease for lives must pay interest on the purchase-money from the day on which the Master reports that a good title could have been made by the vendor, to the time of payment.—*Enraght v. Fitzgerald*, 2 Dr. & War. 43; 1 Con. & L. 181. (C.)

3. Bill to raise an annuity. Answer, by purchaser of part of the lands charged, claiming to be exonerated from paying it. Upon motion for a receiver, ptf. relied on an affidavit, showing that, to obtain payment of the arrears, a receiver must be appointed over the sold lands. The order of reference directed the Master to appoint the receiver over part of the lands sufficient to pay the annuity.—*Bonyng v. Colgan*, 2 I. Jur. 156. (R.)

4. A purchaser served notice on the vendor that, unless a good title was made within one week, he would consider the contract at an end, yet continued negotiations, and did not appear to finally abandon the contract until about a month before the vendor filed his bill for specific performance. *Held*, that the

purchaser's acquiescence in the proceedings taken after the service of the first notice, prevented his relying on unreasonable delay, so as to disentitle the vendor to maintain his bill.—*Irvine v. Deane*, 2 I. Jur. 201. (C.)

### III. 2. b. Investment of Purchase-money: who is to have the Benefit, or bear the Loss of Investment.

5. A sum, not exceeding the interest of the purchase-money, or the rents of the estate, paid to the purchaser, when the money had been lodged three years, but the title had not yet been completed.—*Piers v. P.*, 11 I. E. R. 358. (R.)

6. A R. Co., needing lands for the construction of their railway, served, in Nov. 1846, a notice to treat upon the owners of the legal estate in the lands; but the parties not having come to any arrangement in pursuance of that notice, the Company, in May 1847, proceeded by inquisition before the sheriff and a jury; and a verdict was then given for sums for purchase-money and compensation. Afterwards, in the same month, the Company went into possession of the lands. In March 1848, an abstract of the title of the owners was furnished to the Company; and from that period up to Jan. 1851, a correspondence took place between the respective parties, partly relating to title, and partly to a claim made by the owners for interest upon the purchase and compensation moneys. Eventually, the Company refused to pay interest, and in Jan. 1851 lodged the purchase-moneys in the Bank of Ireland to the credit of all persons interested in the lands. A cause petition having been filed by the owners, praying a specific performance, and interest at the rate of £5 per cent. upon the purchase and compensation moneys, from the period at which the Company took possession of the lands up to the time of the lodgment of those moneys in Bank; *Held*, that the ordinary relation of vendor and purchaser existed between the parties.

That the owners were entitled to the interest as prayed for.—*Blount v. Gt. S. & W. Ry. Co.*, 2 I. C. R. 40. (C.)

### IV. OF THE TITLE.

1. *Generally.*
2. *When Purchaser must Accept it.*
3. *When not bound to Accept it.*
4. *By Assignees in Bankruptcy, &c.; and under Trusts to Sell.*
5. *When Title is not made out until after the Contracts, or after Institution of the Suit.*

#### IV. 1. Of the Title generally.

7. The Court will not make it a condition of sale of an interest under a lease, that a purchaser shall not be at liberty to object to the lessor's title to grant the lease; but will direct that the purchaser shall not require ptf. to show that the lessor had such power,

leaving the purchaser free to object *aliunde*.—*Willis v. Latham, S. & Sc.* 441. (R.)

1. A purchaser, having lodged one-fourth of his purchase-money, refused to lodge the remaining three-fourths unless the abstract of title was first delivered to him. No report of good title had been obtained. The ptf. moved that the lands be re-sold, and the one-fourth forfeited. *Held*, that the purchaser was not entitled to the abstract, and that the one-fourth could not be forfeited; no report of good title having been obtained.

*Seemle*—If that report had been obtained, the proper motion would have been, that the lands be re-sold; the one-fourth to remain as a security to indemnify the estate from all loss and costs attending the re-sale.—*Warren v. Bateman, Fl. & K.* 189. (R.)

2. Construction of a contract to sell a leasehold estate: whether the contract was, to sell the vendor's interest, whatever it might be; or, that a good title to the leasehold estate should be made out?

Under a contract to make out a good title to a lease for lives renewable for ever, the vendor must show who were the lives existing when the contract was made.—*Anderson v. Higgins, 1 Jon. & L.* 718. (C.)

3. Recognizances conditioned for the due accounting of a receiver are not within the 2 G. 1. When recognizances of this description are searched for and found, it is not sufficient to satisfy the purchaser that twenty years have elapsed, and no payment has been made, or proceeding taken during that period; whereas, if that were a sufficient answer, there is no doubt that it would be relied on as an answer to the purchaser's objection; because it would be much easier for the vendor to rely on that, in many cases, than to procure the recognizance to be vacated; and yet the latter is the course invariably pursued.—*Reg. v. Bayley, 4 I. E. R.* 146. (C.)

4. Although a purchaser who buys subject to an incumbrance, for payment of which the vendor has bound himself by covenant, is bound to indemnify the vendor against it; yet, in a suit, to which the vendor is not a party, for the recovery of that incumbrance out of the estate, the Court will not, in his absence, compel the purchaser to pay more than six years' arrears.

It is too late now to dispute that a purchaser buying, subject to incumbrances, is bound as the seller was, and that he is bound to indemnify the seller against those incumbrances, subject to which he took.—*Kyme v. Dignam, 4 I. E. R.* 652. (C.)

5. Form of order to the Master to deliver title deeds and documents to the ptf.'s solicitor to be deposited in the Bank of Ireland for the benefit of the several purchasers under the decree; and allowing the purchaser to compare copies with the original deeds.—*Cunningham v. Hume, 6 I. E. R.* 76, n. (R.)

6. A condition of sale, that the purchaser shall not be at liberty to investigate the lessor's right to grant a lease for lives renewable for ever, decreed to be sold, will not be allowed; but the Court will refer it to the Remembrancer to settle a condition of sale, that the purchaser shall not require the vendors to produce the lessor's title.

A vendor will be relieved from the liability of verifying the abstract of title only by proper evidence, by stipulations expressed in plain, clear, and unambiguous language.—*Lahey v. Bell, 6 I. E. R.* 122. (E.E.)

7. Observations on a vendor's duty in preparing particulars of the estate to be sold.—*Martin v. Cotter, 9 I. E. R.* 351; 3 Jon. & L. 496. (C.)—[See 9 I. E. R. 44; 8 I. E. R. 147. (R.)]

8. R., occupier of premises, agreed to give them up to a company for a sum; but afterwards—stating that another person also had an interest in them—refused. The company lodged the money Court to his separate credit. *Held*, that that lodgment was an admission by the company of his title, and that he was entitled to be paid without a reference.

That the company, having made an insufficient tender, was not entitled to costs; and that R., his proceedings having been *mala fide*, was not entitled to costs.—*In re Ir. S. East. R. Co., 1 I. Jur.* 155. (E.E.)

9. A purchaser under a decree objected to the title, but did not appear on the summons to consider the objections. A report of good title was made. He took several objections: they were overruled. Reference to enquire whether he had been put into possession of all the lands. Report, that he was entitled to £60 compensation; which he moved should be allocated to him with costs of the motion and reference.

Cross-motion, that he should pay ptf.'s costs of the reference upon which his objections had been overruled.

The Master certified that there were not grounds to justify those objections.

Order—that the compensation be allocated to the purchaser; but that he should pay the ptf.'s costs.

The Court declared that the 4 & 5 W. 4, c. 78, s. 12, gave the Masters jurisdiction to decide such questions of costs.—*Beckly v. Smith, 2 I. Jur.* 266. (R.)

10. An agreement "to sell the interest of A. B. in the lands of W.," does not absolve A. B., the vendor, from the necessity of proving his lessor's title.

Nor is there any waiver of that necessity by the mere fact of the vendee having taken possession of the lands before production of the lessor's title.

When an agreement for sale of a leasehold is silent as to the production of the lessor's title, parol testimony is admissible in proof of facts and circumstances constituting a waiver by the vendee of production of the lessor's title.

*Semble*—That if such a waiver be proved, the Court will declare it to be established although the bill contains no prayer to that effect.—*Wright v Griffith*, 1 I. C. R. 695; 3 I. Jur. 138. (C.)

1. An agreement by the vendors to let to the vendees, for the term of 61 years, the premises then occupied by the vendors, "as held under A.," does not absolve the vendors from the duty of proving the title of their lessor, A.

And on its appearing that A. was himself only a lessee for three lives, with a covenant for perpetual renewal—*Held*, that the vendors could not make good title to grant a lease for a term of 61 years.

That the fact of other premises (besides those proposed to be let by the vendors) being comprised in the lease to A., was a fatal objection to the title.

When there is an agreement by a vendor, having a derivative estate in lands, to let them for a term of years; and such an agreement, if carried into execution, would operate not as a lease, but as an assignment of the vendor's estate: *Quære*—Whether specific performance of the agreement will be decreed against the vendee?—*Leatham v. Allen*, 1 I. C. R. 688; 3 I. Jur. 73. (C.)

2. A contract for sale of the "lessee's interest" in a lease does not exonerate the vendor from the necessity of proving the lessor's title to grant the lease.—*Fennelly v. Anderson*, 1 I. C. R. 706; 4 I. Jur. 33. (C.)

3. When a party who had contracted for the sale of lands died before the execution of the conveyance, having by will, before the contract for sale, devised all his real estate to trustees (who took the legal estate) upon trust for A. for life; remainder to B. for life; remainder to C., an infant, in tail; a suit for the completion of the contract having been rendered necessary by reason of the infancy of B., the Court decreed specific performance, with costs of the suit.—*Heard v. Cuthbert*, 1 I. C. R. 369. (C.)

4. When a purchaser of lands waives his right to have proof of the vendor's title, and a suit for specific performance of the contract is instituted by the vendor, the latter ought, if he wishes to take advantage of the waiver, to put the question in issue by his petition. The point should not be raised by a subsequent affidavit.

As a general rule, each party to a contract for the purchase of lands should employ a separate solicitor; the same solicitor ought not to act for both.—*Meara v. Rogers*, 3 I. Jur. N. S. 108. (R.)

5. By deed of 1769, A. granted a perpetual yearly rentcharge of £134, payable out of lands held by him for three lives, perpetually renewable. That deed was lost, but it appeared, from a memorial thereof, that A. had granted to B. and C., for the uses mentioned in the deed, a yearly rentcharge of £134, for

ever, issuing out of the lands. The rentcharge was paid by the owners of the lands from 1769 down to 1860, when a petition was presented to the L. E. Court for a sale of the rentcharge. *Held* (overruling a decision of a Judge of the L. E. Court), that the memorial, coupled with evidence of the payment of the rentcharge down to 1860, was sufficient evidence of a perpetual subsisting rentcharge, so as to enable the Court to sell.—*In re Harding*, 11 I. C. R. 29. (C.A.)

6. A., having made a will, devising all his property to his wife, and having contracted to sell the lands, died. *Held*, in a suit for specific performance by the purchaser, that the heir-at-law of A. was not a necessary party to the conveyance, as he had no legal estate in the lands, and no equitable estate; and no right to institute a suit to set aside the contract, having regard to the will of A., devising all his property to his wife, who, if the contract was set aside, would be entitled to the lands; and, if the contract was not set aside, would be entitled to the purchase-money.—[*Roberts v. Marchant*, 1 Ph. 370, explained.]—*Fowler v. Lightburne*, 11 I. C. R. 495; 6 I. Jur. N. S. 93. (R.)

#### IV. 2. When the Purchaser must accept the Title.

7. D. being entitled to an undivided moiety of a lease for lives, containing a covenant for perpetual renewal, devised her interest to A. The day after the date of this will a renewal was granted by D. to the deft., who was entitled to the other moiety, and to C., who was supposed to have some interest in the lease. A. having contracted with the deft. to sell his (A.'s) moiety—*Held*, on a bill by A. for specific performance, that the renewal did not operate in Equity as a revocation of the devise to A. although it admittedly did at Law, and that A.'s was such a title as the Court would compel a purchaser to take.—*Poole v. Coates*, 2 Dr. & War. 493; s. c., 1 Con. & L. 581; 4 I. E. R. 497. (C.)

8. A purchaser, under a decree, will be compelled to take a title which depends on adverse possession, under the Statute of Limitations, although the fact of such adverse possession is evidenced merely by affidavit in the Master's office, and was not at issue in the suit.

*Held*, that it was no objection to the title, that the facts constituting adverse possession were proved by affidavit, and in the absence of the heir.—*Scott v. Nixon*, 2 Con. & L. 185; 6 I. E. R. 8; 3 Dr. & War. 388. (C.)

9. *Semble*—That when the estate bargained for has been voidable in its creation, it lies upon the purchaser objecting to the title upon that ground to show that it has been avoided.—*Massey v. Batwell*, 2 Con. & L. 413. (C.)

10. The decree in a suit, to raise charges created by will, directed the sale of lands, the legal estate in which was vested in an adult trustee, in trust for minors. The trustee and

c. *g.* trusts were parties to the suit. A day to show cause was given to the latter.

A purchaser under the decree was compelled to take the title.—*Kirby v. O'Hea*, 2 Jones, 635. (E.E.)

1. An estate for life having been sold under a decree, the tenant for life died after lodgment of the purchase-money in Court, and obtaining the rule *nisi* to confirm the report of the sale, but before the sale was confirmed. *Held*, that the purchaser must complete his purchase.—*Vincent v. Going*, 3 I. E. R. 480; Fl. & K. 250. (R.)—[Rev'd.: 3 Dr. & War. 75, n. (C.)]

2. When the purchaser of an interest sold under the Court acquires thereby a knowledge of a defect in the title to it, and afterwards buys up the estate of the person interested in taking advantage of the defect, the Court will not allow him to rely upon the doctrine, that a purchaser is not obliged to take a doubtful title, in support of an objection to the title founded on that defect.

*Quere*—If the objection was valid, would the Court allow him to rely on it?

Ultimately the purchaser accepted the title, being allowed his costs.—*Sheppard v. Doolan*, 5 I. E. R. 6; 3 Dr. & War. 1. (C.)—[See 4 I. E. R. 654; Fl. & K. 598. (R.)]

3. A marriage settlement conveyed lands, held under a lease for lives renewable for ever, to trustees to the use of G., the husband, for life; remainder (subject to jointure and younger children's portions) to the first and other sons of the marriage in *quasi* tail. After G.'s death, the younger children filed a bill to raise their portions. In 1843 the lands were sold under a final decree of 1838. In 1842, a renewal of the lease had been executed to deft., the *quasi* tenant in tail, against whom, pending the suit, several judgments had been obtained, of which no notice had been taken. Because of them the purchaser objected to the title. The Master reported a good title. On exceptions to the report—*Held*, that the renewal ought to have been executed to the trustees of the settlement: that, it having been executed to the deft., he was made thereby a mere trustee of the legal estate on the trusts of the settlement: that the judgments did not constitute a valid objection to the title.—*Leake v. L.*, 5 I. E. R. 361. (R.)

4. In a purchase of a life interest under the Court, the life dropped after the rule *nisi* to confirm the report of the sale had been obtained, and before it could be made absolute. *Held*, that the purchaser was bound to pay the purchase-money.

In sales under the Court, the purchaser's title relates back to the day of the bidding, as in other sales it does to the day of the contract.

*Semble*—The case of the purchaser of a fee-simple estate is distinguishable from that of a life estate, with respect to compensation for casualties.—*Vesey v. Elwood*, 3 Dr. & War.

74; 2 Con. & L. 47. (C.)—[Affg. 5 I. E. R. 184; Fl. & K. 668. (R.)]

5. A tenant in tail, C., on the marriage of his eldest son, B., conveyed the entailed lands as if he were seized in fee, to trustees for a term of years, to secure a jointure for his own wife, and a jointure for B.'s intended wife, if other property whereon the latter had been charged should be sold; and, subject thereto, to the use of C. for life, remainder to other trustees for another term to raise portions for C.'s younger children; then to B.'s use for life; remainder, subject to a third term, to B.'s first and other sons in tail. No fine was ever levied, nor any recovery suffered by C. or B. A bill having been filed to raise the portions, a sale of the term was decreed. Afterwards, B. and C. being dead, the eldest son of B. executed a disentailing deed, and conveyed the lands in fee to D., not a party to the suit, expressly subject to the term. D. conveyed to B.'s widow, a party to the suit. She had allowed the decree to be made on sequestration against her. The M. R. overruled the purchaser's objections to the title. On appeal, *Held*, that the acts of the eldest son confirmed the settlement, and that a good title to the term could be made; that the widow, having acquired her title after the decree, must out of it give the decree effect; that the judgments, entered pending the suit, against the eldest son and D., did not constitute an objection to the title.—*Massey v. Batwell*, 5 I. E. R. 382; 4 Dr. & War. 56. (C.)

6. Objections to title overruled.—*Poole v. P.*, 6 I. E. R. 50. (R.)

7. The purchaser under a decree in a creditors' suit objected to the title because of outstanding judgments confessed by deft. before the bill was filed, but which afterwards, pending the cause, were revived and redocketed under Moore's Act; and that they were not bound by the decree. The Master overruled the objection, being of opinion that the judgments in *sci. fa.* were to be deemed new and original judgments; that the first were gone, and that the others, having been obtained pending the suit, did not affect the title to be conveyed to the purchaser. On exceptions to a report of good title—*Held*, that they should be allowed:—that the judgments in *sci. fa.* were not to be considered as creating new rights, but merely as reviving rights under the original judgments; and that the purchaser's objection should therefore be allowed.—*Newman v. Fitzgerald*, 6 I. E. R. 260. (R.)

8. The lands of M., part of the manor of C., were conveyed, in 1823, to A. and his heirs, "saving and excepting thereout the manorial rights belonging to the manor of C., and the tolls and duties of the fairs and markets thereof, and also any liberty of turbary or limestone heretofore granted therein or thereout by B. or his ancestors to any of the tenants of the said manor as expressed in their leases respectively." There was no lime-

stone or turbary on the lands of M., nor had any manorial rights been exercised for more than twenty years, nor any fair or markets ever held. In 1845 M. was set up and sold as held by a clear indefeasible title in fee-simple. Upon objection to the title, the Master in Chancery reported the title bad. *Held*, upon exceptions to the report, that under the circumstances the saving in the deed did not form any ground for the report of bad title.

In the rental under which the lands were sold, a part was thus described:—"Term for which demised; under an article of agreement for lease for four lives, bearing date 1804, and one year." The sale took place in Jan. 1845, and on the 9th April, the purchaser's solicitor received a copy of the article, and then first discovered that the agreement was for a lease to commence after the expiration of a then subsisting lease which did not expire until 1843. On the 24th Oct. he lodged objections to the title, and subsequently swore that he was misled by the statement in the rental. *Held*, affirming the report, that the misstatement was ground for discharging the purchaser, not for compensation. That the delay in lodging the objection disentitled the purchaser to his costs.—*Martin v. Cotter*, 9 I. E. R. 44. (R.)—[See 9 I. E. R. 351; 3 Jon. & L. 496. (C.)]

1. A., tenant for life, mortgaged under a power the inheritance for £500 and £1000. He afterwards paid the first mortgage, and took an assignment to a trustee. After his death, B. became entitled to the mortgages. C., the tenant in tail, being a minor, covenanted by marriage articles, in 1827, to convey the lands in trust to sell, and pay the debts affecting them; and, subject thereto, for herself for life; remainder to her children. On her attaining age, a recovery was suffered. B. filed a bill, and, in 1835, got a report finding that arrears of rent and fines due in A.'s life, and after, had been paid by loan on mortgages, and that this sum, and the two mortgages with interest on them all from A.'s death to the date of the report, were due. A sale to pay them was decreed. In 1840, B.'s assignee filed a bill, not making the trustee of C.'s settlement a party, and obtained a decree to carry the former decree into execution. *Held*, that the first decree erred in declaring the inheritance liable for interest, payable by the life estates of A. and C., and that a purchaser under the second decree, in which the inheritance was not represented, could not be held to his purchase.

A report of good title, ptf.'s solicitor undertaking to procure a signature, is informal.—*Mugawley v. Brady*, 9 I. E. R. 59. (R.)

2. The trustees of a marriage settlement were empowered, upon the request of the tenant for life, to raise such sum of money as might be necessary to purchase a mansion-house, with a demesne attached, as a residence for the tenant for life; and it was declared that the mansion-house or lands, when so purchased, should be conveyed to the trustees, upon and for the same trusts, &c., and

with, under, and subject to the same powers, &c., as were in and by "these presents declared and contained, of and concerning the said hereditaments and premises hereinbefore granted." The settlement contained a power to the trustees, with the consent of the tenant for life, to sell, by public auction or private contract, or to exchange the settled lands for such price in money, or equivalent in other lands, as to them should seem reasonable; or to re-sell the lands which might be so purchased, and to give discharges for the purchase-money; and, in order to effectuate such sales, to revoke the uses and trusts of the settlement, and to appoint any uses and trusts which should be thought necessary or expedient for effectuating such sale or exchange; and the trustees were authorised to invest the purchase-money in lands, which were to be settled to the same uses, and upon and for the same trusts, &c., and subject to such and the same powers, provisions, declarations, and agreements, as were declared as to the settled lands. In 1857, the trustees, with the consent of the tenant for life, purchased for £1200 a mansion-house, which was conveyed to them, subject to such and the same trusts, &c., and subject to the same powers, &c., as in the thereinbefore recited indenture limited, &c., of and concerning the lands of L. In 1858, the trustees, at the request of the tenant for life, sold the mansion by auction to the respondent. *Held*, in a suit for specific performance of the contract for sale, that the trustees could make a good title to the mansion-house, and the purchasers were bound to accept it.

Deeds are to be read in their grammatical and ordinary sense; and the Court should not transpose the words of a clause, unless it is absurd, or repugnant to or inconsistent with the rest of the deed.—*Clements v. Henry*, 10 I. C. R. 79. (R.)

3. A purchaser, who has agreed to take an assignment of premises held under a lease for years, cannot object to the title upon the ground of the discovery that such lease is an under-lease; because the sub-lessee is now placed in privity with the head landlord, by the 23 & 24 Vic., c. 154, s. 21.—*Balfour v. Macneill*, 7 I. Jur. N. S. 8. (C.)

#### IV. 3. When not bound to accept Title.

4. A purchaser cannot be compelled to accept a title, without having judgments against the person in whom the legal estate is vested satisfied.

*Semle*—Even when a purchaser can get a clear legal estate, he will not be compelled to accept the title without having judgments, entered after the execution of a deed conveying such legal estate, satisfied; he having notice of them.—*Piers v. P.*, S. & Sc. 379. (R.)—[Affd.: 1 Dr. & Wal. 265. (C.)]

5. The omission from a rental, of a reservation of mines, minerals, and of a right of



entry to search for them, is a valid objection to the title.—*Barton v. Lord Downes*, Fl. & K. 505. (R.)

1. By deed of 1709, S., with twelve other denominations, was conveyed to J., subject to a rent of £126, determinable on payment of £1200. In J.'s will of 1717, and in family settlements of 1756 and 1778, no notice of the existence of this rent was taken. In 1841, S. was sold under a decree in a foreclosure suit. In the rental and abstract the lands were described as fee-simple; and in a declaration made by deft. under the 4 & 5 W. 4, c. 62, he stated that no part of the rent had ever been paid by him, or any of his ancestors, out of S. There was not evidence to show that it had not been paid out of the other denominations. *Held*, that there were not grounds sufficient to warrant the Court in presuming that the rent was extinguished or released; and that it was a valid objection to the title.—*Warren v. Bateman*, Fl. & K. 448. (R.)

2. An estate, described as a freehold estate for three lives, with covenant for perpetual renewal, was sold under a decree. The original lease of 1777 did not contain any express covenant for perpetual renewal; but the *habendum* was to the lessee, his heirs and assigns, "for and during the natural lives of J. and C., or the longest liver of them, or whatever life or lives should for ever or thereafter be nominated or appointed, added or inserted on the back of said indenture, or a label affixed thereto; yielding and paying unto R. L., the lessor, his heirs and assigns, the yearly rent of," &c. In 1836, the son and devisee of the original lessor executed to the assignee of the original lessee a renewal for three lives, in which the original lease was recited as containing a covenant for perpetual renewal; and the renewal was expressly made "in pursuance and performance of said covenants." It did not contain any covenant for renewal; but the *habendum* was like that in the original lease, except that the word "and" was used instead of "or." The Master reported that the title was not such as the purchaser could be compelled to take. On exceptions thereto, *Held*, that the report should be confirmed, and the exceptions overruled, with costs.—*Sheppard v. Doolan*, 4 I. E. R. 654; Fl. & K. 598. (R.)—[But the purchaser ultimately accepted the title, being allowed his costs on appeal, 5 I. E. R. 6; 3 Dr. & War. 1. (C.)]

3. By letters patent of 31 Car. 2, the lands of H. were granted to G. in tail male; and a rent of 3d. an acre, the amount of quit-rent prescribed by the Act of Settlement, was reserved. In 1681, G. conveyed H. to S. and his heirs, saving the estate and right of the Crown. In 1776, the estate tail determined by failure of G.'s issue male. Until the filing of the bill in 1841, the representatives of S. remained in possession, and dealt with the estate as an absolute one in fee. The rent reserved by the letters patent was regularly

paid to the proper officer, and the usual receipt given for it as quit-rent. *Held*, that the Crown's right to the land on the determination of the estate tail was barred, and transferred to the vendor by the 48 G. 3, c. 47; the case not coming within any of the exceptions in its 1st sec.

The purchaser's exception to the title was overruled.—*Tuthill v. Rogers*, 6 I. E. R. 429; 1 Jon. & L. 86. (C.)

4. When a party objects to a Master's report as to title, his proper course is, to file exceptions, and set them down for hearing in the cause list.

A ptf. cannot, after proceeding before the Master on a reference as to title, rely on the purchaser's previous acts as binding him to his purchase, notwithstanding a report of bad title.—*Harwood v. Bland*, Fl. & K. 540. (R.)

5. Under a deed, in the nature of a mortgage, containing a trust for sale, the trustees and mortgagee can make a good title to a purchaser without the concurrence of judgment creditors of the mortgagor, whose judgments are subsequent to the deed; and it makes no difference that the sale is had in a suit founded on the deed.

Though a purchaser is not bound by the opinion of his counsel on the abstract of title, waiving an objection, yet if the objection, does not go to the root of the title (*ex. gr.*, if it be for the non-production of an old deed), if the purchaser continues to treat, and leads the seller to further expense for some time after the first waiver, he cannot afterwards rely on it.—*Alexander v. Crosbie*, 7 I. E. R. 445; 1 Jon. & L. 666. (C.)—[*Affg.* 6 I. E. R. 513.]

6. Lands were set up as held under a clear and indefeasible title in fee-simple. It appeared that they had been conveyed forty years before, reserving a right to cut turf and quarry limestone, to tenants of another estate, although the right had never been since exercised, and there were no turf bogs worked or quarries open on the estate; but it did not appear that there might not be turf, and there was no proof that there was not limestone. *Held*, a good objection to the title and the purchaser discharged.—[Overruling the decision of the M. R., 8 I. E. R. 147.]

The rental at the sale contained an obscure statement, leaving it doubtful whether a tenant held for lives named in 1804 or 1843. It proved to be the latter, and the purchaser swore he had been misled. *Held*, a sufficient ground for discharging the purchaser.—[Affirming the decision of the M. R.]

Observations on clearing a title by showing the non-existence of rights under a reservation or onerous covenant not stated; and on the duty of being careful and explicit in preparing for a sale.

A delay of seven months—*Held*, no waiver of an objection to the title which turned upon a question of fact.—*Martin v. Cotter*, 9 I. E. R. 351; 3 Jon. & L. 496. (C.)—[Affirming the decision at the Rolls, 8 I. E. R. 147.]

1. Lands were sold as fee-simple; after the sale, the purchaser found that, though the lands were held in fee, the owner was bound to raise and maintain the fences, and keep the drains and watercourses clear, &c. *Held*, that the purchaser could not be compelled to accept the title, when the enjoyment of the estate was subject to those qualifications.—*Larkin v. Lord Rosse*, 10 I. E. R. 70. (R.)

2. A purchaser of a leasehold under a decree is affected with notice of all clauses in the lease; but has a right to assume that the premises are lawfully in the condition in which they are sold. Therefore when a lease contained a clause of forfeiture for the exercise of a trade, which was that carried on on a part of premises comparatively of little value for any other business—*Held*, a ground for discharging the purchaser, though he had been some time in possession, and there was a waiver by the landlord for the time past.

A purchaser under a decree is not bound to make his objections to the title in any particular order.—*Spunner v. Walsh*, 11 I. E. R. 597. (C.)

3. An agreement by the vendors to let to the vendees for 61 years the premises then occupied by the vendors, "as held under A.," does not absolve the vendors from the duty of proving the title of their lessor.

On its appearing that A. was himself only a lessee for three lives, with a covenant for perpetual renewal—*Held*, that the vendors could not make good title to grant a lease for 61 years.

That the fact of other premises (besides those proposed to be let by the vendors) being comprised in the lease to A. was a fatal objection to the title.

When there is an agreement by a vendor, having a derivative estate in lands, to let them for a term of years, and such an agreement, if carried into execution, would operate not as a lease, but as an assignment of the vendor's estate; *Quære*—Whether specific performance of the agreement will be decreed against the vendee?—*Leatham v. Allen*, 1 I. C. R. 683; 3 I. Jur. 73. (C.)

4. A., seized of P. and other lands, directed all his just debts, funeral expenses and legacies to be paid by his executors, and devised all his real and freehold estates (save a part devised to his wife), upon trust that his wife and her assigns should, after his decease, receive a rentcharge, with power of distress; and that three of his daughters should receive rentcharges; with like remedy by distress and entry as provided with respect to the rentcharge to his wife. A. then bequeathed pecuniary legacies to his children, and left all the residue and remainder of his real, freehold and personal estates, subject to his debts and the aforesaid legacies and annuities, to the trustees. *Held*, that the rentcharges to the daughters were specifically charged on the same lands as the rentcharge to the wife, and had priority over the legacies, which were charged by the residuary clause only.

By the marriage settlement of one of the daughters, one of the rentcharges and part of a legacy were vested in the children of the marriage (some of whom were minors), subject to an exclusive power of appointment in the parents. The minors were depts. in a suit to carry the trusts of the will into execution, in which the Master found, upon the consent of the counsel and trustee of the minors, that the legacies and rentcharges were in equal priority, and that the finding was in the nature of a compromise, and beneficial to the minors. The report was confirmed by a final decree, and the lands of P., among others, were decreed to be sold to pay the several sums reported, in the first instance subject to the rentcharges to the daughters, and if sufficient was not produced to pay the debts and legacies, then discharged of the rentcharges. If the sum arising from such sale should be insufficient to pay the debts, legacies, and value of the rentcharges, and costs, the legatees and devisees of the rentcharges should abate rateably. The lands of P. were sold discharged of the rentcharges. *Held*, allowing exceptions to the Master's report of good title, that the report and decree, being founded on a consent which the Court had no jurisdiction to take, were erroneous, and that the title under it was bad.

Pending an appeal from that decision, which was affirmed, a deed was executed by the father of the minors, appointing the rentcharge to a son, who was adult when the consent was entered into, and was a party to it, and the legacy to him and two of the minors, who had since come of age. The Lord Chancellor having, on the statement that the ptf. could then show a good title, referred it back to the Master to review his report, who found that a good title could be made by reason of the deed.

*Semble*—That the appointment having been made on an emergency, and not *bona fide* for the end designed by the donor of the power, was void.

*Held*, that the title was too doubtful to be forced on a purchaser, and the exceptions to the Master's further report of good title were also allowed.—*Weir v. Chamley*, 1 I. C. R. 295. (R.)—[S. c., 4 I. Jur. 1. (C.)]

#### IV. 4. By Assignees in Bankruptcy, &c.; and under Trusts to Sell.

5. By marriage articles of 1767, it was agreed that £1000, secured by the bond of A., the intended husband, on which judgment was entered, should be divided among the younger children of the marriage. By deed of 1795, A. conveyed the lands of K., of which he was seized in fee, to the use of himself for life; remainder, subject to £500, secured by a term for his younger children, to J., his second son, for life, remainder to his third, fourth, and other sons in tail. In 1798, A. made his will, without noticing the deed of 1795, and devised K., subject to £1000 for his younger children, to J. A. died, and bills were filed in 1803 and 1818 on behalf of some of the younger children to raise the £2000 secured by the articles and

the will; but not noticing or relying on the deed which was afterwards put in issue by one of the answers. In 1818, G., the fourth son, who was entitled to an estate tail in remainder under the deed, became insolvent. He and his assignee were parties to the latter suit, but not in respect of that estate. A decree for a sale of the fee was pronounced for the sum due under the articles, and a part of the sum due under the deed. The abstract of title stated the insolvency of G., and that the heir of his assignee would join in the conveyance. The assignment under the insolvency had been lost, but the deed of 1795 was referred to in the schedule. *Held*, on objections to title—

That the abstract and schedule afforded sufficient evidence of an actual assignment of the estate tail in remainder under the Insolvent Act then in force.

That the assignment, though *pendente lite*, was valid, being made under the authority of a statute, and conveyed a base fee to the assignee; and, the decree not being binding on him, the title was defective.

That the defect could not be cured by the heir of the assignee joining in the conveyance, as he was a trustee for the creditors of G., who did not appear to have been paid, and were not bound by the decree.

That the decree was not erroneous in directing a sale of the fee for a portion of the sum secured by the term in the deed of 1795.—*Keogh v. K.*, 13 I. E. R. 284. (R.)

1. In the case of purchasers from the assignees of a bankrupt, the rule respecting the costs of investigating the title resembles that governing sales under decrees of Courts of Equity.—*In re Page*, 1 Dr. & Wal. 31. (C.)

2. A ptf. may rely on a title acquired in point of form after he filed the bill, if it be not inconsistent with his original claim, and is capable of relating back. Therefore, when an insolvent debtor's devisee filed a bill for a renewal; and, the objection being raised, afterwards procured himself to be appointed assignee, and amended the bill stating that fact, *Held*, that he could sustain the bill.—*Doyle v. Callow*, 12 I. E. R. 241. (C.)

#### IV. 5. When Title is not made out until after the Contracts, or after Institution of the Suit.

3. A ptf. may rely on a title acquired in point of form after he filed the bill, if it be not inconsistent with his original claim, and is capable of relating back. Therefore, when an insolvent debtor's assignee filed a bill for a renewal; and, the objection being raised, afterwards procured himself to be appointed assignee, and amended the bill by stating that fact—*Held*, that he could sustain the bill.—*Doyle v. Callow*, 12 I. E. R. 241. (C.)

4. A. in 1838 agreed to sell to B. lands, B. to pay £6000 of the purchase-money at once, and the rest by the 1st Jan. 1839, on a good title being made out; B. to get possession of L., part of the lands, on the 1st May 1838,

subject to any question of title; the abstract to be delivered on the 1st Nov. 1838, and a good title made out to the satisfaction of B.'s counsel in a month after; B. to execute the conveyance on the 1st Jan. 1839, and if a good title were not made out by the 1st of Feb. 1839 (which was expressly fixed as of the essence of the contract), B. to be discharged from his purchase. B. paid the £6000, and entered into possession of L., and before Jan. 1839 requested A. not to press the contract, as he was not in a condition to pay the balance; and, at the request of B., A. deferred to furnish the abstract until 1844. In August 1845, B. furnished requisitions for searches. The discussion on the title continued until June 1847, when B. stated that he considered himself no longer bound, unless his objections were satisfactorily answered in a month. A. then furnished what he relied on as satisfactory evidence of the point in dispute, and declined to give further searches, and in March 1848 filed the bill for specific performance. *Held*, that though time was originally of the essence of the contract, it was waived by the conduct of the parties. That B.'s right to give notice to rescind the contract could not arise until July 1847, and that the bill was filed within a reasonable time after. That the retention of L. by B. was inconsistent with the rescinding of the contract.—The satisfaction of counsel means reasonable satisfaction.—*Gordon v. Mahony*, 13 I. E. R. 383. (C.)

#### V. WHEN THE PURCHASER MAY, OR MUST TAKE THE TITLE, WITH INDEMNITY, OR WITH COMPENSATION.

5. The case of a purchase of a fee-simple estate is distinguishable from that of a life estate with respect to compensation for casualties.—*Vesey v. Elwood*, 3 Dr. & War. 74; 2 Con. & L. 47. (C.)—[*Affg. Fl. & K.* 667; 5 I. E. R. 184. (R.)]

6. When lands are purchased by Commissioners under the 2 & 3 Vic., c. 61, for the purposes of the Act, and the purchase-money is lodged in Court, the Court will, under the words "reasonable costs, charges, and expenses," in the 29th sec., award the parties entitled, the costs necessarily incurred by them in obtaining payment from the Court, and in having the money invested upon trusts similar to those to which the lands purchased were subject.—*In re The Commissioners of the River Shannon*, 3 I. E. R. 355. (R.)

7. A purchaser of lands, sold under the decree, and described in the rental as held under a lease that would expire on the 1st June then next, discharged from his purchase; it subsequently appearing that the tenant of part of the lands was entitled under an equitable article to a reversionary lease for four lives. The purchaser, under his contract, is entitled to actual possession, when the contrary is not stipulated for. An outstanding lease is not the subject of compensation.—*Linehan v. Cotter*, 7 I. E. R. 176. (R.)

1. When lands sold under a decree contain a quantity less than stated in the rental, the ptf. cannot, the purchaser not having made any objection, set aside the sale, or insist that the purchaser shall not have compensation if he choose to hold his bargain.—*Magawley v. Brady*, 7 I. E. R. 557. (R.)

2. Part of the lands sold under the decree was liable to quit rent and tithe rentcharge, though not stated to be so in the rental. Another part was stated in the rental to be held from year to year by C. at a rent payable 1st May and 1st Nov.; but the purchaser found, after he lodged his one-fourth of the purchase-money, that it was held for a term, with power to the tenant to surrender on any 25th March or 29th September, giving six months' previous notice, and it was surrendered on the 25th March then next. The tenure by which other parts were held was not stated in the rental, but the purchaser, on going into possession, found they were held for lives still subsisting. *Held*, that the purchaser was entitled to compensation for the quit rent, but not for the tithe rentcharge: that C. was at the time of sale a tenant, not from year to year, but for a term to end on the 25th March then next, and the purchaser was entitled to compensation therefor; and that he was not entitled to compensation in respect of the premises whose tenure was not stated, as he should have ascertained how they were held.—*Martin v. Cotter*, 8 I. E. R. 147. (R.)—[*Affd.*: 9 I. E. R. 351; 3 Jon. & L. 496. (C.)]

3. The solicitor for X., ptf. in a suit to raise a charge on lands, purchased in the name of a trustee the lands, at a sale under the decree, which was conducted by him in a manner that showed great negligence, or a design to depreciate the property. The proceeds were insufficient to discharge his demand for costs, without paying anything to X. The sale was declared void, on a bill filed by X. sixteen years afterwards, without any proof of its being at an undervalue.

*Semble*—A solicitor having the conduct of a sale under a decree is under an absolute incapacity to purchase at it.

Relief in such cases is given after a great lapse of time. When there is a deception on the Court—*Semble*, There is no fixed period of limitation to bar relief.—*Atkins v. Delmege*, 12 I. E. R. 1. (C.)

4. A solicitor purchased a leasehold interest from his client, and prepared the assignment, which contained no covenant to indemnify the vendor, but contained the words "subject to the rents and covenants" in the lease. *Held*, that the executor of the solicitor was bound to indemnify the vendor against the rent and covenants.—*Greenfield v. Bates*, 5 I. C. R. 219. (C.)

5. Lands were sold in Ch., in the cause of C. v. C., and purchased by A., to whom a conveyance was executed describing the lands by reference to a map on the margin of the conveyance. A. was evicted, by title paramount, from a portion of the lands as marked

out on the map. Meanwhile, E. filed a bill against the deft., C., to recover the amount of claims for which he was liable as trustee. It prayed that she might have the benefit of the proceedings in the cause of C. v. C. An order of the Court transferred the funds in C. v. C., to the cause of E. v. C. *Held*, that the map on the conveyance was conclusive evidence that everything so marked out on it was intended to be conveyed to the purchaser; and that he was entitled to compensation for the portion of the lands from which he had been evicted; that, if any of the purchase-money of the lands so transferred to the cause of E. v. C. remained in Court, compensation should be paid thereout; but that a motion seeking compensation out of the funds generally in Court to the credit of the cause of E. v. C. should be refused with costs, whatever the rights of the parties might be in a plenary suit.

*Semble*—That the purchaser, when served with the ejectment, should have served notice on the parties in the cause of C. v. C., that he, if evicted, would seek compensation; and that they would then have been bound by the proceedings.—*Cooper v. C.*, 6 I. Jur. 404. (R.)

6. The rental of a lot of lands sold in the I. E. Court stated that the property was held under two leases for three young lives, with a concurrent term, at a rent; and that the lease contained covenants by the lessee to expend £300 in building a dwelling-house and for planting and registering trees. One lease contained a covenant to expend £300 in building a house; but there were blanks for the names of the covenantor and covenantee, and for the years within which the covenant was to be performed. The other lease contained a covenant merely to improve a dwelling-house; and each lease contained a covenant to plant timber trees every year. *Held*, that the observations in the rental were not so specific as to amount to misrepresentation, such as would entitle the purchaser to be discharged from his purchase.

That the purchaser had constructive notice of the covenants in the leases.

That the purchaser was entitled to compensation, because the covenant to build was limited in point of time.—*In re Irwin*, 5 I. C. R. 290. (P.C.)

7. The L. E. Court, even in the absence of an express condition of sale to that effect, does not guarantee the particulars of tithe rentcharge, the amount and apportionment of which are settled by statute. A rental stated incorrectly the names of the tithe rentcharge payers; but the same amount was in fact paid by other parties. The Court refused to discharge a purchaser, but gave him compensation, at the rate of the purchase, for any substantial error of detail.—*In re Moorhead's Estate*, 12 I. C. R. 371; 6 I. Jur. N. S. 319. (L.E.C.)

8. In 1851, the I. E. Court, upon a mortgagee's petition, ordered a sale of the estate of O., a tenant for life. Lot 14 was sold by

private sale, and, in 1855, conveyed to the purchaser. It was described in the rental as containing, amongst other denominations, "Coolacarra mountain, in common to tenants, 363a. 2r." A map, approved of by the Master of the Court, was annexed to the conveyance, which did not refer to the map. The denominations and quantities in both were the same. A portion of O.'s estate, sufficient to pay all incumbrances thereon, having been sold in the I. E. Court, the order to sell was, as to the unsold portion, dismissed, on the petitioner's application; O. undertaking to pay petitioner's post costs, and a balance of interest due, and to abide any further order to be made by the Commissioners in the matter. The sheriff put the purchaser into possession of lot 14, including the 363 acres, called "Coolacarra" in the map and rental. In 1859, H. having disputed the purchaser's title to 270 acres of Coolacarra, the purchaser brought an action against him, and obtained a verdict, which was set aside. On a second trial, the jury found that the 270 acres in question had never been known as Coolacarra, and were the property of H.—The purchaser moved the L. E. Court to vary the order dismissing the order for sale, and to sell further portions, sufficient to compensate him for the loss of the 270 acres, and for the costs of the two trials. The Judge ruled that the purchaser was entitled to compensation for the 270 acres, and that O., in accordance with his undertaking, was bound to pay it, but refused to grant compensation for the costs of the trials. O. appealed from the whole order; the purchaser appealed from the latter portion. *Held*, that the decisions as to compensation in cases of sales in the Court of Ch., do not apply to sales in the I. E. Court, the conveyance from which contains no covenants; and the purchaser in which has no opportunity of investigating title.

That O. was not, by reason of his above undertaking, bound to compensate the purchaser; because its true construction was, that O. would abide any further order made by the Court in the matter, as it then stood.

That, there being no fund upon which the Court could act, and the Court having no jurisdiction to sell any further portion of the estate, the purchaser could not obtain any compensation.—*In re Otway's Estate*, 13 I. C. R. 222; 7 I. Jur. N. S. 189. (C.A.)

#### VI. ALLOWANCE TO PURCHASER RESPECTING ABATEMENT OF PRICE.

1. One of the lots in a rental comprised a flour mill. The rental contained no notice that the Board of Works had executed works upon the river which supplied said mill; but the purchaser of the lot had resided in the neighbourhood of the premises for some time before the sale. *Held*, that, as the purchaser must have been aware of the execution of the drainage works, he was not entitled to compensation in respect of an annual charge imposed after the sale by the Board of Works upon the purchased premises.—*In re Fitzgerald's Estate*, 5 I. Jur. N. S. 208. (C.A.)

#### VII. DELIVERY OF POSSESSION: ITS EFFECT AS AN ALLOWANCE OR WAIVER OF OBJECTIONS TO TITLE.

2. A land-agent has not authority to enter into contracts for leases.

Entering into possession under a contract for a lease is a part performance; but the Court will not decree a specific performance unless the terms of the contract are clearly proved. Therefore, when a tenant paid a fine, and entered into possession, but did not claim performance of the contract for a lease for thirteen years, during part of which time he paid an increased rent; nor until after the death of the agent with whom the contract was alleged to have been made; and there was evidence that the contract was for a tenancy from year to year, the Court refused specific performance.—*Mortal v. Lyons*, 8 I. C. R. 112. (R.)

#### VIII. THE CONVEYANCE, SURRENDER, AND ADMISSION OF PARTIES: COSTS THEREOF.

3. A., entitled to freehold lands, confessed a judgment in 1806, and, in 1829, granted an annuity charged upon those lands. The judgment was not revived or redocketed within five years after the passing of the Redocketing Act. The rent fell into arrear. The landlord recovered judgment in an ejectment for non-payment of rent; but the annuitant redeemed the lands. The grantor devised the lands, upon trust, to sell and pay his debts, and distribute the surplus among his younger children. After his death, his younger children contracted with the executrix of the annuitant, who had a life interest in the annuity, to sell the lands, which were accordingly conveyed to her. The deed conveyed them subject to the judgment; but the vendors covenanted against all incumbrances, without excepting it. *Held*, that the purchaser took subject to the judgment, and that the judgment creditor was entitled to be paid its amount out of the lands, but that the purchaser was entitled to be repaid out of the other assets of the testator.

That the purchaser was not entitled, as against the judgment creditor, to the benefit of the sums paid in discharge of head-rent.—*Garnett v. Armstrong*, 3 Dr. & War. 182; 2 Con. & L. 449; 5 I. E. R. 533. (C.)

4. A. and B., petitioners in the I. E. C. for sale of lands, purchased them. The map to the I. E. C. conveyance included a plot of land alleged to have belonged to X., an adjoining owner. On application to the Court, to compel A. and B. to re-convey to X.—*Held*, that, as the circumstances of the case negatived the presumption of misconduct on the part of A. and B., or their solicitor, arising from the mistake, the Court had not jurisdiction to direct a re-conveyance.

*Semble*—That the principle which guides the Court in such cases is, that if, by any fraud, negligence, or other misconduct of the party having the carriage of the sale, he procures the Court to sell and convey to him

property which ought not to have been sold or conveyed, the Court has jurisdiction to compel him to re-convey, if the property remains in his hands, and to make good the loss, by pecuniary compensation, if it has passed from him into the hands of a purchaser for value.

From a clear mistake, the Court will presume misconduct, unless and until the contrary is proved. A substantial loss must have been suffered by the applicant.—*In re Collis's Estate*, 14 I. C. R. 511; 9 I. Jur. N. S. 177. (L.E.C.)

#### IX. PURCHASER'S AND VENDOR'S COVENANTS.

#### X. DISCHARGE OF CONTRACT: REFUNDING PURCHASE-MONEY.

[See also of the TITLE, IV, ante.]

1. A purchaser, discharged on a report of bad title, is entitled, in this Court, to interest, from the date of the lodgment, on the one-fourth of the purchase-money lodged. — *Gower v. Hill*, Hay. & J. 127. (E.E.)

2. When a deficient fund is produced by a sale under a decree; and judgment creditors, having upon the legal estate a lien puisne to the reported incumbrances, refuse to prove under the decree, or to release the lands; if the purchaser, who relies on those judgments as objections to the title, will not consent to be discharged, the proper course is to apply for a reference touching the title.—*Barret v. Birmingham*, S. & Sc. 419. (R.)

3. A purchaser who, having lodged only one-fourth of his purchase-money, was discharged upon a report of bad title—*Held*, entitled to his costs incurred in investigating the title, but not to interest on the one-fourth.—*Feely v. Kilkenny*, Fl. & K. 456. (R.)

4. The omission from a rental of a reservation of mines and minerals, and of a right to enter and search for them, is a valid objection to the title.—*Barton v. Lord Downes*, Fl. & K. 505. (R.)

5. A purchaser of lands; sold under the decree, and described in the rental as held under a lease that would expire on the 1st June then next, discharged from his purchase; it appearing that the tenant of part of the lands was entitled under an equitable article to a reversionary lease for four lives.

The purchaser, under his contract, is entitled to actual possession when the contrary is not stipulated for. An outstanding lease is not the subject of compensation.—*Linehan v. Cotter*, 7 I. E. R. 176. (R.)

6. It is irregular for a party in the cause to bid at the sale of lands set up under the decree, without having previously obtained permission of the Court to bid. The Court will not, in such case, on a certificate of his being the highest and best bidder, declare him the

purchaser, unless special circumstances are shown to excuse his irregularity.—*Byrne v. Lafferty*, 8 I. E. R. 47. (R.)

7. In order to set aside a conveyance by a principal to his agent, it is not necessary to prove that the property was sold at an under-value; and though an agent may purchase from his principal, he must make a full disclosure of all the knowledge which he himself possesses with respect to the property. If there be any underhand dealing—*ex. gr.*, a purchase in the name of another person—however good the price or fair the transaction in other respects, it has no validity in a Court of Equity.—*Murphy v. O'Shea*, 8 I. E. R. 329; 2 Jon. & L. 422. (C.)

8. Lands were set up as held under a clear and indefeasible title in fee simple, and it appeared that they had been conveyed forty years before, reserving to tenants of another estate a right to cut turf and quarry limestone, although the right had never been since exercised, and there were no turf bogs worked or quarries open on the estate; but it did not appear that there might not be turf, and there was no proof that there was not limestone. *Held*, a good objection to the title, and the purchaser was discharged.

The rental at the sale contained an obscure statement, leaving it doubtful whether a tenant held for lives named in 1804 or 1843. It proved to be the latter, and the purchaser swore he had been misled. *Held*, a sufficient ground for discharging the purchaser.

A delay of seven months *held* no waiver of an objection to the title, which turned upon a question of fact.

Observations on clearing a title by showing the non-existence of rights under a reservation or onerous covenant not stated; and on the duty of being careful and explicit in preparing for a sale.—*Martin v. Cotter*, 9 I. E. R. 351; 3 Jon. & L. 496. (C.)—[*Affg.* 8 I. E. R. 157. (R.)—*See* 9 I. E. R. 44.]

9. A release of an annuity, given by an illiterate person without professional assistance, and for inadequate consideration, was set aside after several years; the price being held inadequate as to the debt, by whose covenant the annuity was secured, although, considering the nature of the security, it might not have been so from a stranger.—*Garvey v. M'Minn*, 9 I. E. R. 526. (C.)

10. The rental of lands sold under a decree stated the date, tenure, and rent of a tenant's lease, but not a clause in it giving the tenant power, under restrictions, to fell and dispose of the timber, which was very valuable. *Held*, that the purchaser, having notice of the lease, was bound by constructive notice of the clause relating to the timber.

The rental described lands as held by lease for three lives and thirty-one years, the lease being for three lives and the survivor, and, if all the lives died before the expiration of thirty-one years, for so much of such term of

private sale, and, in 1855, conveyed to the purchaser. It was described in the rental as containing, amongst other denominations, "Coolacarra mountain, in common to tenants, 363a. 2r." A map, approved of by the Master of the Court, was annexed to the conveyance, which did not refer to the map. The denominations and quantities in both were the same. A portion of O.'s estate, sufficient to pay all incumbrances thereon, having been sold in the I. E. Court, the order to sell was, as to the unsold portion, dismissed, on the petitioner's application; O. undertaking to pay petitioner's post costs, and a balance of interest due, and to abide any further order to be made by the Commissioners in the matter. The sheriff put the purchaser into possession of lot 14, including the 363 acres, called "Coolacarra" in the map and rental. In 1859, H. having disputed the purchaser's title to 270 acres of Coolacarra, the purchaser brought an action against him, and obtained a verdict, which was set aside. On a second trial, the jury found that the 270 acres in question had never been known as Coolacarra, and were the property of H.—The purchaser moved the L. E. Court to vary the order dismissing the order for sale, and to sell further portions, sufficient to compensate him for the loss of the 270 acres, and for the costs of the two trials. The Judge ruled that the purchaser was entitled to compensation for the 270 acres, and that O., in accordance with his undertaking, was bound to pay it, but refused to grant compensation for the costs of the trials. O. appealed from the whole order; the purchaser appealed from the latter portion. *Held*, that the decisions as to compensation in cases of sales in the Court of Ch., do not apply to sales in the I. E. Court, the conveyance from which contains no covenants; and the purchaser in which has no opportunity of investigating title.

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Entering into possession under a contract for a lease is a part performance; but the Court will not decree a specific performance unless the terms of the contract are clearly proved. Therefore, when a tenant paid a fine, and entered into possession, but did not claim performance of the contract for a lease for thirteen years, during part of which time he paid an increased rent; nor until after the death of the agent with whom the contract was alleged to have been made; and there was evidence that the contract was for a tenancy from year to year, the Court refused specific performance.—*Mortal v. Lyons*, 8 I. C. R. 112. (R.)

#### VIII. THE CONVEYANCE, SURRENDER, AND ADMISSION OF PARTIES: COSTS THEREOF.

3. A., entitled to freehold lands, confessed a judgment in 1806, and, in 1829, granted an annuity charged upon those lands. The judgment was not revived or redocketed within five years after the passing of the Redocketing Act. The rent fell into arrear. The landlord recovered judgment in an ejectment for non-payment of rent; but the annuitant redeemed the lands. The grantor devised the lands, upon trust, to sell and pay his debts, and distribute the surplus among his younger children. After his death, his younger children contracted with the executrix of the annuitant, who had a life interest in the annuity, to sell the lands, which were accordingly conveyed to her. The deed conveyed them subject to the judgment; but the vendors covenanted against all incumbrances, without excepting it. *Held*, that the purchaser took subject to the judgment, and that the judgment creditor was entitled to be paid its amount out of the lands, but that the purchaser was entitled to be repaid out of the other assets of the testator.

That the purchaser was not entitled, as against the judgment creditor, to the benefit of the sums paid in discharge of head-rent.—*Garnett v. Armstrong*, 4 Dr. & War. 182; 2 Con. & L. 449; 5 I. E. R. 533. (C.)

4. A. and B., petitioners in the I. E. C., for sale of lands, purchased them. The map to the I. E. C. conveyance included a plot of land alleged to have belonged to X., an adjoining owner. On application to the Court, to compel A. and B. to re-convey to X.—*Held*, that, as the circumstances of the case negatived the presumption of misconduct on the part of A. and B., or their solicitor, arising from the mistake, the Court had not jurisdiction to direct a re-conveyance.

*Semble*—That the principle which guides the Court in such cases is, that if, by any fraud, negligence, or other misconduct of the party having the carriage of the sale, he procures the Court to sell and convey to him

Conveyances is not confined to cases in which the same person makes both conveyances.—*Blake v. Hyland*, 2 Dr. & Wal. 397. (C.)

1. An estate for life having been sold under a decree, the tenant for life died after lodgment of one-fourth of the purchase-money, and after the rule *nisi* to confirm the sale had been obtained, but before it could be made absolute. *Held*, that the purchaser must complete his purchase.—*Vincent v. Going*, 3 I. E. R. 480; Fl. & K. 250. (R.)—[Rev'd.: 3 Dr. & War. 75, n. (C.)]

2. Under a decree of the Court of Ch. an estate *pur autre vie* was sold. The sole c. q. v. died after the bidding, but before the Master's report of the sale could be confirmed. *Held*, that the purchaser was not discharged from his purchase.

In sales under the Court, the purchaser's title relates back to the time of the bidding, as in other sales it does to the time of the contract.—*Vesey v. Elwood*, 3 Dr. & War. 74; 2 Con. & L. 47. (C.)—[Affg. 5 I. E. R. 184; Fl. & K. 668. (R.)]

8. H., on his marriage covenanted to settle specified lands on trusts, under which portions were to be secured for his younger children. Afterwards, H. sold the lands, and levied a fine to the purchaser. *Held*, that in equity the fine did not protect the purchaser: that H. was a trustee for his children, and that the fine could not give the purchaser a benefit which H. could not take.

At the end of half a century, a Court of Equity will not fix on a purchaser a difficult construction of an ambiguous instrument, which it might have done as between the original parties, if there had not been a sale.

When several estates are settled on children, they may recover a part thereof without showing title to the rest of the settled property.

But, when estates and other property, forming a mixed fund, are settled, subject to a power of appointment, the Court, when the parties entitled to the mixed fund are numerous, will not, as against a purchaser of part of the mixed fund, in which purchase one of the objects of the fund acquiesced, act as against that purchaser without knowing all the dispositions of the mixed fund.—*Thompson v. Simpson*, 1 Dr. & War. 459. (C.)

4. A party who takes an assignment of a lease from the lessor's agent, with notice of his character as agent, has cast upon him the same liability of sustaining the lease as rested upon the agent. If the agent cannot support the lease, neither can his assignee.

When a deft. insists by his answer that he is a purchaser for value, and without notice, proof of payment of the purchase-money is an essential part of the defence. If at the hearing deft. fails to prove it, the Court will not allow the cause to stand over in order to enable him to supply that defect.—*Molony v. Kernan*, 2 Dr. & War. 31. (C.)

5. When an estate has been devised to trustees to sell to pay debts, and, subject thereto, for testator's younger children; *Semble*—A purchaser from them will in all cases buy subject to the debts.—*Garnett v. Armstrong*, 5 I. E. R. 533; 4 Dr. & War. 182; 2 Con. & L. 458. (C.)

6. It never could have been the intention of the Legislature that a judgment debt should be placed in a worse situation than a simple contract debt; and there is nothing harsh in holding that a purchaser, with express notice of a judgment which has not been redocketed or revived pursuant to the 9 G. 4, c. 35, shall not take advantage of the provisions of that statute. A similar construction has been put on the words of the Registry Act, which are as strong as those of the 9 G. 4, c. 35.—*Cockburne v. Wright*, 6 I. E. R. 4. (E.E.)

7. Although there is considerable difference of opinion on this point, whether a purchaser for value without notice can protect himself when there is a legal right—that is, whether the Court can give relief to such a purchaser, when it is open to the other party to pursue his legal right,—yet, when the purchaser is brought into this Court, he may avail himself of his character of a purchaser for valuable consideration without notice, as a defence, whether his title be a legal or an equitable one; and he is entitled to have the bill against him dismissed with costs, although the next hour the party may be able to turn him out of possession. This Court ought not to act against him. I agree with Lord Rosslyn; and my opinion is, that the right of a purchaser for valuable consideration without notice should be sustained, although he has only an equitable interest.—*Bowen v. Evans*, 6 I. E. R. 615; 1 Jon. & L. 178. (C.)—[Decree aff'd.: 2 H. L. Cas. 257.]

8. A sum having been bequeathed to a wife, she and her husband joined in a power of attorney to A. to receive it. A. took out administration, as attorney of the wife, and received the money, which he lodged at a banker's to the credit of the husband. The wife bequeathed the money by a will, which was proved by the husband; and administration c. t. a. taken out by him. The account having been afterwards settled and the balance struck, the husband released A. from all claim. *Held*, that giving the power of attorney to A. did not amount to a reduction into possession by the husband; but that the receipt of the money by A. and the payment of it into the Bank to the husband's credit did.—*Roche v. R.*, 7 I. E. R. 436. (C.)—[See 2 Jon. & L. 561. (C.)]

9. A person who advances money *bona fide* on the deposit of title deeds, made by one who has no right to them, or to the estate to which they relate, will be protected in equity as a purchaser for value without notice; and may retain the deeds, though the person making the deposit was not in possession of the property, if it be an incorporeal hereditament.—*Joyce v. De Moleyns*, 8 I. E. R. 215; 2 Jon. & L. 374. (C.)



thirty-one years from that period as should be to come upon the decease of the survivor. *Held*, that the rental being substantially correct, there was not misrepresentation entitling the purchaser to be discharged from the purchase.—*Vignolles v. Bowen*, 12 I. E. R. 194. (R.)

1. The Court will not act on evidence of a parol waiver of a written contract, unless it be very clear and distinct.

The petitioner and respondent contracted in writing to make a joint purchase. The petitioner paid the respondent one-half the amount of the deposit; but afterwards took back that money and gave the respondent a receipt for it. In a suit for specific performance, the respondent relied on the resumption of the money and the receipt, as a waiver of the contract. The petitioner alleged that he had taken back the money on a misrepresentation by the respondent, that the deposit had been returned and the contract rescinded. The evidence was conflicting as to the alleged false representation. *Held*, that the respondent had failed to prove the waiver, and that there should be a decree as the case stood. The Court offered an issue on the question of misrepresentation.—*Clifford v. Kelly*, 7 I. C. R. 333. (R.)

2. A., a solicitor, having a charge on real estate, caused a bill to be filed, in his partner's name, to raise the charge. A sale having been decreed, A., without obtaining leave from the Court, purchased the lands in the name of B., to whom the conveyance was made. The fact that A. was the real purchaser was never disclosed to the Master, or to the parties in the cause; and several orders were made, on applications in the name of B., calculated to lead the Court to believe that he was the real purchaser, though the whole of the purchase-money was paid by A. The Court, after the expiration of nineteen years, and after the death of A. and his partner, set aside the sale, although it was not proved to have been fraudulent or at an undervalue.

It is a settled rule of the Court that the ptf., or his solicitor, cannot bid at a sale under the decree, without leave of the Court. Non-compliance with that rule will vitiate the sale.

If a solicitor or trustee secretly purchases, in the name of another, at a sale under the Court, the sale is void.

Where there has been concealment, a violation of a rule of the Court, or the sale was void, *laches* or lapse of time will not preclude relief.

Form of decree setting aside a purchase by a solicitor, and directing accounts, when no fraud or undervalue was proved.—*Popham v. Exham*, 10 I. C. R. 440. (R.)

3. A purchaser discharged on the ground of misrepresentation of the value of the property in the rental. His costs were given him; but interest was refused, only one-fourth of the price having been lodged.—*Porter v. Vesey*, 6 I. Jur. N. S. 48. (R.)

4. Purchase by a receiver of an annuity at an undervalue set aside in a suit instituted by

the vendor's personal representatives.—Form of order.—*Eyre v. M'Donnell*, 15 I. C. R. 534. (C.)

5. Purchase by a receiver, of a jointure charged upon the lands over which he was receiver, declared a trust for the benefit of those entitled to the estate.

The receiver over the estates of L. purchased from L.'s widow a jointure charged on the estate. In a suit instituted by an incumbrancer on the estate to set aside this purchase, the widow declaring herself satisfied with the terms of the arrangement, the purchase was upheld as regarded her, but was declared a trust for those beneficially entitled to the estate. Form of decree.—*Bodding v. Langford*, 15 I. C. R. 558, *note*. (C.)

#### XI. BONA FIDE PURCHASER: HOW FAVOURED OR BOUND.

6. A person in Ireland bought an annuity, granted out of an annuity charged on an estate, then the subject of litigation in England.—*Held*, that the purchase was one for value, without notice, as the original annuity was not impeached in that English suit.—*Houlditch v. Wallace*, 5 Cl. & F. 629; 1 Dr. & Wal. 490.—[*Affg. Wallace v. Marquis of Dougal*, 1 Dr. & Wal. 461. (C.)]

7. A., being indebted to B., by deed of 1819 granted lands and premises to C., as trustee for B., in consideration of, and for the purpose of discharging the debt, &c., with specified powers; and, after satisfying those purposes, on trust to re-convey to A. B. died, having named C. his executor. C. assigned to ptf., by deed in 1834, the benefit of the deed of 1819, as forming part of B.'s assets, on trust to apply the produce of its sale in further payment of B.'s creditors. In pursuance of the deed of 1834, a bill was filed against A., and a decretal order referred it to the Master to take the usual accounts. He reported that D., assignee of a judgment obtained in M. T. 1811, against A., filed a charge of that judgment, which was, however, null and void against ptf., a purchaser for value under the two deeds mentioned, and the judgment not having been revived or redocketed pursuant to 9 G. 4, c. 35. On exceptions.—*Held*, that the Master was right in postponing the judgment: that the deed of 1834 was one for value within the 9 G. 4, c. 35: and that that Act applies as well to purchases made before as to those made after that Act passed.—*Knox v. Kelly*, 1 Dr. & Wal. 542. (C.)

8. When a judgment affects several denominations, a prior purchaser of one of them is entitled to throw the judgment from his own upon the lands of any puisne purchaser; and so on, in succession, with each purchaser, until it falls in the hands of the last purchaser.—*Aicken v. Macklin*, 1 Dr. & Wal. 621. (C.)

9. *Semble*—The protection given to a purchaser under the Statute against Fraudulent

Conveyances is not confined to cases in which the same person makes both conveyances.—*Blake v. Hyland*, 2 Dr. & Wal. 397. (C.)

1. An estate for life having been sold under a decree, the tenant for life died after lodgment of one-fourth of the purchase-money, and after the rule *nisi* to confirm the sale had been obtained, but before it could be made absolute. *Held*, that the purchaser must complete his purchase.—*Vincent v. Going*, 3 I. E. R. 480; Fl. & K. 250. (R.)—[Rev'd.: 3 Dr. & War. 75, n. (C.)]

2. Under a decree of the Court of Ch. an estate *pur autre vie* was sold. The sole *c. q. v.* died after the bidding, but before the Master's report of the sale could be confirmed. *Held*, that the purchaser was not discharged from his purchase.

In sales under the Court, the purchaser's title relates back to the time of the bidding, as in other sales it does to the time of the contract.—*Vesey v. Elwood*, 3 Dr. & War. 74; 2 Con. & L. 47. (C.)—[Affg. 5 I. E. R. 184; Fl. & K. 668. (R.)]

3. H., on his marriage covenanted to settle specified lands on trusts, under which portions were to be secured for his younger children. Afterwards, H. sold the lands, and levied a fine to the purchaser. *Held*, that in equity the fine did not protect the purchaser: that H. was a trustee for his children, and that the fine could not give the purchaser a benefit which H. could not take.

At the end of half a century, a Court of Equity will not fix on a purchaser a difficult construction of an ambiguous instrument, which it might have done as between the original parties, if there had not been a sale.

When several estates are settled on children, they may recover a part thereof without showing title to the rest of the settled property.

But, when estates and other property, forming a mixed fund, are settled, subject to a power of appointment, the Court, when the parties entitled to the mixed fund are numerous, will not, as against a purchaser of part of the mixed fund, in which purchase one of the objects of the fund acquiesced, act as against that purchaser without knowing all the dispositions of the mixed fund.—*Thompson v. Simpson*, 1 Dr. & War. 459. (C.)

4. A party who takes an assignment of a lease from the lessor's agent, with notice of his character as agent, has cast upon him the same liability of sustaining the lease as rested upon the agent. If the agent cannot support the lease, neither can his assignee.

When a deft. insists by his answer that he is a purchaser for value, and without notice, proof of payment of the purchase-money is an essential part of the defence. If at the hearing deft. fails to prove it, the Court will not allow the cause to stand over in order to enable him to supply that defect.—*Molony v. Kernan*, 2 Dr. & War. 31. (C.)

5. When an estate has been devised to trustees to sell to pay debts, and, subject thereto, for testator's younger children; *Semble*—A purchaser from them will in all cases buy subject to the debts.—*Garnett v. Armstrong*, 5 I. E. R. 538; 4 Dr. & War. 182; 2 Con. & L. 458. (C.)

6. It never could have been the intention of the Legislature that a judgment debt should be placed in a worse situation than a simple contract debt; and there is nothing harsh in holding that a purchaser, with express notice of a judgment which has not been redocketed or revived pursuant to the 9 G. 4, c. 35, shall not take advantage of the provisions of that statute. A similar construction has been put on the words of the Registry Act, which are as strong as those of the 9 G. 4, c. 35.—*Cockburne v. Wright*, 6 I. E. R. 4. (E.E.)

7. Although there is considerable difference of opinion on this point, whether a purchaser for value without notice can protect himself when there is a legal right—that is, whether the Court can give relief to such a purchaser, when it is open to the other party to pursue his legal right,—yet, when the purchaser is brought into this Court, he may avail himself of his character of a purchaser for valuable consideration without notice, as a defence, whether his title be a legal or an equitable one; and he is entitled to have the bill against him dismissed with costs, although the next hour the party may be able to turn him out of possession. This Court ought not to act against him. I agree with Lord Rosslyn; and my opinion is, that the right of a purchaser for valuable consideration without notice should be sustained, although he has only an equitable interest.—*Bowen v. Evans*, 6 I. E. R. 615; 1 Jon. & L. 178. (C.)—[Decree aff'd.: 2 H. L. Cas. 257.]

8. A sum having been bequeathed to a wife, she and her husband joined in a power of attorney to A. to receive it. A. took out administration, as attorney of the wife, and received the money, which he lodged at a banker's to the credit of the husband. The wife bequeathed the money by a will, which was proved by the husband; and administration *c. t. a.* taken out by him. The account having been afterwards settled and the balance struck, the husband released A. from all claim. *Held*, that giving the power of attorney to A. did not amount to a reduction into possession by the husband; but that the receipt of the money by A. and the payment of it into the Bank to the husband's credit did.—*Roche v. R.*, 7 I. E. R. 436. (C.)—[See 2 Jon. & L. 561. (C.)]

9. A person who advances money *bona fide* on the deposit of title deeds, made by one who has no right to them, or to the estate to which they relate, will be protected in equity as a purchaser for value without notice; and may retain the deeds, though the person making the deposit was not in possession of the property, if it be an incorporeal hereditament.—*Joyce v. De Moleyns*, 8 I. E. R. 215; 2 Jon. & L. 374. (C.)

1. A purchase of the legal estate for value, without notice, is not a defence to a suit for specific performance of a contract, relating to the lands, contained in a prior duly registered instrument.—*Drew v. Earl of Norbury*, 9 I. E. R. 171, 524; 3 Jon. & L. 267. (C.)

2. Under articles of 1760, estates subject to prior incumbrances were covenanted to be settled on A. for life; remainder to B. for life; remainder to the heirs of his body. A. executed a trust deed to pay creditors; and a bill was filed by one of the creditors, by judgment against A., pursue to the articles of 1760, and under the direction of A. By an arrangement made in the course of the suit, but in pursuance of a private agreement, and without the sanction of the Court, the lands were conveyed in f.-f. by A. and B. to X., who had notice of the articles, the rent being reserved to B., the purchase-money being applied partly to discharge incumbrances before 1760. In a sale in the suit, X. afterwards purchased the f.-f. rent. The proceeds of the sale were paid to B., and otherwise without regard to the rights of his children; all parties apparently acting under a mistake as to the effect of the articles. A bill afterwards filed by A. and B. against X., impeaching the sale for fraud, was dismissed. *Held*, on a bill by the son of B., claiming as remainderman in tail under the articles, that the f.-f. grant should be treated as a private sale and set aside; but that the purchase under the decree should be upheld.—*Fitzmaurice v. Sadleir*, 9 I. E. R. 595. (C.)

3. S., being largely indebted to B. and other persons, agreed with B. for a further advance, on a mortgage of estates in Ireland. By the deed of mortgage, S. covenanted that the lands of K., part of the security, were free from incumbrances; and for further assurance. No title was furnished by S., nor search in the registry in Ireland made by B. Before the entire advance was paid to S., it was discovered that K. was subject to a mortgage to E. B. thereupon applied to S., who told him that E. would release the lands, on his (S.'s) request; on which assurance B. paid over the residue of the loan to S., who fraudulently procured a release from E., of which B. was made aware; but remained ignorant of the fraud, which was discovered after some months had elapsed. *Held*, that B. was a purchaser for value of the release, as having been procured by S., in pursuance of the covenants in the mortgage deed; and that, being ignorant of S.'s fraud, he was entitled to retain the advantage which the release had given him.—*In re Burmester*, 11 I. C. R. 1; 5 I. Jur. N. S. 349. (C.A.)—[Reversed: 10 H. L. Cas. 90.]

4. A marriage settlement limited the husband's estate to his daughters as tenants in common in fee. *Held*, that such limitation, so far as it extended to the daughters of a future marriage, did not come within the doctrine of *Clayton v. Lord Wilton*, 8 Madd. 302, because its avoidance as to such daughters

could not prejudice its validity, so far as it affected the daughters of the marriage; and that, as regards the former class, it could not, in the absence of special reasons, be deemed to have been stipulated for by the husband, whose estate was being settled, nor by the wife.

*Held*, therefore, that as to those daughters, it was voluntary, and void as against a purchaser for value.—*In re Collis's Estate*, 14 I. C. R. 511; 9 I. Jur. N. S. 117. (L.E.C.)

5. A recognizance was acknowledged and registered under the 7 & 8 Vic., c. 90, s. 11, in the name of John Donovan Barron, by which name the conuzee executed other instruments and was known in his family, though he had been baptized by the name of John Barron. He had, by the name of John Lawrence Barron, acquired and sold to a purchaser, who had no notice of the recognizance, real estate. *Held*, that, as against the purchaser, it was not a charge on the real estate.

In order to bind the purchaser, the recognizance should have been registered, as acknowledged by John Donovan Barron; and, under the head of "persons whose estates are sought to be affected," the name of John Lawrence Barron should have been entered.—*Staunton v. S.*, 15 I. C. R. 464. (R.)

## XII. LIEN, GENERALLY.

1. *Vendor's Lien.*
2. *Purchaser's Lien.*

### XII. 1. *Lien generally: Vendor's Lien.*

6. A. and B. were equal partners in mills and concerns of which A. was lessee. In Nov. 1810, they took in C. as a partner, for £8500. In Jan. 1811, B. proposed to A. and C. to sell them his share for £8500, and to let his name continue in the firm for five years, they paying interest at £8 per cent. on his money remaining in their hands. This proposal was accepted. Thenceforward A. had two-thirds of the profits. C. had one-third. In July 1812, A. conveyed to C. the legal estate in one-third of the mills and concerns by a deed, which was never registered. In August 1812, C., by his marriage settlement, conveyed his one-third to A. and D. as trustees for himself for life; remainder for ptf's. (daughters of the marriage), as tenants in common. This deed was registered in 1814. In 1819, B. withdrew his name from the firm, and furnished A. and C. with an account current, showing a balance of about £24,000, due to himself. This balance was composed of the £8500, with interest at £8 per cent, and of advances made since 1814 to the firm on C.'s credit. A. and C. then mortgaged the mills to B. to secure the £24,000. The mortgage was registered soon afterwards. C. died in 1820; A. died in 1823. In 1826, B. procured from A.'s representatives an assignment of the equity of redemption, and entered into possession of the mills. The bill charged that, before the mortgage was executed, B. had been informed by A. and C. of the prior settlement. It prayed for an account, partition, and an allotment of one-third.

The only evidence of notice was a deposition of E., A.'s family solicitor, who deposed that he had apprised B. of the settlement. *Held*, that the debt. had not any claim of lien against ptfs., as an unpaid vendor.—*Stuart v. Ferguson*, Hayes, 452. (E.E.)

1. In a suit by a vendor to establish a lien upon the estate for the unpaid purchase-money, the Court decreed that the ptf., notwithstanding the recital in the conveyance that the consideration money was paid, and the endorsed receipt, was entitled to an enquiry whether the full consideration was paid; and to a lien, as an unpaid vendor, on the lands, for whatever amount should appear to be unpaid, with interest from the date of the conveyance. *Held*, that the onus of proving payment of the consideration money lay on debt. (the vendee's assignee); and that neither the receipt nor the recital was any evidence of that fact.—*Croly v. O'Callaghan*, 5 I. E. R. 25. (E.E.)

2. In March 1857, the bankrupt borrowed from W. £200, and deposited with W., as a security, a memorandum of agreement between the bankrupt and his landlord, whereby they agreed that, on payment of £400, by instalments of £50, a lease would be granted to the bankrupt. The instalments were not paid, and the benefit of the agreement was forfeited. In April 1858, the bankrupt, being indebted to R. in £160, proposed, as security to R., an equitable mortgage on those premises. The landlord agreed to execute a lease, on payment of £100, the balance due on the £400. The lease was executed; R. paid the £100. *Held*, that R.'s demand for £260 was prior to the claim of W. on the premises.—*In re Clarke*, 8 I. C. R. 216. (B.)

3. S. agreed with E. to purchase from him lands already sold in the I. E. Court, but not yet conveyed. A bill of exchange, accepted by the T. Bank, was to form part of the consideration for the purchase. S. forged a conveyance from the I. E. Court to persons from whom he traced title to himself; and executed to W. a conveyance, reciting the forged conveyance, as if genuine. Afterwards the I. E. Court executed to S. a conveyance reciting the purchase-money to be E.'s. *Held*, that under the genuine deed an interest in the land passed by estoppel to W.; and that E. had not a lien for the amount of the bill.—*Eyre v. Sadleir*, 15 I. C. R. 1. (C.A.)

## XII. 2. Purchaser's Lien.

4. A purchaser in possession of lands under an executed conveyance, part of the purchase-money having been secured by bond, may come into Equity, to have it employed in discharge of an arrear of head rent due at the date of the conveyance; and is not confined to the legal remedy on the covenants in his conveyance.—*Woods v. Martin*, 11 I. C. R. 148. (C.A.)

## XIII. OF NOTICE, AND ITS EFFECT: OF CHOSSES IN ACTION.

1. What amounts to Notice.
2. Effect of Notice, or the want of it.
3. Choses in Action.

### XIII. 1. Of Notice and its Effect: of Choses in Action: what amounts to Notice.

5. A person bought an annuity granted out of an annuity charged on an estate which was at the time of the purchase the subject of litigation in England. *Held*, that he was a purchaser for value without notice, since the original annuity was not impeached in the suit.—*Houlditch v. Wallace*, 1 Dr. & Wal. 490: 5 Cl. & F. 629.—[*Affg. Wallace v. Marquis of Donegal*, 1 Dr. & Wal. 461. (C.)]

6. If, in the matter of a purchase, a party employs a solicitor, who has any knowledge of an incumbrance affecting the property, that knowledge is, in law, communicated to the principal, who may, nevertheless, be wholly unconscious of the existence of the incumbrance. It makes no difference that the solicitor happens to be himself owner of the property.

Notice to an agent, even although acquired in a different transaction, is notice to his principal in those cases in which, from the former transaction being so recent or so closely connected with the latter, it must be presumed that the agent remembered it.—*Marjoribanks v. Hovenden*, 6 I. E. R. 238; Dr. Rep. temp. Sug. 11. (C.)

7. When, at the time of a purchase tenants are in possession, the purchaser, entering into possession and receipt of the rents, has constructive notice of the title by which the tenants hold.—*Hamilton v. Lyster*, 7 I. E. R. 560. (R.)

8. W. being seized of the lands of X., confessed a judgment, and afterwards, on his son's marriage, joined in a settlement under which the son was made tenant for life of X., remainder to his children; W. covenanting that X. was free from incumbrances. W. then made his will, giving large legacies, and making his son executor. Y., one of the legatees, married. By her settlement the legacy was assigned to trustees, of whom the son was one. He executed the settlement. A suit was instituted by the judgment creditor in 1835, the bill praying a general account, and administration of the assets. In 1836 a bill was filed by the parties entitled to Y.'s legacy, praying the proper and usual accounts, the judgment creditor being a debt. Soon afterwards the son disposed of some assets, and an order made on consent transferred a considerable sum to the credit of the legatees' cause, without prejudice to the rights of the various parties at the hearing, the judgment creditor not being represented on the motion. The order directed the dividends of the sum invested to be paid to the party entitled to the interest under Y.'s settlement, and the bill was dismissed against the judg-

ment creditor. The assets being wasted, the son's children filed a bill, claiming as specialty creditors to have X. indemnified against the judgment under the covenant in the son's settlement; and an order was obtained to transfer the fund in Court to the credit of this cause. *Held*, that there had been no appropriation of the fund, either as against the specialty creditors, or as against the other legatees in W.'s will, but that it still continued assets.

The purchaser for value of a legacy, being merely the purchaser of a *chose in action*, has no higher equity than the legatee himself.

A suit, by a judgment creditor for the general administration of his debtor's estate, is a sufficient *lis pendens* to affect a purchaser of a life estate in lands the whole of which were bound by the judgment, with an equity against the life estate to indemnify the inheritance.

On a question of *lis pendens*, the registry of the purchase deed of the person sought to be affected is immaterial.

The 7 & 8 Vic., c. 90, s. 10, as requiring registry of *lis pendens* to affect a purchaser, does not apply to a purchase before the Act.—*Jennings v. Bond*, 8 I. E. R. 755; 2 Jon. & L. 720. (C.)

1. A purchaser of a perpetual rentcharge had notice of a deed which made his vendor tenant for life of the lands on which the rent was charged; and of a subsequent deed whereby the vendor, suggesting that he was seized in fee, purported to convey the lands in fee, in consideration of the perpetual rentcharge. *Held*, that he had notice of, and was bound to enquire into the circumstances under which the latter deed was executed.—*Roddy v. Williams*, 3 Jon. & L. 1. (C.)

2. The purchaser of a leasehold interest under a decree is bound by notice of all the covenants contained in the lease under which the property is held.

The omission to state, in the rental of a leasehold sold under a decree, a covenant in the lease against the exercise of particular trades, is not misdescription, although the value of the premises may be lessened by the covenant. A rental described the premises as held for the residue of a term at a yearly rent, though by the breach of a covenant the term had been forfeited, or an additional rent incurred, at the election of the lessor. *Held*, a misdescription, and the purchaser was discharged.

The rental described premises as let by one lease at one rent, whereas they were let by two leases at two separate rents, together equal to that stated in the rental. *Held*, that the misdescription was not such as affected the title.—*Spinner v. Walsh*, 10 I. E. R. 386. (R.)

3. Renewable leaseholds were settled by a registered deed on B. for life, remainders over. B. being in possession, apparently as absolute owner, new leases were obtained under circumstances which against him would have made them grafts on the old interests, and at the same time the lands were sold by him to a

purchaser for value without notice. *Held*, that the equitable claim of a remainderman under the settlement was, under the Registry Act, preserved against the purchaser.—*Hill v. Mill*, 12 I. E. R. 107. (C.)—[Varied: 3 H. Lds. Cas. 828.]

4. Lands held under a Bishop's lease for 21 years were sold under a decree. The rental stated the date of the lease, and that the lands were subject to a rentcharge, which appeared to be a permanent charge on them. *Held*, that the purchaser was bound by constructive notice of a non-alienation clause, and other unusual covenants in the lease.

That he was bound by notice of the deed granting the rentcharge, and of all its contents, and could not therefore object to the purchase, because the rentcharge was secured by a term short by six months of the 21 years, with a *t. q.* covenant for renewal.—*Vaughan v. Magill*, 12 I. E. R. 200. (R.)—[Affd.: 12 I. E. R. 207 (C.)]

5. A purchaser of a leasehold sold under a decree is bound by notice of all clauses and covenants, whether usual or unusual, in the lease, though not specially mentioned in the rental or conditions.

A rental stated that an annuity was charged on the premises sold. *Held*, that that statement was sufficient notice of the legal estate being outstanding to secure it in the usual way. That principle applies equally when the interest sold is a renewable leasehold, and the annuity deed contains a *t. q.* covenant, though the effect is, that the purchaser cannot acquire the reversion of the tenancies on the lands.—*Vaughan v. Magill*, 12 I. E. R. 207. (C.)—[Affg. 12 I. E. R. 200.]

6. The donee of a judgment appointed the conuzor one of his executors. The will was proved by the other executor only. *Held*, that in equity the judgment debt was not extinguished, but was assets in the hands of the executor for payment of his testator's debts; and that lands of the conuzor, sold after the rendition of the judgment, were in the possession of a purchaser with notice, liable to the discharge of the judgment debt.—*Willock v. Dargan*, 1 I. C. R. 39. (C.)

7. A., having effected a policy of insurance, by deed of the 1st Nov. 1827 assigned it to B., in trust for his wife and children. B. assigned the policy to C., for value, by a deed falsely reciting that A., by deed of the 1st Nov. 1827, had assigned the policy to B., for her own benefit. C. died, having bequeathed the policy to D., who assigned it to E., a solicitor, who acted in that transaction for B., by deed of the 4th Feb. 1843, in which D. covenanted that he had full power, and lawful and absolute authority to execute the assignment. The life insured died; and E. having received the amount of the policy, a bill was filed against him by the children of A., and he was obliged to compromise the suit, by paying a sum of money. D. died; and a claim having been made by E.'s executor against his assets,

on foot of the covenant for title, a cause petition was filed to administer his estate. It stated that E. was D.'s solicitor; that it was his duty to have limited the covenant to the acts of D.; and that he was entitled to no benefit greater than if he had only imposed the proper and usual covenant on D., but prayed no relief as to that statement, and did not make E.'s executrix a respondent. The usual order of reference having been made under the Ch. Reg. Act. s. 15, and E.'s executrix having filed, on foot of the covenant, a charge which the Master disallowed, on the ground that E. was D.'s attorney, and ought not to have permitted him to enter into such a covenant—*Held*, on appeal, that, the claim under the covenant being a legal claim, the Master had no jurisdiction to disallow it on that ground, without a cross petition.

*Semble*—Though E. had constructive notice of the trusts of the deed of the 1st Nov. 1827, such notice could not qualify or control the covenant for title.

D. having directed that any claim on foot of any covenant should be paid out of a particular legacy, the legatees should be before the Court.—*Ex parte Collins*, 2 I. C. R. 618. (R.)

1. In 1781, A. agreed, on the occasion of his marriage, to settle the lands of X. The articles were lost; but by the memorial it appeared that X. was conveyed in trust, subject, as therein mentioned, to pay the rents and profits to A. for life; and, after his decease, upon trust, at the request of the eldest son of A., or of such person as should then be heir or heirs of the eldest son, to convey X. to the person so requiring the conveyance; and, if A. should die in the life of B., his intended wife, without issue male then living, or without B. being then *en ventre* of a son, who should be afterwards born alive, and should have one or more daughter or daughters, then upon trust, to convey to such daughter or daughters. A. had but one child, a son, who died in the life of B. In 1828, the respondent purchased a portion of X. from A., and the person who was then heir of the only son of A. In 1844, A. died; and the petitioner was the person who was then heir of the only son of A. *Held*, that he was not entitled to require a conveyance of X. as against a purchaser for value.

In the memorial the county in which the lands were situate was not stated; but one of the parties was described as of X., in the county of T.

*Semble*—That, as the articles were not produced, it would be presumed that the memorial followed them, and that consequently the memorial was sufficient.

*Semble*—That the doctrine of constructive notice has been carried too far in *Penny v. Watts*, 1 Mac. & Gor. 150, and that that case cannot be considered established law.—*Abbott v. Geraghty*, 4 I. C. R. 15. (C.)

2. A tenant contracted with a tenant for life for a lease. The contract did not bind

the remainderman. The tenant entered into possession; and, after the death of the tenant for life, having sent a copy of the contract to the land agent of the remainderman, expended a large sum on the lands, of which expenditure the remainderman knew, or had an opportunity of knowing, though he denied, and it did not appear, that the contract was directly communicated to him. *Held*, that the notice of the contract to the land agent did not affect the remainderman, so as to give the tenant an equity against him, by reason of his acquiescence in the expenditure.—*O'Fay v. Burke*, 8 I. C. R. 225. (R.)—[*Affid. Ibid*, 511. (C.A.)]

3. A testator devised all his property, in trust to pay his debts, amongst which was a charge (secured by mortgage and judgment collateral) in favour of his son, C. (the petitioner's father), who, in a suit instituted in relation to the testator's assets, was appointed receiver and manager of the testator's personal estate, and was authorised to proceed in the executor's name to render the assets available.

Under a subsequent consent order, premises (of a mortgage affecting which the testator died possessed) were sold to D., to whom they were conveyed by a deed, which alleged that, in pursuance of provisions in the consent order, the purchase-money (£750) was paid thus:—£250 to the party entitled to the equity of redemption in the premises, and £500 to C.

Afterwards, C.'s wife instituted a suit to compel the execution of the trusts of her marriage settlement, whereby C. had assigned (*inter alia*) the aforesaid charge, and the securities for it, to trustees, in trust for his wife for life; and, after her decease, for the issue of the marriage. In this suit, V. acted as her solicitor.

Afterwards other premises, part of the testator's assets, were mortgaged to another solicitor, P., to secure the repayment of £250 and interest; and, subject to his demand, the equity of redemption therein was, at a later period, conveyed to J., his heirs and assigns. C. and his family emigrated. P. afterwards presented a petition to administer J.'s real and personal estates, and to enforce payment of his own demand; neither C., nor any member of his family, was a party to this suit, in which V. was P.'s solicitor.

After sale of (*inter alia*) the property mortgaged to P., he was paid the amount found to be due to him by the Master's order, which ascertained the amount, and declared that there was not any other charge affecting the premises. Upon this order of the Master the Court's order for payment was founded. A younger child of C. presented both the present petitions, and sought in the first to compel P. to replace the sum so paid to him. *Held*, that, under the circumstances of the case, and particularly having regard to P.'s position as an officer of the Court, and to the fact of his having instituted the suit through the intervention of V., he had notice of the petitioner's claims, and was bound to replace the moneys so paid to him.

In the second suit, the petitioner sought that the sale to D. of the premises in Baggot-street, as well as the sale of other premises, which also had been sold to him, might be set aside.

It was not shown that D. had ever paid (as the conveyance to him alleged) to C. any portion of the £500; but it appeared that C. and D. had mutual private dealings, in respect of which some settlement was alleged to have taken place. *Held*, that D.'s purchases could not be sustained.—*Walker v. Power and Walker v. Taylor*, Dr. Rep. temp. Napier, 668. (C.)

### XIII. 2. Effect of Notice, or of its Want.

1. A debt., who means to rely on his being a purchaser for value without notice, must, by his answer, deny notice, although it be not charged in the bill that he had notice.—*Ireland v. Kidd*, Jon. & Ca. 249. (E.E.)

2. Notice of the contents of a voluntary instrument has not any effect in postponing a purchaser for value.—*Nixon v. Hamilton*, 1 I. E. R. 55. (C.)

3. A purchaser with notice, implied or constructive, from a trustee, is bound by the trust, though there has been a fine levied to him, and five years' non-claim.—*Thompson v. Simpson*, 2 Dr. & War. 459. (C.)

4. R., being seized of an undivided moiety of lands, conveyed it on his marriage, in 1775, to trustees, for himself for life; remainder to his first and every other son in tail; remainder to himself in fee. This settlement contained a leasing power to R., to lease for any period not exceeding three lives, or thirty-one years, at the full improved rent, and not dispunishable of waste. R. subsequently purchased the other undivided moiety of the same lands; and in 1785 leased the entire to T. for three lives, renewable for ever. This lease contained a covenant by R. for quiet possession, without the disturbance of R., his heirs or assigns, or any person claiming under him, and for further assurance. It contained no reference to the power. In 1797, upon the marriage of G., eldest son of R., by deed, to which R. and G. were parties, all the lands were settled and conveyed to the use of R. for life, and after his death to G. for life; remainder to the use of such of the sons of G. as G. should appoint to. R., by this deed, covenanted against all incumbrances, "save and except the leases heretofore *bona fide* made by R.;" and G. covenanted for further assurance and quiet enjoyment against all persons, "except the lessees in such leases, as aforesaid." G. executed the power of appointment reserved to him in favour of W., his son, and died in 1809. On the death of R., W. filed his bill to set aside the lease of the moiety comprised within the settlement of 1775, as contrary to the leasing power. *Held*, that W., claiming and deriving benefits under the settlement of 1797, which contained references to the lease made by R., was bound by the

lease of 1785, and could not set it aside.—*Steele v. Mitchell*, 2 Dr. & Wal. 568; 3 I. E. R. 1. (C.)

5. When lands, let under the Court for seven years, pending the cause, are sold under a decree, and the tenancy determines before the term expires, the purchaser who, at the time of the sale, has notice of the tenancy, and goes into possession, is not entitled to the crops sown by the outgoing tenant, and growing on the lands. The outgoing tenant is entitled to emblements. His right is not affected by the custom of the country respecting the outgoing tenant's right after the expiration of his lease.

*Semble*—If the purchaser insists upon retaining the crops, the Court will direct a reference at his expense touching the value of the crop, and the damage sustained by the outgoing tenant in relation thereto.—*Creed v. C.*, 3 I. E. R. 207. (R.)

6. The doctrine, that a purchaser may defeat the title of the vendor's wife to dower, by obtaining a conveyance of a prior outstanding term, with notice of her title, is not to be extended.—*Kent v. Roberts*, 3 I. E. R. 297. (E.E.)

7. An agent obtained a lease from his principal, at a low rent, and reciting it to be "in consideration of faithful services." *Held*, that this recital was sufficient to put a purchaser for full value of the lease upon enquiry into the nature of the transaction; and that therefore the lease was equally impeachable in his hands as in those of the lessee.

A party who takes an assignment of a lease from the agent of the lessor, with notice of the assignor's character as agent, has cast upon him the same liability of sustaining the lease that the agent has; and if the lease cannot be upheld by the agent, neither can it by the purchaser.—*Ker v. Lord Dungannon*, 1 Dr. & War. 542; 1 Con. & L. 335; 4 I. E. R. 343. (C.)

8. In a suit to administer real estate, there had been a decree to account. Purchasers after the decree are bound by the constructive notice given by the *lis pendens*, as the decree to account does not terminate the suit.—*Higgins v. Shaw*, 2 Dr. & War. 356; 1 Con. & L. 400. (C.)

9. A registered mortgage will not be preferred to a prior unregistered deed of annuity, when the solicitor of the mortgagee was, at the time of executing the mortgage, fully aware of the existence of the former deed, having himself assisted in the preparation and execution of it, and being a party thereto as trustee; there being at the same time some evidence to show that the non-registry of the former deed was caused by the improper conduct of the same solicitor.

Notice to bind a purchaser must not of necessity be notice in the same transaction.—*Nixon v. Hamilton*, 2 Dr. & Wal. 364. (C.)

1. A married woman or infant is as much bound by notice as an adult.

A purchaser, with notice of, and who takes subject to an incumbrance, is bound to indemnify the vendor against that incumbrance, although there is no express contract to that effect.—*Jones v. Kearney*, 1 Dr. & War. 184, 166; 4 I. E. R. 87; 1 Con. & L. 46. (C.)

2. An advertisement is not notice, unless it is brought home to the party.—*Nagle v. Baylor*, 3 Dr. & War. 73. (C.)

3. The purchaser of a reversion, under a decree of the Court, will not be precluded from taking advantage of a breach of covenant incident to the reversion, by notice of a breach being committed before the sale was confirmed.

Notice to the solicitor is notice to the client, but the rule does not extend to cases in which the solicitor acts for third parties.—*Gerrard v. O'Reilly*, 2 Con. & L. 165; 3 Dr. & War. 414. (C.)

4. A purchaser, who buys expressly subject to a judgment, will be bound by it, although it has not been redocketed within the time required by the 9 G. 4, c. 35.

When an estate is devised in trust to sell for payment of debts, and, subject thereto, for younger children, a purchaser from such children must take subject to the debt.—*Garnett v. Armstrong*, 2 Con. & L. 449; 5 I. E. R. 538; 4 Dr. & War. 182. (C.)

5. A suit was instituted in 1822, to impeach a sale for fraud, and have it set aside. In 1823 the debt. answered, and in 1828 died, no proceedings having been taken in the cause since his answer. In 1839 a bill of revivor and supplement was filed, and the cause brought to a hearing in 1842.

*Semble*—That there was sufficient *lis pendens* to affect purchasers of the subject-matter in 1830, with constructive notice.—*Thornhill v. Glover*, 3 Dr. & War. 195. (C.)

6. An information was filed in Ch., in 1832, to set aside a lease, granted at an undervalue, and was amended in 1827. The interest in the lease was, in 1835, put into settlement. The parties entitled under this settlement claimed the rights of purchasers for value without notice. *Held*, that there was *lis pendens* sufficient to affect them with notice of the adverse claim.—*Att.-Gen. v. Corp'n. of Cashel*, 3 Dr. & War. 294. (C.)

7. A trustee, in violation of his duty, lent the trust money to F., upon the security of judgment; F. at the time not being aware that it was trust money. Subsequently, F. was informed that it was trust money, and recognised and acknowledged the title of the trustee thereto. *Held*, that from the time he had notice of the trusts, F. was a trustee of the money, and as such liable for the safety of it.—*Sheridan v. Joyce*, 1 Jon. & L. 401; 7 I. E. R. 115. (C.)

8. Notice, to a purchaser for value, of a judgment not revived or redocketed pursuant to the 9 G. 4, c. 35, will not take it out of the operation of that statute.—*Beere v. Head*, 9 I. E. R. 76; 3 Jon. & L. 340. (C.)—[*Revq.* on this point, 8 I. E. R. 647. (R.)]

9. If a debt., in his answer, relies generally on his right as a purchaser for value, without notice, but does not specifically deny notice of a particular matter—e. g., a private act, with notice of which the bill charges him, and notice of which would invalidate his title—*ptf.*, not excepting to the answer, must prove notice.

A statute relating to the corporate property of a city, with the usual clause declaring that it shall be deemed a public act, does not bind strangers with notice. The mere probability of a stranger knowing it, or precautions taken by him when buying corporate property, will not fix him with constructive notice.—*Att.-Gen. v. Marrett*, 10 I. E. R. 167. (C.)

10. A bill by a judgment creditor to have the benefit of a renewal to A., and to set aside a sub-lease to B., who sold to the debt. X., stated circumstances of express notice to A. and B. The bill was taken as confessed against A. and B. The debt. X. denied notice to them, and it was not proved. *Held*, that there could not be a decree against him.—*Kelly v. Magee*, 11 I. E. R. 383. (C.)

11. An estate having, under a decree of the Court of Exchequer, been sold for £12,000, the purchaser lodged in Court £5000 of his own moneys, and applied to the *ptfs.* in the present suit to lend him the remaining £7000 on the terms of securing that sum as the first incumbrance upon the lands. After an agreement with the *ptfs.* for this loan, but before it was carried out, the purchaser confessed a judgment for value. The *ptfs.* although having notice of the judgment, advanced £8000, of which £7000 were paid into Court as there stood of the purchase-money; and £1000 to the purchaser. By consent, which was made an order of Court, the conveyance of the lands was made to a trustee for the purchaser and the *ptfs.* The trustee subsequently, in consideration of the £8000, mortgaged the lands to the *ptfs.* *Held*, that the judgment was prior to the mortgage as a charge upon the lands.—*Walcott v. Lynch*, 13 I. E. R. 199. (R.)

12. Letters patent, under which lands sold by private contract were held, contained covenants by the grantee:—first, that he would place three free tenants of English or British race, blood, or names on the premises, each of whom should have 50 acres, or one free tenant who should have 100 acres, for life.

Secondly:—That he would have on the premises eight cullivers or muskets, and a proper number of arms to arm eight pikemen, for his defence against rebels, &c.

Thirdly:—A proviso, that if he should demise any part of the premises to the mere Irish for any term exceeding 41 years or three lives, or if he should demise the premises, limited



to be disposed of to any English or British person, to any person being mere Irish, the Crown might re-enter. The particulars of sale described the lands as a valuable fee-simple property. One of the conditions of sale alluded to the letters patent. It appeared from a statute (10 Car. 1, sess. 3, c. 3), and public documents therein referred to, that the covenants were those inserted in patents at the plantation of Ulster, in which province the lands were situated. *Held*, that the purchaser, having express notice of the letters patent, was bound by constructive notice of the covenants contained therein. That the first and third covenants were no longer enforced, every subject of the Crown, since the Union, being a person of British race, name, and blood, and there not being any person now answering the description of mere Irish.

*Semle*—The second covenant could not now be enforced by the Crown.—*Stewart v. Marquis of Conyngham*, 1 I. C. R. 534. (R.)

1. A recovery was suffered by a tenant for life and remainderman in tail in 1781. The record stated that the tenant to the præcipe called to warranty the tenant for life, who appeared by his attorney, and warranted the tenant in tail, who appeared in person. *Held*, that the recovery was valid, though the record did not state a summons to warranty, nor a warrant of attorney to authorise the appearance for the tenant for life.—*Stewart v. The Marquis of Conyngham*, 1 I. C. R. 535. (R.)

2. The lands of S., held for lives renewable, were devised to A. for life, remainder to his children in strict settlement, remainder to testator's daughters, B. and C., in *quasi* tail; and if either B. or C. should die without issue, to the surviving daughter, in *quasi* tail.

On the marriage of E., eldest son of B., a settlement was executed, containing a recital that E., by virtue of the will of his grandfather, was entitled to a contingent remainder in the lands of S., on failure of issue of A., subject only to such powers over the same as should appear to be vested in A., and further containing a covenant, on the part of E., to settle the lands when they should become vested in possession in him.

After the execution of the settlement, A. died without issue, and after his decease, B. and C. barred their respective estates in *quasi* tail, and died. B.'s moiety of the lands of S. descended, and C.'s was devised to E., who sold them to a person affected with notice of the covenant. *Held*, as against the purchaser, that though the estates in existence at the time of the execution of the settlement had been destroyed, the estates in the land which actually became vested in the settlor were bound by his covenant.

*Semle*—That "surviving daughter" must be taken to mean "other daughter."—*Osborne v. Smith*, 4 I. C. R. 58. (C.)—[*Rev'd. in part*: 6 H. L. Cas. 375; 3 I. Jur. N. S. 41.]

3. In a suit for specific performance of an agreement which was taken out of the Statute of Frauds, by part performance, the petitioner

having pleaded an agreement in writing, which omitted to state the term of the lease to be made—*Held*, that parol evidence should not be received to supply the term.

*Semle*—A purchaser for value without notice before his purchase, who afterwards receives express notice, is notwithstanding entitled to register his deed, and obtain to all the benefits of the Registry Acts.—*Riddick v. Glennon & others*, 6 I. Jur. 39. (C.)

4. A. being seized of an estate tail in the lands of S., &c., and of an estate in fee in K., &c., in 1794, by an indenture reciting that he was seized in fee of both denominations, conveyed them to trustees to the use of himself for life, remainder to his eldest son, B. (then alive), for life, remainder to B.'s children successively in tail, remainder to the sons of A. successively in tail, remainders over; and A. covenanted with the trustees that he was seized in fee of all the lands, and for further assurance. A. died, leaving several sons, and without barring the entail in S. B. went into possession of all the lands. In a suit against B. to raise out of the lands charges created by A., B., by answer, admitted that A. had been seized in fee of all the lands. On the investigation of the title, in contemplation of a sale in that suit, B.'s attention was called to the existence of the entail, and he soon afterwards executed a disentailing deed. He also procured the discharge from S. of a receiver who had been appointed over it and K., in the suit, on the ground that by reason of the entail S. was not after his death subject to the charges. He continued by himself or creditors in possession of all the lands; and part of K. having been sold, he obtained payment of the income of a surplus fund realised by them, and lodged in Court, claiming such income as tenant for life under the settlement of 1794. He afterwards mortgaged S., by a deed reciting the settlement, &c., and which conveyed to the mortgagee B.'s life estate in K., &c., under the settlement. The persons entitled in remainder did not interfere, although aware of nearly all these proceedings. *Held*, that B. had conclusively elected to take under the settlement of 1794, and was bound to give effect to it; and that his mortgagee, having taken with notice, was equally bound.

B. died without having children; and C., a minor and B.'s heir-at-law, became, after B.'s death, entitled to the remainder limited by the settlement of 1794. B., devised S., subject to charges, to trustees for C. In a suit by one of the trustees to carry out the trusts of B.'s will, C. having come of age, and having first desired an issue as to B.'s competency, a decree was afterwards made on consent that the trusts of B.'s will should be carried into execution; and that the usual consequential accounts should be taken. C. soon after filed a petition, as owner, to sell S. to pay B.'s charges; and, in a discharge filed in the Master's office in an administration suit, admitted that B. had been seized in fee of S. He afterwards, by leave of the Master, filed a fresh charge, alleging that B. had elected to take under the settlement of 1794.

*Held*, that C. was not prevented by the decree or his admissions from claiming S., &c., as bound by the settlement of 1794.—*Spread v. Morgan*, 9 I. C. R. 535; Dr. Rep. temp. Napier, 525. (C).—[Rev'd.: 11 H. L. Cas. 588.]

1. A., being sub-tenant of a college lease for 14 years, with a *t. g.* covenant for renewal, demised for 14 years, with a like covenant, by an unregistered deed, and afterwards assigned his interest to a purchaser for value by a registered deed. *Held*, that the purchaser having no notice of the unregistered deed, was not bound by the covenant to renew contained in it, as it was not a lease within sec. 14 of the Registry Act (6 Anne, c. 2), which declares that the Act shall not extend to leases not exceeding 21 years, when the possession goes with the lease.

*Semble*—A license to set, at the tenant's convenience, any part of the premises included in a lease containing a non-alienation clause, does not authorise an assignment of them.—*Clarke v. Armstrong*, 10 I. C. R. 263; 5 I. Jur. N. S. 89. (R.)

2. S., being largely indebted to B. and other persons, agreed with B. for a further advance, on a mortgage of estates in Ireland. By the deed of mortgage, S. covenanted that the lands of K., part of the security, were free from incumbrances; and for further assurance. No title was furnished by S., nor search in the registry in Ireland made by B. Before the entire advance was paid to S., it was discovered that K. was subject to a mortgage to E. B. thereupon applied to S., who told him that E. would release the lands on his (S.'s) request; on which assurance B. paid over the residue of the loan to S. S., subsequently, by fraud, procured a release from E., of which release B. was made aware, but was ignorant of the fraud, which was discovered after some months had elapsed. *Held*, that B. was a purchaser for value of the release, as having been procured by S., in pursuance of the covenants in the mortgage deed; and that, being ignorant of S.'s fraud, he was entitled to retain the advantage which the release had given him.—*In re Burmester*, 11 I. C. R. 1; 5 I. Jur. N. S. 849. (C.A.).—[Reversed: 10 H. Lds. Cas. 90.]

3. A., tenant in tail in possession, executed a disentailing deed, not for value, which was enrolled after his death, but within six months from its execution. B., entitled in remainder expectant on the determination of A.'s estate tail, executed a disentailing deed for value after A.'s deed, but enrolled before it. B. and B.'s grantees had express notice of A.'s deed. *Held*, that the enrolment of A.'s deed was good, although made after his death.

That whether B. was entitled in fee or in tail, B.'s deed being made to a purchaser for value, and being first enrolled under the 3 & 4 W. 4, c. 74, s. 74, avoided A.'s deed; and that notice was immaterial.

That the 38th and 74th sections of the 3 & 4 W. 4, c. 74, are not *in pari materia*; that the 38th sec. applies to dispositions by the same tenant in tail, while sec. 74 applies to dispo-

sitions by successive tenants in tail.—*In re Piers' Estate*, 13 I. C. R. 459; 8 I. Jur. N. S. 76. (L.E.C.)

4. By a written agreement, framed as an accepted proposal, and dated 12th Feb. 1839, A. gave his son, B., on his marriage, a moiety of the lands of X. B. entered into, and continued in possession of X., until his death in 1840, when he left all his estate and interest in X. to his daughter, C. B.'s widow entered into occupation, but was induced by A., and his son, D., to give them possession in consideration of money. A. and D. continued jointly in possession until A.'s death, after which, and until this suit, D. remained in exclusive possession. C., attained age in 1861, unsuccessfully endeavoured to get possession of X., and then instituted this suit to obtain possession from D., with an account of the rents, &c. D. set up a title under a registered deed of 1840, whereby A., in consideration of £150, conveyed X. to D. and E.; and claimed to be a purchaser for value, without notice. Notice was clearly proved. *Held*, that D., having confessedly taken possession from the minor's guardian, could not set up a title adverse to the minor.

*Semble*—The question of notice was sufficiently put in issue, without amendment of the petition.—*Kennefick v. K.*, 8 I. Jur. N. S. 181. (C.)

5. Purchase for value, without notice, is not a defence to a suit instituted to enforce a mere legal right, such as dower.

A purchaser in 1840, obtained possession of the deed creating an attendant term, but did not procure an assignment of the term. *Held*, that he could not rely on the term as a bar to a claim for dower.

The Act (5 & 6 Vic., c. 113), for the Confirmation of Marriages in Ireland confirms marriages theretofore solemnized by persons who had been Protestant Dissenting Ministers, even though at the time of the marriage they had been degraded or suspended.

A purchase made for a minor ward of the Court, under a power given by statute, is an Act done under the authority of the Court, within the meaning of the 3rd sec. of that Act.

A statement of an admission in the petitioner's affidavit in reply, is not a compliance with the rules of Equity pleading, requiring admissions to be put in issue.—*Corry v. Cremorne*, 12 I. C. R. 136; 7 I. Jur. N. S. 21. (C.)

6. A., by marriage settlement, executed on the 10th August 1787, covenanted with the trustees, within three years after the marriage, to pay them, their executors, or administrators, £2500, which (with £500, the fortune of A.'s intended wife) they were to invest in the purchase of land to be held in trust for A., for life, and, after his decease, for the children of the marriage. The settlement provided that, until such investment, the trustees should lay out those two sums on public or private security, and pay the interest to the persons entitled to the rents of the purchased lands. On the same day, A. passed his bond to the

trustees for the penal sum of £6000, and judgment was entered up against him by the trustees on the 11th August 1787. On the 10th of Nov. 1800, A. became entitled to an equitable interest in the lands of R. under the limitations contained in a deed for value, dated the 14th May 1812. This equitable interest became vested in B., without notice of the judgment. A. died in 1845. C., one of A.'s daughters, in 1862, presented a petition to sell the equitable interest in R., to pay the judgment. No payment of principal or interest was ever made on foot of the judgment, nor was there any acknowledgment in writing, or revivor, within twenty years before the filing of the petition. *Held*, even supposing the £2500 and £500 were represented by the judgment, that B. was entitled, as a purchaser for value without notice, to R., discharged from the judgment, and, that therefore the petition must be discharged with costs.

*Seem*—That a judgment creditor, claiming against an assignee for value, should aver notice, to give himself any equity.—*In re Grady's Estate*, 13 I. C. R. 154. (L.E.C.)

1. A will directed that no part of the testator's property, except the interest in a house, should be sold or disposed of for ten years only, if thought advisable by the executors; and bequeathed testator's property to his son, a minor. The executor sold the interest in the house to the respondent, who had notice of some restriction on the executor's power to sell. There were not any debts. In a suit to impeach the sale—*Held*, that the respondent was bound to prove that the sale, being a breach of trust, was at the full value.—*M'Mullen v. O'Reilly*, 15 I. C. R. 251. (R.)

2. In 1849 judgments were obtained against A., who in 1851 became by virtue of a parol agreement, or by the operation of law, tenant from year to year of X.

In professed pursuance of the Judgment Mortgage Act, s. 6, affidavits were in 1855 registered in respect of the judgments of 1849 against A.'s interest in X. In 1858 that interest was enlarged by A.'s accepting a lease for years, with a covenant for perpetual renewal. This lease was, immediately upon its execution, deposited with B. to secure a previous loan made by C. to A. on the faith of this security. Throughout this transaction B. acted as solicitor for both A. and C. There was not any investigation of the title, and B. had actual notice of the previous tenancy from year to year. A.'s enlarged interest in X. having been sold, a question of priority arose between C. and the judgment creditors of 1849 touching the proceeds of the sale. *Held*, that the tenancy from year to year, not having become vested in A. under an "instrument," was not under Pigot's Act withdrawn from the operation of the judgments of 1849 by the 2nd section of the Judgment Mortgage Act.

That the enlarged interest of 1858, being a graft on the tenancy from year to year, became vested in A. as a trustee for the judgment

creditors of 1849, to the extent of their equitable charges; and that C., although a purchaser for value, took subject to these incumbrances, on the assumption of their having been kept duly registered as judgments, the circumstances having been such as to fix him with notice of their existence.—*In re Tottenham's Estate*, 16 I. C. R. 115. (L.E.C.)

### XIII. 3. Choses in Action.

3. An assignee of a chose in action takes it subject only to existing equities, and not to collateral rights arising from events after the assignment. Therefore when X., a legatee, assigned his legacy, payable out of a charge on A.'s estate, and, the executor having died, X. obtained administration to the testator, and as such administrator received payments from A., whereby the charge became deficient to pay other legatees—*Held*, that X.'s assignee was not bound to bear the entire loss.

The rule requiring notice of an assignment of a chose in action does not apply when there is no question between successive claimants under the assignor; and as between them, the personal representative is the proper party to have the notice of the assignment of a legacy, though payable out of a debt to the estate.—*Molloy v. French*, 13 I. E. R. 261. (C.)

4. A married woman being entitled to a share in a legacy payable out of real estate, she, by her husband's consent, and with other beneficiaries, agreed to accept the lands in lieu of the money. The testamentary trustee accordingly conveyed the lands to a trustee. By a subsequent deed declaring the trusts, a portion of the lands was limited to the husband and wife during their joint lives, and to the survivor for life; remainder to such of their children as the husband in his lifetime, or the wife, if she survived him, should by deed or will appoint. *Held* (by the Lord Chancellor), that the assignment to the trustee did not operate as a reduction into possession of the wife's chose in action, and that the lands into which the money was thereby converted became subject to the same uses and trusts as the money.

By the Lord Chancellor:—That the modification of the prior rights and interests of the husband and wife in the lands formed a sufficient consideration in the deed declaring the trusts, to make it a deed for value.—*In re Bayley's Estate*, 16 I. C. R. 215. (C.A.)

### XIV. APPLICATION OF PURCHASE-MONEY.

5. *Seem*—If a man sells lands which are subject to specialty debts, this Court will presume that the purchase-money is to be applied to discharge them, and that the sale is made with that view; and the purchaser will be discharged.—*Higgins v. Shaw*, 2 Dr. & War. 356; 1 Con. & L. 400. (C.)

6. In a suit by a vendor, to establish a lien upon the estate for the amount of the unpaid purchase-money, the Court decreed that the ptf., notwithstanding the recital in the deed

of conveyance of the payment of the consideration money, and the receipt endorsed on it, was entitled to an enquiry whether the full amount of the consideration money was paid; and to a lien, as an unpaid vendor, on the lands, for so much of the consideration money as should, upon enquiry, appear to be unpaid, with interest from the date of the conveyance. *Held*, that the *onus* of proving the payment of the consideration money lay upon the deft. (the assignee of the vendee); and that neither the recital nor the receipt was any evidence of the fact.—*Croly v. O'Callaghan*, 5 I. E. R. 25. (E.E.)

1. When a policy of insurance is assigned upon trusts, even though the deed contains no express power to the trustee to give receipts, the insurer is not compellable to see to the application of the sum assigned; payment to the trustee will sufficiently discharge him.—*Ford v. Ryan*, 4 I. C. R. 342. (C.)

2. When a trustee, entitled to receive purchase-money, gives an order requiring it to be paid to a person named therein, and acknowledges, in the deed of purchase, the receipt of the money; and when the transaction seems to be one within the province of the trustee, and the purchaser has no notice of the breach of trust committed, he is not liable for the misapplication of the money.

*Semble*—Parties paying money to trustees having power to give receipts, are not bound to pay it into their hands, or into a bank to their credit. A judgment on the receipt of the trustee is sufficient to discharge the payer.—*Burris v. Sheppard*, 6 I. Jur. 98. (C.)

#### XV. LIFE ESTATES: REVERSIONS: OTHER LIMITED INTERESTS.

3. A., entitled, if B. died without issue, to the interest of £2000, for life, sold his reversionary interest for £250. The Court gave effect to the contract, notwithstanding allegations of inadequacy of price, the dealing not having been with an expectant heir.—*Woodroffe v. Allen, Hay. & J.* 73. (E.E.)

4. *Semble*—The purchaser of a reversion expectant on a demise made by the vendor may, on its expiration, maintain a possessory bill on the vendor's possession, though the tenant has not acknowledged the purchaser as his landlord.—*Lefroy v. Lee, H. & J.* 721. (E.E.)

5. When, an estate for life having been sold under a decree, the tenant for life died after lodgment of one-fourth of the purchase-money, and obtaining the rule *nisi*, but before the sale was confirmed—*Held*, that the purchaser was bound to complete his purchase.—*Vasey v. Edwood*, 5 I. E. R. 184; Fl. & K. 667. (R.)—[Affd.: 3 Dr. & War. 74; 2 Con. & L. 47. (C.)]

6. On a bill for specific performance of a contract to purchase a reversion expectant on a lease for lives, the vendor is entitled to in-

terest on the purchase-money from the day on which the Master reports that a good title could have been made.

In future the Court will add, to the reference, whether a good title can be made, a direction to the Master to enquire and report at either party's request, at what time a good title was shown.—*Enraght v. Fitzgerald*, 2 Dr. & War. 43. (C.)

7. A life interest having been sold under a decree, the tenant for life died after the one-fourth of the purchase-money had been lodged, but before the sale was confirmed. *Held*, that the contract was not complete until the sale had been confirmed by the order of the Court; and that the purchaser was not bound to complete his purchase.—*Vincent v. Going*, 3 Dr. & War. 75, n. (C.)—[Rev. 3 I. E. R. 480; Fl. & K. 250. (R.)]

8. Under a contract to make a good title to a lease for lives renewable for ever, the vendor must show who are the lives existing at the time of the contract.—*Anderson v. Higgins*, 1 Jon. & L. 718. (C.)

#### VENTRE INSPICIENDO, DE.

See PRACTICE, WRIT, VI.

#### VERDICT AND JUDGMENT AT LAW.

— *As to Proof for Damages and Costs.* See BANKRUPTCY, XII.  
See 21 & 22 Vic., c. 27.

#### VESTED.

— *Interests.* See INTERESTS IN PROPERTY—WILL, XV.  
— *Portions.* See PORTIONS, III, IV—ESTATES.

#### VEXATION.

#### VICAR.

See ECCLESIASTICAL PERSONS.

#### VICARAGE.

— *Endowment of.* See TITHES, II—ECCLESIASTICAL PERSONS AND THINGS.

#### VICE-CHANCELLOR.

See 30 & 31 Vic., c. 44.

#### VISITORS.

See CHARITY, I.

#### VIVA VOCE EXAMINATION.

See PRACTICE, EVIDENCE.

#### VOID.

— *Trust.* See TRUST, VII.  
— *Execution of Power.* See POWER, I.

## VOLUNTARY.

- *Agreements or Contracts.* See AGREEMENT, VIII.
- *Conveyance.* See BANKRUPTCY, XII.
- *Deeds.* See DEEDS, III.
- *Settlement.* See SETTLEMENT, II.

## WAIVER.

- *Of Agreement.* See AGREEMENT, VI.
- *Of Lien.* See LIEN, III.
- *Of Forfeiture and Penalties.* See PLEADING, BILL.
- *Under the Tenancy Act.* See LEASE.
- *Of Exceptions.* See PRACTICE, ANSWER.
- *Of Objections to the Title.* See VENDOR AND PURCHASER, TITLE.
- *Of Plea.* See PRACTICE, PLEA.
- *Of Security.* See SECURITY, III.
- *Of Rights and Settlement.* See SETTLEMENT, XII.

See ABANDONMENT—PRACTICE, DEMURRER—PRACTICE, COSTS.

- I. WHAT AMOUNTS TO, AND GENERALLY.
- II. EFFECT OF.

## I. WHAT AMOUNTS TO: WAIVER GENERALLY.

1. By indenture of demise executed in 1835, the lessee covenanted not to do a certain act, under the penalty of a double rent, recoverable by distress as the single rent. A creditor's suit having been instituted to sell the lessor's interest, Y., a solicitor, was appointed receiver therein. O. had proved as a judgment creditor in the suit, and Y., had acted as his solicitor. In H. Term, 1847, an action was brought against the lessee for injuries to the property of W. (ptf. in the action, but no party to the demise of 1835), consequential upon an act done in violation of the covenant in that lease. This action was stopped by consent, and the matter referred to three arbitrators, who, in ignorance of the prohibitory covenant in the lease, awarded that the lessee should, amongst other things, do a certain act, which involved a breach of that covenant. The lessee served a copy of this award upon all the parties in the creditors' suit, except Y., accompanied with a notice of his intention to perform it; and then began to act pursuant to the award. In June 1838, O. became the purchaser in the creditors' suit. The sale was confirmed in July 1839, and the conveyance executed in 1840. It was proved that in July 1838, O. had seen the workmen of the lessee engaged in performing the act directed by the award, and had not made any objection thereto; and that Y. was also aware of it in 1838. *Held*, that there was not such an acquiescence by O. as amounted to a waiver of the forfeiture caused by the act so done in violation of the covenant in the lease.

That notice to the solicitor in that case was not sufficient to bind the principal.

In order to constitute a waiver of a legal right, there must be fraud, or such acquiescence, as, in the view of a Court of Equity,

would make it a fraud to insist thereon upon the legal right.—*Gordon v. O'Reilly*, 12 Dr. & War. 414, 431, 433. (C.)

2. Acquiescence in a voidable transaction is not be a waiver of the right to avoid it even the party so acquiescing was the debtor of the person against whom he should proceed to impeach the transaction, and therefore within his power.—*Mulholland v. Mason*, 3 Dr. & War. 317. (C.)

3. Lease in 1819, with covenant against assignment, and to pay an increased head rent in case of breach. In 1824 lessee assigned with consent. In 1845 another assignment without consent. *Held*, that the first assignment was not a general waiver of the covenant, and that the lessor was entitled to the penalty.—*Stewart v. Hassard*, 1 L. Jur. 291. R.

4. A., in 1838, agreed to sell B. certain lands, B. to pay £6000 of the purchase-money at once, and the rest by the 1st Jan. 1839, a good title being made out; B. to get possession of L., part of the lands, on the 1st May 1838, subject to any question of title: the abstract to be delivered on the 1st Nov. 1838, and a good title made out, to the satisfaction of B.'s counsel, in a month after; B. to execute the conveyance on the 1st Jan. 1839; and if a good title were not made out by the 1st Feb. 1839 (which was expressly fixed as of the essence of the contract), B. to be discharged from his purchase. B. paid the £6000; entered into possession of L., and before Jan. 1839 requested A. not to press the contract, as he was not in a condition to pay the balance. At B.'s request, A. deferred to furnish the abstract until 1841. In August 1845, B. furnished requisitions for searches. The discussion on the title continued until June 1847, when B. stated that he considered himself no longer bound, unless his objections were satisfactorily answered in a month. A. then furnished what he relied on as satisfactory evidence of the point in dispute; declined to give further searches; and in March 1848 filed this bill for specific performance. *Held*, that though time was originally of the essence of the contract, it was waived by the conduct of the parties. That B.'s right to give notice to rescind the contract could not arise until July 1847; and that the bill was filed within a reasonable time after. That the retention of L. by B. was inconsistent with the rescission of the contract.—The satisfaction of counsel means reasonable satisfaction.—*Gordon v. Mahony*, 13 L. E. R. 383. (C.)

5. An agreement, "to sell the interest of A. in the lands of W.," does not absolve A., the vendor, from the necessity of proving his lessor's title, nor is that necessity waived by the fact that the vendee has taken possession of the lands before the lessor's title is produced. When an agreement to sell a leasehold is silent respecting the production of the lessor's title, parol testimony is admissible to

prove facts and circumstances constituting a waiver by the vendee of production of the lessor's title.

*Semble*—If such waiver be proved, the Court will declare it to be established, although the bill does not contain a prayer to that effect.—*Wright v. Griffith*, 1 I. C. R. 695; 3 I. Jur. 138. (C.)

1. The Board of the College of Physicians resolved that B. should be accepted as tenant of a farm for thirty-one years, at a rent of £1. 10s. 0d. an acre, as nominee of P., a former tenant, who had been allowed to dispose of his interest. F., B.'s solicitor, acting under a general authority, wrote to the solicitor of the College that, in consequence of the dangerous illness of B., he had not finally concluded with P., and could not take out the lease. *Held*, that the letter amounted to a waiver of B.'s right to the lease.

*Quære*—Whether, if there had not been any waiver, P. could have compelled the execution of a lease to the representative of B., who was a banker, and would not have resided on the farm?

After B.'s death, P. filed a cause petition for a specific performance of the agreement. The solicitor for the College stated in his affidavit an agreement made in 1846 for a lease for twenty-one years, at a rent of £1. 17s. 0d. an acre, with the brother of P., who had formerly been tenant of the farm, and whose administrator and creditor P. was, of which agreement P. was ignorant. P. amended his petition, and, as administrator, prayed, in the alternative, a specific performance of that agreement. *Held*, having regard to the 19th G. O. of May 1857, that the misjoinder could be set right, by amendment of the prayer, at the hearing.

*Quære*—Whether the 19th G. O. of May 1857 applies to misjoinder of causes of suit, as well as to misjoinder of parties?

*Held also*, on the authority of *Lindsay v. Lynch* (2 Sch. & Lef. 1), that the petition should be dismissed, as praying relief in the alternative, under two inconsistent agreements. But the Court gave leave to amend the petition, by abandoning the relief prayed by the original petition.

The petitioner had paid the rent of £1. 10s. an acre up to March 1856; and receipts had been given by the respondents for each gale. *Held*, that the petitioner was entitled to specific performance of the agreement of 1846, on the terms of paying all rent from the 25th March 1856, at the rate of £1. 17s., without prejudice to the respondents bringing such action as they might be advised, for the arrears alleged to be due up to March 1856.—*Power v. College of Physicians*, 7 I. C. R. 104. (R.)

2. The purchaser of a leasehold interest filed a petition for specific performance. The respondent, in his answering affidavit, insisted that time was of the essence of the contract; and that he had not waived his right so to insist. The petitioner in his replying affidavit went into evidence to establish a waiver. *Held*, that it could not be received, no case of waiver having been made on the petition.

When the petitioner intends to rely upon a waiver by the respondent of a right arising out of the contract, the waiver must be specifically put in issue by the petition.—*Barry v. Burns*, 3 I. Jur. N. S. 97. (C.)

3. When a purchaser of lands waives his right to have proof of the title of the vendor, who institutes a suit for specific performance, the vendor ought, if he wishes to avail himself of the waiver, to put that question in issue by his petition; the question should not be raised afterwards by affidavit.

As a general rule, each party to a contract for the purchase of lands should employ a separate solicitor; the same solicitor should not act for both.—*Meara v. Rogers*, 3 I. Jur. N. S. 108. (R.)

4. In April 1854, A. contracted to let lands to B. at an occupation rent. The written agreement provided that the lease should be taken out in three months. B. immediately went into possession of the lands. In May 1854, B. tendered a draft lease to A. who refused to execute it. In Jan. 1856, A. sold the lands to C., who had notice of the agreement. In June 1856, C. tendered to B. a deed of attornment, describing B. as tenant from year to year; this B. refused to execute. In March 1857 C. served a notice to quit on B., and in May 1857 B. filed his petition. *Held*, that there was no abandonment of the lease, and that there was no such waiver as to disentitle B. to specific performance of his contract.—*Brophy v. Connolly*, 7 I. C. R. 173; 3 I. Jur. N. S. 330. (C.A.)

5. Waiver of a demand under the Tenantry Act, if the petitioner intends to rely upon it, should be put in issue by the petition; not by an affidavit in reply.—*Ex parte Bull*, 3 I. Jur. N. S. 332. (R.)

6. The Court will not act on evidence of a parol waiver of a written contract, unless it be very clear and distinct. The petitioner and respondent contracted in writing to make a joint purchase. The petitioner paid the respondent one-half of the amount of the deposit, but afterwards took back that money, and gave the respondent a receipt for it. In a suit for specific performance, the respondent relied on the resumption of the money, and the receipt, as a waiver of the contract. The petitioner alleged that he had resumed the money on a misrepresentation by the respondent; that the deposit had been returned, and the contract rescinded. The evidence conflicted as to the alleged false representation. *Held*, that the respondent had failed to prove the waiver, and that there should be a decree as the case stood. The Court offered the respondent an issue on the question of misrepresentation.—*Clifford v. Kelly*, 7 I. C. R. 333. (R.)

7. D., sub-tenant of a portion of leasehold property, having undertaken to pay the head-rent, fraudulently omitted to do so. The head landlord evicted the lease for non-payment of

rent. More than six months after the execution of the decree, the head landlord offered the sub-tenant the option of redeeming, or taking out a new lease to himself. The sub-tenant elected to take the new lease. *Held*, that the forfeiture was not waived in favour of the mesne tenant.—*Dowding v. The Commrs. of Ch. Don. & Beg.*, 12 I. C. R. 861. (C.)

1. M. agreed to sell his interest in a lease under the following conditions of sale (amongst others):—"As the property in question is of small value, and the vendor is unwilling to incur any unnecessary expense or costs, the purchaser is to accept the title which the present vendor accepted upon the occasion of the purchase of the premises in February last; and such purchaser shall not be entitled to object on any grounds whatsoever to the title anterior to the conveyance to the present vendor, dated the 1st of February 1861, or to make any requisition in respect to such prior title; but the abstract of title under which the vendor was satisfied upon the purchase of these premises, and all deeds, documents, and papers handed over to him or his solicitor upon that occasion, shall be handed to the present purchaser." Pending the negotiation between the solicitors of the parties, M. frequently by letter assured the intending purchaser that the title was perfectly good. *Held*, that the letters amounted to a waiver of the above conditions of sale.—*Mathews v. Archer*, 7 I. Jur. N. S. 235. (C.)

2. Proviso in a mortgage, that if the interest should be punctually paid, the principal should not be called in before a certain date; but that in case of default the mortgagee might enter notwithstanding any subsequent acceptance of interest. The first half-year's interest was not paid within the time limited. During that time the mortgagee was out of the country. The interest was forwarded upon the mortgagee's sending instructions as to the mode of remittance. The next half-year's interest was liquidated, in advance, by a bill accepted by the mortgagor for the mortgagee's convenience, and the mutual relations of the parties were treated as subsisting unchanged. *Held*, that there had not been default in payment of the interest, and that if any default had been made, the subsequent conduct of the mortgagee would have amounted to a waiver of it.—*In re Taaffe's Estate*, 14 I. C. R. 347; 9 I. Jur. N. S. 18. (L.E.C.)

3. The tenant of an intermediate interest in lands the property of a See, without having renewed his lease or paid rent to his immediate landlord for more than twenty years, petitioned the L. E. Court to sell the fee, but afterwards served on his immediate landlord a notice containing an offer to take out a perpetuity grant. The landlord, by notice, replied that he would execute the grant on payment to him of all rent, fines, interest, and costs of establishing his title in the L. E. Court. *Held*, that that notice was a

waiver of the forfeiture.—*Courtenay v. Parker*, 16 I. C. R. 320. (R.)

## II. EFFECT OF.

4. An information against distillers charged them with distilling large quantities of spirits for which they had not paid duty; they having evaded payment by concealing the distillation, and pretending that their distillery had been silent during the time when the spirits were distilled. The information required the debts to discover the actual quantities of wort fermented in the distillery, and prayed an account of the duties payable to the Crown on spirits distilled by them. The Att.-Gen. waived all penalties and forfeitures. *Held*, that the debts were bound to answer the charges fully; and could not protect themselves on the ground that the facts charged would, if coupled with other facts, show that they had been guilty of a conspiracy to defraud the Crown.—*The Att.-Gen. v. Conroy*, 2 Jon. 791. (E.E.)

## WANT.

- *Of Constitution.* See CONSTITUTION.
- *Of Parties.* See PLEADING, PARTIES—PLEADING, PLEA.
- *Of Appearance; its Effect.* See PRACTICE, APPEARANCE.
- *Of Answer, Attachment for.* See PRACTICE, ATTACHMENT.
- *Of Prosecution, Dismissal of Bill for.* See PRACTICE, BILL, DISMISSAL OF.

## WARD.

See GUARDIAN AND WARD.

- *Of Court.* See INFANT, I.

## WARRANT OF COMMITMENT.

See BANKRUPTCY, VII, VIII.

## WASTE.

See PRACTICE, INJUNCTION—LANDLORD AND TENANT.

5. In 1618, the Irish Society granted lands to the Fishmongers' Company, reserving the timber. By deed of 1741, the Society declared that they would not claim trees thereafter planted, but that the Company might cut them, so as they should be first applied in improving the estate. In 1747, the Company demised to a lessee, excepting the trees, with liberty to themselves to cut them to improve their estates, according to their interest, but not for sale; granting estovers to the tenant, who covenanted to use the trees cut on the estate, and not for sale. He cut trees for sale. *Held*, that neither the nature of their title, nor the Timber Acts, were an objection to a suit by the Company for an account and injunction.

A bill by a landlord for an account of waste, committed by a tenant in cutting timber, lies against his executors.

The waste having been committed during 50 years of the tenant's life, the bill was not filed until a few years after his death. The account was refused touching all the waste done in the tenant's life; but was granted with an injunction touching waste committed by the executors.—*The Fishmongers' Company v. Beresford*, Beat. Rep. 607. (C.)

1. The clerk of a patron, having recovered in *quare impedit*, filed a bill under the 1 G. 2, c. 23, against the presenting bishop and against his clerk, for an account of the profits of the benefice pending the litigation. The bill contained (amongst others) charges of waste by cutting trees and otherwise. *Held*, that such a clerk, *deft.*, is liable, in a suit instituted in this Court under the statute, to account for the waste committed; and that the incumbent's remedy for such dilapidation is not confined to a proceeding in the Ecclesiastical Court under the 11 W. 3, c. 6, and 12 G. 3, c. 10.—*Crompton v. Bishop of Meath*, S. & Sc. 297. (R.)

2. A bill by the next remainderman charged that the tenant for life, who was dispunishable of waste, and had power to make leases not dispunishable of waste, had demised part of the lands to a third person, who, in collusion with the tenant for life, was committing waste by turning up, tilling, and burning the land. The *deft.* admitted the turning up, &c.; but stated that it was land which the tenant for life had reclaimed, and laid down in grass about thirty years before. The Court refused a motion for an injunction.

*Semble*—That such pasture is not ancient meadow or pasture.—*Davies v. D.*, 2 I. E. R. 414. (E.E.)

3. Upon the receiver's application, an injunction was granted to restrain one tenant of the estate from quarrying upon a private road, part of the premises, which was common to all the tenants.—*Dorman v. D.*, 3 I. E. R. 385. (E.E.)

4. The erection of a building, even of small size, for a purpose foreign from that contemplated on the demise of the lands, is waste in the contemplation of a Court of Equity.—*Hunt v. Hodges*, 1 I. Jur. 83. (C.)

5. To break up a rabbit-warren, unless it be a warren by charter or prescription, is not waste at Common Law; the Court will not grant an injunction to prevent it. *Quere*—If the warren be demised as such?—*Lurting v. Cons*, 1 I. C. R. 273; 3 I. Jur. 99. (R.)

6. When a lessee, bound by covenant not to commit waste, has committed acts of waste, for which damages merely nominal would be given, the Court of Ch. will not entertain against him, a suit founded on those acts, when it appears that he does not contemplate committing any further waste, or assert a right to commit it. No change in this respect has been introduced by the Ch. Amendment Act 1858. A tenant, by replying to a letter charg-

ing him with committing waste, and requiring him to make compensation for it, "that he is prepared to defend any action which may be brought against him, and to show that, so far from having committed injury, he has materially improved the premises demised to him," does not assert a right to commit the waste complained of.—*Doran v. Carroll*, 11 I. C. R. 378. (C.)

7. The introduction of folding-doors into the walls of a deanery parlour is waste. The cost of removing them, and of restoring the wall, was charged against the late Dean's executor; the value of the doors being allowed for.

The deanery gatehouse was, the Dean and Chapter assenting, removed by the late Dean without any faculty. *Held*, waste. The necessary expense of rebuilding it was charged against the Dean's executor.—*In re Dilapidations of the Deanery-house of St. Patrick's, Dublin*, 10 I. Jur. N. S. 38. (Cons.)

8. The conversion of lands into a cemetery is waste. Demise of lands for lives and years, with a covenant to yield them up in repair at the expiration of the lease. The lessee's assignee agreed with Poor-law Guardians with the Poor-law Commissioners' assent, not under seal, to let a portion of the lands to the Guardians as a cemetery. The land was so used for many years. The reversion was sold in the L. E. Court, and conveyed subject to the lease to the petitioner, who before the conveyance had notice of the cemetery's existence. *Held*, that the agreement with the Guardians was not a "purchase or hiring" by the Commissioners within the 10 Vic., c. 31, s. 20.

*Semble*—Such a "purchase or hiring" must be by deed, and from or with the concurrence of the owner of the fee.

The Court granted an injunction to restrain future burials, but refused to order the restoration of the surface to its condition at the date of the demise.—*Cregan v. Cullen*, 16 I. C. R. 339. (R.)

9. A lease for years demised premises "with the right of digging, lowering, levelling, and removing" any portion thereof, so as to make them suitable for building or ornamental purposes. The lessee covenanted not to "commit any wilful or voluntary waste, spoil, or destruction upon said premises."

The lessee removed sand, which he sold for profit. The Master reported that the sand had been removed *bona fide* to aid the lessee in building upon and improving the premises. On exceptions taken to the report—*Held*, that the lessee, though he might remove the sand *bona fide*, was not empowered to sell any portion thereof; and that his doing so was waste, although the price was expended on improving the premises.—*Clelland v. Ritchie*, 11 I. Jur. N. S. 64. (C.)

## WAYS, WATER, AND WATERCOURSES.

See CANALS, &c. See also PRESCRIPTION.



**WEAKNESS OF MIND.***See LUNACY.***WIDOW.***See DOWER—PRACTICE, WRIT—JOINTURE.***WIFE.**

- *Generally. See HUSBAND AND WIFE — DOWER—JOINTURE.*
- *Her Property, and Equity—Provision for her on Husband's Bankruptcy. See BANKRUPTCY, XI.*
- *Her Rights to Husband's Property. See HUSBAND AND WIFE, II, III, V.*

**WILFUL DEFAULT AND NEGLECT.**

- *When it must be Alleged. See PLEADING BILL, ACCOUNT.*

**WILLS AND DEVICES.**

- *Appointment of Guardian by. See GUARDIAN AND WARD, II—INFANT.*
- *Proof of. See ADMINISTRATOR—PRACTICE, EVIDENCE—COURT OF PROBATE.*
- *When Evidence is admitted to expound them. See PRACTICE, EVIDENCE.*
- *Respecting Payment of Legacy Duty. See LEGACY DUTY, ante.*
- *Cumulative and Substitutional Legacies. See LEGACY, VIII—PROPORTIONS, IX.*
- *Estate which Trustees take under. See infra, XV—also ESTATE AND EXECUTORY DEVISE—FRAUDS, STATUTE OF, II—HEIR-AT-LAW, I—JURISDICTION, VI—LEGACY—MORTGAGE, II—PORTIONS—INTERESTS IN PROPERTY—PRACTICE, ISSUE AT LAW.*

[*See Administration when Executor is abroad, 28 G. 3, c. 87; Wills Act, 1 Vic., c. 26; Probate Act, 21 & 22 Vic., c. 79; Probate Amendment Act, 22 & 23 Vic., c. 31; Act for Appointment of a Commissioner of Charitable Donations, 24 & 25 Vic., c. 111.*]

- I. JURISDICTION TOUCHING: GENERALLY.
- II. WHO MAY MAKE A WILL.
- III. WHAT MAY BE DISPOSED OF BY WILL.
- IV. VALIDITY AND CONSTITUTION OF.
- V. EXECUTION AND PUBLICATION OF.
- VI. ATTESTATION OF. *See PRACTICE, EVIDENCE.*
- VII. REPUBLICATION AND REVIVAL OF.
- VIII. REVOCATION OF.
  - 1. *By Cancellation.*
  - 2. *By Marriage and Birth of Issue.*
  - 3. *By Will, Codicil, or other Testamentary Act. See infra, XVI.*
  - 4. *By Alteration or Alienation of the subject-matter by subsequent act or deed.*
- IX. NUNCUPATIVE WILL.

**X. PROBATE, AND PROOF OF. See PRACTICE, EVIDENCE—COURT OF PROBATE.**

- 1. *In general.*
- 2. *Probate Duty.*

**XI. SUBSTITUTION.****XII. MUTUAL WILLS.****XIII. OBTAINED BY FRAUD.****XIV. PREVENTED BY PROMISE.****XV. CONSTRUCTION OF. See WORDS, CONSTRUCTION OF.**

*As to Duty on Legacies. See LEGACY DUTY. Cumulative or Substitutional Legacies. See LEGACY, VII—PORTIONS, X.*

*Estate taken by Trustees, &c., under. See infra.*

- 1. *General Principles, Rules, and Examples of Construction, with the Cases that fall under them.*
  - a. *Generally.*
  - b. *Gift by Implication: what words amount to a Gift.*
  - c. *Gifts by rejecting words, or substituting one word for another.*
  - d. *When Gifts are enlarged or confined by the terms of Gifts over.*
  - e. *Gifts by way of Substitution.*
  - f. *Gifts or Powers for Maintenance, and Directions or Trusts to Convey or Settle.*
  - g. *Periods to which in general words are referable, and herein of "dying without issue" and of survivorship.*
- 2. *Generally.*
- 3. *Nature, Quantity, and Quality of Interest in Real or Personal Estate.*
  - a. *Generally.*
  - b. *Fee-simple, or Quasi Fee.*
  - c. *Absolute Interest.*
  - d. *Estate Tail.*
  - e. *Estate for Life, or other Limited Interest.*
  - f. *Joint Tenancy.*
  - g. *Tenancy in Common.*
  - h. *Estate Beneficial, or clothed with a Trust.*
  - i. *Whether to be enjoyed in Specie, or not.*
  - j. *Estate Vested, subject to be Devested: Period of Vesting.*
  - k. *Annuities.*
- 4. *What passes by.*
  - a. *Real Estate, and Copyhold.*
    - 1. *In general.*
    - 2. *In respect to particular Words of Description.*
  - b. *Personal Estate.*
    - 1. *Generally: whether general Personal Estate, or Residue passes.*
    - 2. *When Chattels, Stock, &c., pass, and by what words.*
  - c. *Property acquired after Date of Will.*
  - d. *Property Contracted to be Purchased or Sold.*
- 5. *Devises and Bequests, Valid or Void.*
  - a. *In general.*

- b. *Remoteness and Perpetuity.* See PERPETUITY.
  - c. *Accumulations.*
  - d. *Mistake or Uncertainty in.*
  - 6. *Description of Legatees: who take, and are capable of taking.*
    - a. *Legitimate Children, and Grandchildren.*
    - b. *Illegitimate Children.*
    - c. *Heirs, Heirs Male.*
    - d. *Issue.*
    - e. *Relations.*
    - f. *Next-of-kin.*
    - g. *Personal Representatives, or Legal Personal Representatives.*
    - h. *Executors.* See EXECUTORS, VII.
    - i. *Family: Name and Blood: next Eldest.*
    - j. *Nephews and Nieces: Uncles and Aunts, &c.*
    - k. *First and Second Cousins.*
    - l. *Government.*
    - m. *Servants.*
    - n. *When to be in esse.* See infra, LAPSED LEGACIES.
    - o. *Whether per Capita or per Stirpes.*
    - p. *Mistakes.* See supra, 5. d.
    - q. *Wrong or Imperfect Descriptions, &c.*
    - r. *Witness.* See PRACTICE, EVIDENCE.
    - s. *Classes.*
  - 7. *Words Precatory and of Recommendation.*
  - 8. *Concerning Specific Legacies.* See LEGACY, X.
    - a. *Generally.* See *ibid.*
    - b. *Rights of Specific Legatees.* See *ibid.*
    - c. *Their Abatement and Ademption.* See LEGACY, I, III, X.
  - 9. *Concerning General Legacies, their Ademption and Abatement.* See LEGACY, I, III.
  - 10. *Concerning Lapsed Legacies.* See LEGACY, V.
  - 11. *Concerning Conversion.* See EXECUTORS, IX.
  - 12. *Of Vested Legacies, and Interests out of Personal Estate; Exoneration of.* See INTERESTS IN PROPERTY, II.
  - 13. *Of Vested Legacies, and Interest out of Real Estate.* See *ibid.*, III.
  - 14. *Charges on Real Estate: of Exoneration.* See ESTATE, VIII, IX—PORTIONS, III—COPYHOLD, I.
  - 15. *Conditional Legacies and Bequests.* See LEGACY, VI.
  - 16. *Of Payment and Appropriation of Legacies, &c.* See LEGACY, VIII.
  - 17. *Of the Satisfaction and Release of Debts and Portions.*
  - 18. *Of Bequests to Charity, and of Mortmain.*
  - 19. *Of Interest on Legacies, Intermediate Maintenance, and Disposition of Mesne Profits.* See INTEREST PERPETUARY, I.
  - 20. *Of the Surviving of Accruing Shares.*
  - 21. *Bequests to separate Use of Married Women.* See HUSBAND AND WIFE, III.
  - 22. *Respecting Limitations of Chattels, and of Chattel and Personal Interest.* See ESTATE, IX.
  - 23. *Of Election.* See ELECTION, II.
  - 24. *Of the Residuary Personal Estate.*
    - a. *Rights of Residuary Legatee.*
    - b. *Rights of Next-of-kin.*
    - c. *Rights of Executors.* See EXECUTORS, VII.
  - 25. *Of Legacies, Portions, &c., under Will: how to be raised.* See LEGACY, VIII—PORTIONS, VI—ANNUITY, IX.
  - 26. *Of the Administration of the Estate: Duties, Powers, Rights, and Liabilities of Executors.* See EXECUTORS, IX, and *passim*.
  - 27. *More particularly of Devises, and of Real Estate.*
    - a. *Generally.*
    - b. *The operation of Devises of Land, &c., on Copyholds, Leaseholds and Mortgages.* See COPYHOLD, I.
    - c. *Rights, Powers, Duties, and Liabilities of Trustees.* See TRUSTEES.
    - d. *Rights, Duties, Powers, and Liabilities of Tenant for Life and Remainderman.* See ESTATE, III.
    - e. *Rights, Duties, Powers, and Liabilities of Heir-at-law and Devisee.* See DEVISEE—ESTATE, VIII—EXECUTORS, XI—HEIR-AT-LAW, I.
  - 28. *Of Powers: their Execution: by whom: of the Estates created under Powers.* See POWERS, *passim*.
  - 29. *Of Remainders, generally, under Wills.* See REMAINDERS & REVERSIONS—INTERESTS IN PROPERTY, IV, V.
- XVI. CODICIL. See supra, VIII.

#### I. GENERAL JURISDICTION TOUCHING WILLS, &c.

1. When administration had been granted, by sentence of the Ecclesiastical Court, to A., as only next-of-kin of the intestate, in a suit in which B. also claimed to be the only next-of-kin; and that sentence was affirmed by the Court of Delegates on appeal; and B. filed a bill impeaching the pedigree of A. and to establish his own; this Court would not grant an injunction until answer to prevent the administrator possessing himself of the assets, he being, by the decree of the Ecclesiastical Court, both legally and equitably entitled thereto.—*Maher v. Gorman*, 6 L. E. R. 304. (R.)
2. In a suit to carry into execution the trusts of a will; the Court will not merely declare the rights of the parties, and then leave them to act on that declaration out of Court.—*Brown v. Martyn*, 2 Jon. & L. 333. (C.)
3. The Court will distribute a fund in Court payable to a personal representative, upon a

Diocesan probate, if the intestate had not *bona notabilia*.—*Graves v. G.*, 8 I. E. R. 36. (R.)

1. When the heir-at-law successfully resists probate of a will of real estate, the Court of Probate has not jurisdiction to charge the real estate with the costs of the litigation.—*Newton v. N.*, 13 I. C. R. 245. (C.A.)

## II. WHO MAY MAKE A WILL.

[Since the 1 Vic., c. 26, s. 7, no person under the age of 21 can make a Will.]

[As to Persons under Disability; See *Massy v. Pennefather*, 7 I. Jur. N. S. 268.]

## III. WHAT MAY BE DISPOSED OF BY WILL.

[See 34 & 35 H. 8, c. 5; 32 H. 8, c. 1; 3 W. & M., c. 14; 29 Car. 2, c. 3; 7 W. 4 & 1 Vic., c. 26.]

2. The right to set aside a conveyance improperly obtained by a solicitor from his client is devisable.—*Uppington v. Bullen*, 2 Dr. & War. 184; 1 Con. & L. 291. (C.)

## IV. VALIDITY AND CONSTITUTION OF.

[As to Bequests for Charitable Purposes, See MORTMAIN, CHARITY: 1 Vic., c. 26.]

3. A devise of lands in Ireland, to Trinity College, Dublin, for the promotion of the knowledge of the Irish language—*Held*, void.

In Ireland the Statutes of Mortmain include the University of Dublin, and are affected only by the 10 Car. 1.

Devises to Corporations, whether with or without license, are void in Ireland, under the exception in the 10 Car. 1, sess. 2, c. 2, s. 10.

Though a devise to a Corporation be void, its trusts may be supported in equity, provided they are not corporate.—*Att.-Gen. v. Flood*, *Hayes*, 611; *Hay. & J.*, App. 21, 32, 35, 37. (E.E.)

4. When there is a devise in trust, which devise is void at Law by reason of the incapacity of the devisee to take, the trust will nevertheless be supported in Equity, which will enforce it against the estate.—*Incorporated Society v. Richards*, 1 Dr. & War. 258; 1 Con. & L. 58; 4 I. E. R. 177. (C.)

5. *Semble*—That a testamentary instrument which is left incomplete by reason of the testator's sudden death, or other incapacity of making a will suddenly supervening, is not void *in toto*, but is good as far as it goes.—*Armstrong v. Millar*, 4 I. E. R. 659. (E.E.)

6. The fact of testator retaining his mental capacity, and for a considerable length of time surviving the date of, without altering or throwing doubt upon his will, is an important circumstance in favour of its validity.

A will has not been set aside, on the ground of undue influence having been used to procure its execution, in any case in which the evidence did not establish the ascendancy of the controlling power, and its actual exercise by the constraint and coercion of an enfeebled, exhausted, or subjugated intellect.

When force, fraud, or undue influence are alleged to have been exercised in obtaining the execution of a will, the mental capacity of the testator is a question of the utmost importance.

The fraud to vitiate a will must be contemporaneous with the making of the will; it must be discovered in, and form part of, the *res gestæ*. The means and power of achieving the fraud may have been previously acquired and realised, but the Court must be satisfied that the act impeached is effected by their actual present use and exercise at that time, controlling and defeating volition.

When it appeared uncertain whether the Court of Delegates had refused probate of a will, on the ground of fraud, or *defect probatis*, the Lord Chancellor being satisfied that, upon the latter of those grounds, the decision could not be supported, advised the issuing of a commission of review.—*Kelly v. Thomas*, 21 C. R. 510. (C.)

7. Bequest of an annuity to the monks of S., to provide clothing for the poor children attending their schools—*Held*, valid.

That the bequest showed a general charitable intent, which the Court would effectuate, though the school should be accidentally discontinued, or should cease to answer the very description of it in the will.

Bequest of an annuity to the parish priest of D., to provide for the expense of an organ and organist for the chapel of B—*Held*, valid.

A. bequeathed an annuity to the monks of M., to be appropriated to the improvement of the chapel of M. The abbot of M., at A.'s death, having died—*Held*, that his successor had no right to the annuity; and that there was no general charitable purpose for which a scheme should be directed.—*Carbery v. Cat*, 3 I. C. R. 231; 4 I. Jur. 274. (C.)

8. A bequest of a sum of money for the purpose of building a church in Ireland is not within the 7 & 8 Vic., c. 97, s. 16, and is therefore valid, though the will be made within three months of the testator's death.—*Pollock v. Day*, 14 I. C. R. 297. (R.)—[*Affirmed: ibid*, 371. (C.A.)]

9. A solicitor drew from instructions a draft will, settling in strict settlement on testator's children his real estates, with powers of jointuring, charging portions, and giving maintenance. In these powers blanks were left for the sums, and for the trustees' names.

The testator had in his possession for a considerable time an epitome of the draft, of which he approved, and which contained like blanks.

The testator was suddenly taken ill. Whereupon the solicitor, of his own motion, filled up the blanks, but did not inform the testator

how they had been filled. The will, so framed, was executed. *Held*, that the parts filled in formed no part of the will; of which, nevertheless, the remainder was valid.—*O'Reilly v. O'R.*, 11 I. Jur. N. S. 216. (R.)

#### V. EXECUTION AND PUBLICATION OF WILLS.

1. On the 13th June 1825, J. made a will devising his real estate to E. On the 25th Nov. following, he executed another will, disposing of his personal estate merely, but revoking all former wills, and attested by three witnesses thus:—J. told two of them that the document was his will, pointed out his name, and acknowledged the signature to be his, whereupon they subscribed and attested the will. Whilst the second witness was in the act of signing, the third witness accidentally entered the room, and was asked by J. to become a witness, although, J. said, it was unnecessary. J. then gave that witness to understand that the document was his will, but did not point out his name, or acknowledge the signature to be his, to this witness, who might, however, while in the act of signing, have seen J.'s name. *Held*, that it was duly executed as a devising will under the Statute of Frauds. That it, though conversant with personal property only, was a good will to revoke the devise of the freehold.

*Semle*—Even as a "writing of revocation," it was well executed under the statute, J.'s acknowledgment being equivalent to signing in the witnesses' presence.—*Jones v. Ogle*, S. & Sc. 1. (R.)

2. A will terminated with a *testimonium* clause about two inches from the foot of the second page of a sheet of paper, leaving ample room for the signatures of the testatrix and of the witnesses, all of whom, signed their names opposite to an attestation clause at the top of the third page, upon which no part of the will was written. *Held*, that the will was properly signed within the meaning of the 1 Vic., c. 26.—*Derinzy v. Turner*, 1 I. C. R. 341. (Court of Delegates.)

3. Although, to sustain a case of fraud, and show that a will has been made under coercion and influence, the evidence must be pointed to the very *factum* of the will, and directly show that the instrument whose validity is disputed was executed under pressure of coercion and undue influence, the jury may, from circumstantial evidence, or from inference and presumption from such evidence, come to the conclusion that coercion and undue influence existed.—*Rosborough v. Boyse*, 3 I. C. R. 489; 6 I. Jur. 249. (C.)—[S. c. 3 I. C. R. 540, 629.—Orders and decree reversed; 6 H. Lds. Cas. 2.]

4. Under the 1 Vic., c. 26, s. 9, it is necessary that the witnesses to a will shall subscribe their names in the presence of the testator, and of each other.—[*Casement v. Fulton*, 5 Moo. P. Cas. 180, followed.]—*Slack v. Busted*, 6 I. C. R. 1; 2 I. Jur. N. S. 98. (R.)

5. *Quare*—Whether under the 1 Vic., c. 26, s. 9, it is necessary that the witnesses to a will shall subscribe their names in the presence of each other.—*Slack v. Busted*, 6 I. C. R. 226. (C.)—(Sub nom. *Slack v. Gillier*, 2 I. Jur. N. S. 98.)

6. One of the attesting witnesses subscribed the will after the testator's signature, but before execution, in the presence of the other witnesses. *Held*, a bad execution under the 1 Vic., c. 26.

That witness should sign again.—*Mitchell v. Huffington*, 4 I. Jur. N. S. 40. (P.)

7. A solicitor prepared, on the day next but one before the testator's death, a draft will, under which he took, as residuary legatee, a large pecuniary benefit. On the day on which the will was prepared the testator executed it in the presence of two witnesses, brought by the solicitor to witness the testator's signature. The validity of the will having been questioned in a contested suit—*Held*, that the solicitor's evidence on his own behalf was admissible, but should be received with great jealousy and caution.

In such a case mere formal proof, that the will was executed according to the forms prescribed by law, is not sufficient to establish the will; the evidence should satisfy the Court that the instrument so executed was the genuine will of a free and capable testator.

Review of the principles which govern the Court in estimating the capacity of a testator and the testimony of witnesses in contested testamentary cases.—*Keogh v. Barrington*, Dr. Rep. temp. Napier, 1. (C.A.)

8. V. having produced a paper to two persons, told them that it was his will, and requested them to witness his execution of it. The paper was so folded that only a blank space at the bottom was presented to the witnesses; the writing (if any) was hidden.

One witness deposed that he saw no trace of writing inside the paper. The other, averring that it contained some writing, could not say what that writing was.

V. signed his name on the blank portion in their presence. They attested the paper in his presence and in that of each other. *Held*, that the will was valid.

*Quare*—If neither of the witnesses had seen any trace of writing inside the paper?

The next-of-kin did not call any witnesses. *Held*, that they were entitled to costs out of the estate.—*Byrne v. Hogan*, 6 I. Jur. N. S. 114. (P.)

9. A testator signed his will in the absence of the two attesting witnesses, of whom the survivor negatived an express acknowledgment then, but admitted that the will was on the table, signed, before the testator, and handed over to the witnesses to sign. The drawer and the deft., who were present, swore to an express acknowledgment. *Held*, that there was an express acknowledgment, and, besides, that there was enough to constitute

a virtual one at law.—*Todd v. Thompson*, 7 I. Jur. N. S. 390. (P.)

1. Two wills, each of which devised real estate, were executed and attested on the same day, and at the same place. The witnesses could not state which was signed last. Both were endorsed in testator's handwriting: one, with the words "The last will and testament of R. F.," the other, "Duplicate will of R. F." The same words were written on each will after the attestation clause. Each revoked all previous wills. The wills were inconsistent. *Held*, that the former document was the last will.—*Lofthus v. Stoney*, 17 I. C. R. 178. (R.)

#### VI. ATTESTATION OF. See PRACTICE, EVIDENCE.

[The mode of Attestation now settled by 1 Vic., c. 26, ss. 9, 14, 15, 16, and 17.

As to Exceptions in favour of Wills of Seamen, &c., see ss. 11 and 12.]

2. The day before her death, testatrix, V., bequeathed a legacy to her sister, B. The will was then properly attested by two witnesses. Immediately after they had signed, B., at V.'s request, and, as she thought, for greater security, signed her name to the will. After V.'s death, B. cut her name off the will. *Held*, that she signed as an attesting witness, and must pay the costs incurred by her spoiling the will.—*Toker v. Maguire*, 6 I. Jur. N. S. 24. (P.)

#### VII. REPUBLICATION AND REVIVAL OF WILLS.

3. A will was dated before the change of currency, made by the 6 G. 4, c. 79. A codicil was dated afterwards. *Held*, such a republication of the will that the legacies were deemed bequeathed in British currency, though the codicil merely appointed new executors.—*Hamilton v. Carroll*, 1 I. E. R. 175. (C.)

4. If a testator devises to B. an annuity charged upon lands, and subsequently conveys a portion of the premises to the devisee of the rentcharge, the rentcharge is thereby extinguished.

A will speaks from the testator's death; 1 Vic., c. 26, s. 24. But if, after its execution, and before his death, he does an act which extinguishes or revokes the bequest as to that portion, the will is not set up by the statute.—*Hewson v. Carolin*, 3 I. Jur. 285. (C.)

5. C., by will, devised lands to trustees for B. for life, "provided she does not marry;" remainder over, in case of her death or marriage. C. married B., and afterwards made a codicil to his will, which republished it. *Held*, that the devise to B. took effect, notwithstanding her marriage to C.—*Cooper v. C.*, 6 I. C. R. 217. (C.)

6. V., being seized in fee of the lands of X., by will, in 1829, devised X. to A. for life;

remainder to his first and other sons in tail male; and, in default of such issue, to B. and C., share and share alike. After some further dispositions of other property, the will contained this clause:—"I devise and bequeath the residue and remainder of my estate and effects, not herein specifically devised, to my brothers J. S. and D. S., share and share alike." In 1830, C. died. In 1832, V. made a codicil, but made no alteration in the disposition of X. The codicil did not in terms re-publish the will, but adverted to it more than once, and confirmed the appointment of the trustees named in the will. *Held*, that the codicil was a general re-publication of the will.

That the lapsed devise to C. did not come within the operation of the residuary devise, but passed to the heir-at-law.—*In re Swiney*, 6 I. C. R. 455. (I.E.C.)

7. V. made, in Feb. 1858, a will which he subsequently destroyed. After its destruction, he made a will containing a disposition of his property, different from that contained in his former will, and dated in Jan. 1859. These two wills were prepared by different solicitors. In Feb. 1859, he applied to the solicitor who had prepared the will of 1858, and who was ignorant of the existence of that made in 1859, to prepare a codicil. The codicil on its face appeared to be a codicil to the will of 1858, and referred to its provisions. V. afterwards destroyed the codicil of Feb. 1859, with the intention of setting up the will of 1859, and died, without making any further testamentary disposition. *Held*, that he died intestate.—*Newton v. N.*, 12 I. C. R. 118; 7 I. Jur. N. S. 129. (C.A.)

8. In 1845, a testator, by will, settled his estates on A. and his issue; then on B. and his issue. In 1854, he made another will, settling the estates, first, on B. and his issue, and then on A. and his issue; and, in 1858, executed a codicil to the will of 1845, which he mistook for the will of 1854, commencing thus:—"This is a codicil to the above will." *Held*, that parol evidence was inadmissible to prove the mistake; that the will of 1845 was revived; and that it, together with the codicil, formed the testator's last will.—*In the Goods of Stowell*, 7 I. Jur. N. S. 325. (P.)

#### VIII. REVOCATION OF.

[See 1 Vic., c. 26, ss. 18, 19, 20, 21, 22 & 23; and also Statutes repealing former Acts. See also VII. REPUBLICATION AND REVIVAL OF.]

1. By Cancellation.
2. By Marriage, and Birth of Issue.
3. By Will, Codicil, or other Testamentary Act. See *infra*, XVI.
4. By Alteration or Alienation of the Subject-matter by Subsequent Act or Deed.

#### VIII. 1. By Cancellation.

9. A testator bequeathed properties as follows:—"To our three children, Henry and

James, now residing with me, our sons, and the before-named Anne, our daughter." This last member of the sentence had been stroked with a pen, as if to obliterate the words, which were quite legible. *Held*, that the previous words of description, "our three children," were sufficient to entitle Anne to take, even if the obliteration were complete, which it was not.—*Boyd v. Martin*, 2 Dr. & Wal. 355. (C.)

1. In a will of 1836, words, though cancelled, remained legible. *Held*, that, as to the personal estate bequeathed, the cancellation, though unattested, was complete.—*In re Barrett*, 8 I. C. R. 548. (R.)

2. V. devised, in trust, his estates in several Irish counties (which he named), "and elsewhere in Ireland." Through the word "Sligo," one of the named counties, he drew a line in ink, and initialed the alteration. The word remained quite legible. The attestation clause ran thus:—"In witness, &c., the word Sligo being struck out before the execution, and initialed by me." *Held*, that "elsewhere in Ireland," meant elsewhere in Ireland except in Sligo, and that the Sligo estate was not devised to the trustees.

The Lord Chancellor felt strongly convinced that the adverse possession of those estates by a third party, for more than twenty years, would bar all rights of the trustees, and of the equitable tenants in fee in remainder.—*Cooper v. Warre*, 11 I. Jur. N. S. 24. (C.)

3. The effect of interlineations considered.—*Hutchinson v. H.*, 13 I. E. R. 332. (C.)

#### VIII. 2. By Marriage, and Birth of Issue.

4. V. devised the lands of A., B., and C. to trustees, to the use of his son, H., for life; remainder to trustees to preserve, &c.; remainder to other trustees for 500 years, to raise £2000 for portions for H.'s younger children, and subject thereto to the use of the first and other sons of H. successively in tail male; remainder to X., a grandson, for life; remainder to his first and other sons in tail male; and like successive remainders to two other grandsons for life, and their first and other sons in tail male; with an ultimate remainder to V.'s daughter in fee. Powers, including a power to charge £2000 for younger children, were given to the grandsons. Subsequently, V. married again, and vested A. and B. in trustees to secure his wife's jointure; and by codicil, executed afterwards, revoked any bequest or devise in his will to H., and devised A. and B. to him for life, subject to the second wife's jointure; remainder to a new trustee to preserve, &c.; remainder to H.'s first and other sons successively in tail general; remainder to his grandson, X., in fee; and directed that the codicil should be annexed to and made part of his will. *Held*, on rehearing, after two conflicting decisions, that the term and £2000 charge for H.'s younger children were not revoked.

The construction of implied revocations considered.—*Persse v. Daly*, 9 I. E. R. 508. (C.) —[See this case on the hearing; *Daly v. D.*, 2 Jon. & L. 752. (C.)]

5. When a party makes a will, and during the same day marries, the marriage operates as a revocation of the will, notwithstanding that, from the terms of the instrument, it appears that the testator did not intend that it should take effect till after the marriage. The law in such a case does not admit the doctrine of no fraction of a day.—*Otway v. Sadleir*, 4 I. Jur. N. S. 97. (P.)

#### VIII. 3. By Will, Codicil, or other Testamentary Act. See *infra*, XVI.

[See 1 Vic., c. 26, s. 20.]

6. On the 13th June 1825, J. made a will devising his real estates to E. On the 25th Nov. following, J. executed another will disposing of his personal estate merely; but revoking all former wills, and attested by three witnesses thus:—J. told two of them that the document was his will, pointed out his name, and acknowledged the signature to be his, whereupon they subscribed and attested the will. Whilst the second witness was in the act of signing, the third witness accidentally entered the room, and was asked by J. to become a witness, though J. said it was unnecessary. J. then gave that witness to understand that the document was his will, but did not point out his name, or acknowledge the signature to be his to this witness, who might, however, while signing it, have seen J.'s name. *Held*, that the will, though conversant only with personal property, was a good will to revoke the devise of the freehold.—*Jones v. Ogle*, S. & Sc. 1. (R.)

7. Articles of agreement provided that the interest of a fund, which was vested in trustees, should be paid to C. for life; after her death, the principal to go among the then unmarried children as her husband, D., should by deed or will appoint; in default of appointment, equally among the children living at his death. Pursuant to a trust in the articles, the fund was invested in lands. D., by will, appointed the lands among his sons thus:—B. to J.; G. to P.; K. to H.; and E. to N.; to go to them immediately on C.'s death; with a clause of survivorship amongst them, if any brother died before they respectively became entitled. By two subsequent deeds of appointment, D. irrevocably appointed B. to J., and K. to P. By a codicil, reciting those two deeds, D. revoked the appointment of K. to H., and, instead thereof, appointed G. to him. H. died after D., but predeceased C. *Held*, that the devise by the codicil of G. was an absolute appointment, not subject to the clause of survivorship in the will. That the period, at which the estates given by the will vested, was C.'s death, not D.'s.—*Comr's. of Ch. D. & B. v. Cotter*, 2 Dr. & Wal. 615. (C.) —[Latter point *revd.*: 2 I. E. R. 196; 1 Dr. & War. 498. (C.)]

1. V., by will, devised D. to trustees to the use of her son, Y., for life; remainder to his sons in tail. V. then bequeathed annuities to different members of her family; amongst them, one of £100 to H. She directed the annuities to be paid without any deduction, and charged them "on the lands so devised to the use of my son, Y.;" and on the residue of other lands which she directed to be sold. A codicil contained this clause—"And whereas I did, by my said will, give the lands of D. to the use of my son, Y., as therein; now I do hereby revoke so much of my said will as gives said lands of D. to my said son, Y., and I direct the trustees shall stand seized of the said last-mentioned lands to the use of my daughter, H." (the annuitant), "for her life, in addition to what I have left her by my said will." *Held*, that V. merely meant to substitute one devisee for the other, and did not intend to discharge D. from contribution to the annuities charged thereon by the will.

A codicil is never held to revoke a will further than is necessary to effect the testator's intentions.—*Young v. Hassard*, 1 Dr. & War. 638. (C.)

2. A legacy in a third codicil—*Held*, substitutional for a legacy given by the will, and for a cumulative legacy given by a prior codicil; the testator having, in his third codicil, given the legatee a description different from that given her by the will and prior codicil; having expressed an intention to alter his will; and having delivered this codicil as his last will.—*Russell v. Dickson*, 4 I. E. R. 339; 2 Dr. & War. 133; 1 Con. & L. 284. (C.)

3. *Quare*—Whether the devisee of an estate, which the testator subsequently contracts to sell, is entitled to the purchase-money?—*Saunders v. Cramer*, 5 I. E. R. 12; 3 Dr. & War. 87; 2 Con. & L. 54. (C.)

4. V., having by will devised two different properties among her nephews successively for life, remainder to their issue in strict settlement, making A. the head of one set of limitations, and B. of the other, by a codicil reciting that she had made devises to A. and B. respectively, and that she wished them to change places as to the properties so devised, revoked the "said bequests by her said will to the said A. and B. respectively," and bequeathed the property by the will devised to A., to B., his heirs, executors, &c.; and in like manner as to A. and his heirs, with respect to the property devised by the will to B. *Held*, that the codicil revoked all the limitations in the will, and vested the respective properties in A. and B. absolutely.—*Murray v. Johnson*, 2 Con. & L. 104; 3 Dr. & War. 148. (C.)

5. V. devised the lands of K., held for a term of years, to H. and J., and the longest liver of them. He afterwards executed two codicils on the same day. In the first he did not mention K. by name; but, after directing two bonds to be given to his eldest son, "to create a fund to pay their rent of the lands of

K.," relinquished "a settlement made on J. of an interest concern on this occasion, and desired that the entire interest and property arising out of this farm, after the demise and extinction of the present lease, be converted into one fund." By the other codicil he gave property to pay the head rent of K. *Held*, that the bequest of K. to J. was not revoked by the codicils.—*O'Shea v. Howley*, 1 Jon. & L. 391; 7 I. E. R. 56. (C.)

6. V. devised lands to the use of H. for life, without impeachment of waste; remainder to trustees during the life of H., to preserve, &c.; remainder, after his decease, to trustees for a term, upon trust to raise portions for his younger children; remainder to his first and other sons in tail male; with several remainders over.

By codicil, V. revoked any bequest or devise to H. by any former will or codicil; and devised the same lands to H. for life, subject to an annuity charged thereon by deed; remainder to M., during life, to preserve, &c.; remainder to the first and other sons of H. in tail; remainder to M. D. in fee. V. directed that this codicil should be taken as part of his will.

*Semble*—That the codicil revoked the devise of the term, and the trusts thereof.

When a codicil contains an unbroken set of limitations, irreconcilable with those in the will, and which exhaust the fee, the inference is—that the testator intended to dispose by the codicil of the whole fee, which he had otherwise disposed of by his will.—*Daly v. D.*, 2 Jon. & L. 752. (C.)

[On re-hearing—*Held*, that the codicil did not revoke the term and the charge for younger children.—*Persse v. Daly*, 9 I. E. R. 508. (C.)]

7. V. by will bequeathed one-seventh of a fund to B. for life, remainder to her daughter. The residue of the fund was bequeathed to the sisters of B. for life, remainder to their children; with an executory limitation over in default of children, in the nature of a cross remainder. By codicil, V. revoked the bequest of one-seventh to B. and her daughter, and declared his intention that they should take no benefit under the will. *Held*, a revocation of the interest of B. under the executory limitation.—*Murray v. Richardson*, 1 I. Jur. 73. (C.)

8. V. by will devised lands to A. and his heirs, to the use of R. for life, remainder to A. to preserve, &c., remainder to the use of the first and other sons of R. in tail, remainders over. By codicil, reciting that by will he had devised all his estate in the lands to R., he devised all his right, title, and interest in the lands to W. and R., and the survivor of them, on trusts which did not exhaust the fee; and ratified his will in all its parts, save so far as it had been revoked by the codicil, which was to be taken as part of his will. *Held*, that the legal estate tail devised by the will to the sons of R. was revoked by the codicil.

*Quære*—Whether the eldest son of R. was not under the codicil entitled to an equitable estate tail, subject to the trusts stated in the codicil?—*Fitzmaurice v. Sadler*, 12 I. E. R. 136. (R.)—[*Rev'd.*: 12 I. E. R. 544. (C.)—*See* 9 I. E. R. 595.]

1. V. devised the lands of A., B., and C., to trustees, to the use of his son H. for life; remainder to trustees to preserve, &c.; remainder to other trustees for 500 years, to raise £2000 for portions for H.'s younger children, and subject thereto to the use of the first and other sons of H. successively in tail male; remainder to X., a grandson, for life; remainder to his first and other sons in tail male; with like successive remainders to two other grandsons for life, and their first and other sons in tail male; with an ultimate remainder to V.'s daughter in fee. Powers, including a power to charge £2000 for younger children, were given to the grandsons. Subsequently V. married again, and vested A. and B. in trustees to secure the wife's jointure; and by a codicil, executed afterwards, revoked any bequest or devise in his will to H., and devised A. and B. to him for life, subject to the second wife's jointure; remainder to a new trustee to preserve, &c.; remainder to H.'s first and other sons successively in tail general; remainder to his grandson X. in fee; and directed that the codicil should be annexed to and made part of his will. *Held*, on re-hearing, after two conflicting decisions, that the term and £2000 charge for H.'s younger children were not revoked.

The construction of implied revocations considered.—*Persse v. Daly*, 9 I. E. R. 508. (C.)—[*See* the case on the hearing: *Daly v. D.*, 2 Jon. & L. 752. (C.)]

2. V., one of whose sisters, S., was residing with her, while the other, O., resided with her (O.'s) husband, after giving several legacies, amongst them £100 to O., said: "The remainder of my property I leave to my sister S." Subsequently, after giving some small bequests, V. said: "I appoint my two sisters, S. and O., my executrices and residuary legatees of this my last will." *Held*, that the last residuary bequest did not revoke the first, and that S. took all the residuary fund.—*In re Gregory's Trusts*, 5 I. Jur. N. S. 55. (C.)

3. V. made, in Feb. 1858, a will, which he subsequently destroyed. After its destruction, he made a will containing a disposition of his property different from that contained in his former will, and dated in Jan. 1859. These two wills were prepared by different solicitors. In Feb. 1859, he applied to the solicitor who had prepared the will of 1858, and who was ignorant of the existence of the will of 1859, to prepare a codicil. The codicil on its face appeared to be a codicil to the will of 1858, and referred to its provisions. V. afterwards destroyed the codicil of Feb. 1859, with the intention of setting up the will of 1859, and died without making any further testamentary

disposition. *Held*, that he died intestate.—*Newton v. N.*, 12 I. C. R. 118; 7 I. Jur. N. S. 129. (C.A.)

4. A devise to a child of a legal rentcharge will not be satisfied by a subsequent gift, by deed, by way of advancement, of a rentcharge equal in amount.

V., by will, dated 20th Nov. 1834, appointed to his younger children, in pursuance of a power, £16,000 late currency, giving to T., as his share, £5000. He also devised to T. an annuity of £150 for life, charged on land. By a codicil, dated 13th Dec. 1844, reciting that he had made a provision for T. on his marriage, he declared that that provision should be deemed a satisfaction of his share of the £16,000 late currency, and that he should not be admitted to claim under V.'s will the sums appointed and bequeathed to him. By a further codicil, V. devised his real and freehold estates to his eldest son, E., charged with payment of the several legacies and annuities devised and bequeathed by his will and codicil, save such of them as had been revoked by the codicils. *Held*, that the devise of the annuity to T. was not revoked by the codicils.—*Preston v. Gormanstown*, 13 I. C. R. 329; 7 I. Jur. N. S. 310. (C.)

5. V. bequeathed £12,000 among his younger children, and his household furniture, and live and dead stock, to those daughters who should attain twenty-one; and bequeathed other portions of his property, real and personal, to his children, and the residue of his property to his daughters. He made a codicil, commencing thus. "Codicil to my will of the ———, &c. Four of my children having died since the execution of said will, I alter the disposition of my property as follows." He bequeathed £4000 each to his three surviving daughters, and if one died unmarried, her portion to go to the survivors; but if another died unmarried, her portion to go among his sons, as he was of opinion that £6000 was a sufficient portion for any girl; and bequeathed to his two surviving sons the remainder of his property, in equal proportions, of whatever kind it might consist at his death. He gave directions as to the management of mills which he held in partnership; devised his property over in the event of his sons dying without issue; and appointed executors of the codicil as of "his last will and testament." *Held*, that the bequest of the household furniture, &c., in the will, was not revoked by the codicil.

The intention to revoke in a codicil must be as clearly expressed as the intention to devise in the will, otherwise the codicil will not operate as a revocation. A doubt, however reasonable, is not sufficient, if the two instruments are not absolutely inconsistent.

A father advanced £1000 in a partnership concern, for the benefit of his sons A. and B., reserving to himself power, if they died, to substitute two other sons for them. The partner gave credit in his books to A. and B. for £500 each. A. and B. both died under



age; and after their death, the partner, by the father's direction transferred two sums of £500 each in his books to C. and D., two other sons, but without adding any interest or profits thereto from the accounts of A. and B. The business was, by the father's directions, carried on in the partner's own name, and the profits carried in his books to his own account. *Held*, that there was no trust created for C. and D.; that the partnership was with the father, and the share of the profits was his assets.

V., after giving legacies to his daughters, bequeathed to his two sons, C. and D., the remainder of his property, in equal proportions, of whatever kind it might consist at his death. He directed the business of the mills of Y. to be carried on, and a sum to be applied to that purpose; and the remainder of his capital to be invested in fee-simple estates, so that each of his sons should have his portion independent of the other; that they were not to be of age, for the purpose of his will, until they were twenty-five; and if one died without issue, under that age, his property should go over to the other. V. was entitled to £4061 as partner in the mills of Y. C. died under twenty-five. *Held*, that the profits realised on the sum of £4061, during C.'s life, belonged to him, and were not capital to be invested in land.

V.'s partner in the mills of Y., after his death, paid £5421, which he appropriated to the payment in the first instance of the £4061 due at V.'s death, and the balance to subsequent profits. *Held*, that the profits realised after C.'s death were divisible between his representative and D.

*Scumble*—If there had been no appropriation by the partner, the payment would have been applicable first to the payment of the profits realised after V.'s death; and the balance and profits after C.'s death would, as capital, have belonged to D.—*Pilsworth v. Mosse*, 14 I. C. R. 163. (R.)

1. V. devised real estate, upon trust, out of the rents, &c., or by demise, mortgage, or sale, to raise £1000 for each of his daughters; the interest on each sum of £1000 to be paid to each daughter, from his death, during her natural life; on trust, in the events of their being married, for their husbands and children; and upon the death of, and according, and when each daughter should die unmarried, or, being married, should die without leaving issue—sons who should attain twenty-one, or daughters who should attain twenty-one or marry—upon trust to pay the principal sum of £1000 provided for her to and amongst all or any of V.'s other children, in such shares, &c., as each of his daughters, so dying, should by deed or will appoint; in default of such appointment, upon trust to apply the principal sum of £1000 of her so dying to and amongst V.'s then surviving children, and the issue of such of them as should be dead, in equal shares.

By a codicil, V. revoked his will so far as the sum of £1000 was given absolutely to each of his daughters; and declared his will to be, that

if his daughters, or any of them, remained single, they or she should only have an interest for their or her natural lives or life, and no longer, in the said sum of £1000. *Held*, that the codicil revoked the power of appointment given by the will to the daughters who should die unmarried and without issue; but did not revoke the gifts, in default of appointment, of the shares of such daughters.

V., after reciting that he had demised to A. a house and lands for the lives of V.'s daughters, subject to the rent of £2. 10s. per acre, declared that the lease was so made for the use and benefit of his daughters, and the survivor of them. No such lease was made; and V., by a codicil, directed that his then surviving daughters should have the house, lands, furniture, and plate at their disposal. *Held*, that the daughters took the house and lands absolutely, discharged of the rent of £2s. 10s. per acre.—*Kellett v. K.*, 16 I. C. R. 63. (R.)

2. A testator burned a will, and afterwards made declarations that he had revoked it by burning. *Held*, at Nisi Prius, that these declarations were inadmissible to prove revocation.—*Mullarkey v. Mathews*, 11 I. Jur. N. S. 218. (P.)

3. V., having described his property, and made devises and bequests, bequeathed the residue of said several sums of money and securities, after payment of those several legacies and bequests, and the residue of all chattel and other property of what nature or kind soever he might die possessed of, and which was not thereby, or should not be by any codicil thereto, specifically bequeathed, subject to his debts and to any deficiency which might possibly occur in the funds appropriated to the payment of his legacies, upon trust to invest it, and pay the interest to his wife for life, and after her death distribute it among certain persons.

By a codicil of the same date as the will, V., after stating that certain stock was not correctly described in his will, left it to his wife; appointed her sole residuary legatee, and confirmed his will in other respects. *Held*, that the codicil did not revoke the residuary clause in the will.—*Cooke v. Franklin*, 16 I. C. R. 469. (R.)

#### VIII. 4. *By Alteration or Alienation of the Subject-matter by subsequent act or deed.*

4. A renewal of a lease containing a covenant for perpetual renewal, executed to the lessee after the date of her will, devising her interest in the lease, though it was (previous to the passing of 1 Vic., c. 26) a revocation of the will at Law—*Held*, not to have such effect in Equity.

The mere change of the legal estate, unaccompanied by any alteration of the equitable ownership, will not affect a revocation.—*Pool v. Coates*, 4 I. E. R. 497; 2 Dr. & War. 493; 1 Con. & L. 531. (C.)

1. That the subject of an intended provision on marriage was disposed of by will, made after the 1 Vic., c. 26, came into operation, and before an offer to sell was made, forms no objection to its being carried into execution:—a contract to sell being a revocation *pro tanto*, now as well as before that Act, though its effect on the devisee's estate may be doubtful.—*Saunders v. Cramer*, 5 I. E. R. 12; 3 Dr. & War. 87; 2 Con. & L. 54. (C.)

2. Estates were settled to uses, remainder in fee to V., subject to a power of revocation. Under the power they were re-settled to other uses, remainder in fee to V., subject to a proviso, under which this settlement became ultimately defeated. V. made a will before 1838, devising the estates, and they were afterwards settled, reserving the remainder in fee to V. *Held*, that the will was inoperative, as the old remainder did not subsist, and the estates went under the latter deed to V.'s heir-at-law.

A will of lands, made before 1838, is entirely revoked by an alteration in the estate, though made after 1838.—*Lord Langford v. Little*, 8 I. E. R. 546; 2 Jon. & L. 613. (C.)

3. The effect of interlineations considered.—*Hutchinson v. H.*, 13 I. E. R. 332. (C.)

4. V. by will, in 1819, devised his chattel property to J., for life, remainder over. By deed executed in 1820, he assigned the same property to J. absolutely. The deed was witnessed and registered, but remained in V.'s possession until his death, in 1821. The will was proved, but no probate duty was paid in respect of the property comprised in the deed. J. entered into possession, and so remained until his death in 1854, having by his marriage settlement, in 1834, dealt with the property in pursuance of a power derived under the will; and in 1853 assigned it as his absolute property. The deed was, after his death, found among other papers belonging to him, *Held*, that J. took the absolute interest in the property under the deed. That the deed operated as a revocation of the will as to that property, whether J. knew of it and disclaimed it or not.—*Fitzgerald v. Sterling*, 6 I. C. R. 198; 2 I. Jur. N. S. 382. (C.A.)

5. V., seized in tail male of lands, suffered a recovery to the use of himself in fee; and then devised the lands. He afterwards disentailed them by deed, with the sole view, as was admitted, of making title for a lender who had agreed to advance a sum upon mortgage of them. The mortgage was duly executed. *Held*, upon appeal, that the disentailing deed, had operated as a revocation of the will to all intents and purposes. [Affg. Rolls decision.]—*Power v. P.*, 3 I. Jur. N. S. 379. (C.A.)

6. V., seized in tail of several estates, suffered a recovery of them, and made his will in 1834. In, 1836, he borrowed money on the security of a mortgage on one of the estates, and of a judgment. The lender's counsel objected to the recovery, which was valid, and

required the mortgage to be enrolled under the 3 & 4 W. 4, c. 92, s. 18. Instead of that, a disentailing deed of all the estates was executed, by which V. conveyed them to the use of himself and his heirs. *Held*, that the deed was a total revocation of the will.

Before the 1 Vic., c. 26, a deed which revoked a will at Law would also have revoked it in Equity, although the estate in Equity remained unaltered; unless the deed was executed for some partial or qualified purpose.

Intention is immaterial, if there was an alteration of the estate, both at Law and in Equity; but if there was no alteration of the estate in Equity, evidence is admissible to rebut the inference of an intention to revoke, arising from the alteration of the estate at Law.

*Held*, therefore, that the opinion of counsel was admissible as evidence, that the disentailing deed was executed for the purpose of the mortgage.—*Power v. P.*, 7 I. C. R. 354. (R.)—[Rev'd.: 3 I. Jur. N. S. 379. (C.A.)]

7. V., seized in tail of the lands of K. and other lands, suffered a recovery of those lands in 1834, and by will, dated in 1832, devised them. In 1836, V. borrowed money on a mortgage of K., and a collateral judgment. On that occasion, a disentailing deed of all the lands was executed and enrolled, by which A. conveyed all the lands to the use of himself and his heirs. *Held*, that the deed was a total revocation of the will.

On the occasion of the mortgage, the lender's counsel had objected to the recovery which had been suffered of K., and had advised that the mortgage should be enrolled.

*Quære*—Whether that opinion was admissible as evidence.—*Power v. P.*, 9 I. C. R. 178; Dr. Rep., temp. Napier, 268; 3 I. Jur. N. S. 379. (C.A.)

#### IX. NUNCUPATIVE WILL.

8. A testator, knowing that he was in his last illness, delivered several articles into his sister's possession as a gift, in case he died; and, immediately before death, told her that he gave her his gold repeating watch, which was on the table in his bedroom, and of which she did not take possession until after his death. *Held*, that those gifts were good as *donationes mortis causa*.—*Lyster v. O'Sullivan*, 9 I. Jur. N. S. 242. (M.O.)

#### X. PROBATE AND PROOF OF. See PRACTICE, EVIDENCE.

1. *In general.*
2. *Probate Duty.*

##### X. 1. Probate and Proof of Will, generally.

9. That the Prerogative Courts have admitted testamentary papers to probate as a will and codicil, is conclusive evidence upon their being distinct instruments.—*Russell v. Dickson*, 4 I. E. R. 339; 2 Dr. & War. 133; 1 Con. & L. 284. (C.)

1. When the Ecclesiastical Court has given probates of two instruments, as constituting one will or testamentary document, the whole must be construed as one will.

*Semble*—A testamentary instrument, left incomplete by the testator's sudden death, or other suddenly supervening incapacity to make a will, is not void *in toto*, but is good so far as it goes.—*Armstrong v. Millar*, 4 I. E. R. 659; *Long & T.* 557. (E.E.)

2. The Court will distribute, upon a Diocesan probate, a fund in Court payable to a personal representative, if the intestate had not *bona notabilia*.—*Graves v. G.*, 8 I. E. R. 36. (R.)

3. Proof of the *factum* of a will, and of the testator's capacity, are not sufficient to encounter suspicious circumstances which may raise a presumption of falsity or fraud, requiring clear and satisfactory evidence to remove it. It is not necessary to *prove* the fraud or imposition. It may, in such a case, be *presumed*; the *onus* of proof lying on the party propounding the will.

Several authorities, in which the fact of a legatee being the writer of a will, and similar suspicious circumstances, have been held to raise presumptions against it, reviewed and compared, and the principles of the decisions observed on.—*Von Stentz v. Comyn*, 12 I. E. R. 622. (C.)

4. The applicant permitted a will, dated in 1844, of M'C., to be proved in the Prerogative Court, to the prejudice of one of 1817, under which she claimed. On an application by her for an issue to try the validity of the will, and of various judgments obtained in the interval—*Held*, that she had lapsed her time, by delaying such application for fifteen months after the absolute order for sale had been made, and by otherwise sanctioning the proceedings.

*Semble*—This Court is very unwilling to entertain such questions; there being other Courts competent to decide such matters; more especially in cases in which their judgments would not bind those Courts.—*In re M'Clintock*, 3 I. Jur. 199. (I.E.C.)

5. The fact of a testator retaining his mental capacity, and for a considerable length of time surviving the date of, without altering or throwing doubt upon his will, is an important circumstance in favour of its validity.

A will has not been set aside, on the ground of undue influence having been used to procure its execution, in any case in which the evidence did not establish the ascendancy of the controlling power, and its actual exercise by the constraint and coercion of an enfeebled, exhausted, or subjugated intellect.

When force, fraud, or undue influence are alleged to have been exercised in obtaining the execution of a will, the mental capacity of the testator is a question of the utmost importance.

The fraud, to vitiate a will, must be contemporaneous with the making of the will; it

must be discovered in, and form part of, the *res gestæ*. The means and power of achieving the fraud may have been previously acquired and realised; but the Court must be satisfied that the act impeached is effected by their actual present use and exercise at that time, controlling and defeating volition.

When it appeared uncertain whether the Court of Delegates had refused probate of a will, on the ground of fraud, or *deficit probatio*, the Lord Chancellor being satisfied that, upon the latter of those grounds, the decision could not be supported, advised the issuing of a commission of review.—*Kelly v. Theobald*, 2 I. C. R. 510. (C.)

6. In 1830 V. made his will, the draft of which purported to devise all his lands, situate in several counties, amongst others in the county of Sligo, where the lands in the lease were situate, and "elsewhere in Ireland," to trustees, upon trust for his second son. Before the execution of the will, V. drew a pen through the word "Sligo," without making it illegible. *Held*, that evidence was not admissible to show that he intended that the lands in Sligo should not pass by his will.—*Phibbs v. Cooper*, 7 I. C. R. 422. (R.)

#### XI. SUBSTITUTION.

7. A marriage settlement conveyed to trustees property of the wife in trust to pay the interest to the husband for life; after his death to the wife for life; and after the death of the survivor to pay the principal to the child or children of the marriage as the wife should appoint; in default of appointment, amongst the children, share and share alike; on failure of issue of the marriage, to the wife. Their only issue died an infant. Afterwards, the husband, who had received from the trustees the bulk of the trust fund, by will, made devises and bequests to his wife; and directed that they should be in lieu and bar of all her claims under her marriage settlement to anything comprised therein; and that, if she should elect to take under the settlement, the devises and bequests should be void, and the subject of them comprised in the general devise of his property. He devised all the rest of his real and personal property to trustees. *Held*, that the wife, surviving him, was barred by the will from claiming any portion of the principal of the funds comprised in the settlement. But that she was entitled to the interest of the funds during her life.

Two sums of money, the property of a wife, were lent by her to her husband, who gave her a cheque for one sum, and for the other a letter acknowledging the receipt of it, and placing it to her credit in his firm. *Held*, that she was entitled only to one year's interest on the sums against her husband's assets.—*Mackey v. Maturin* 15 I. C. R. 150. (R.)

#### XII. MUTUAL WILLS.

## XIII. OBTAINED BY FRAUD.

1. When an heir-at-law files a bill to impeach a will of real estate, alleged to have been obtained by undue influence or fraud, the Court of Ch. may, at its discretion, direct an issue *devisavit vel non*, or may merely remove obstacles which impede the heir in asserting his legal title.

The House of Lords will not interfere with the exercise of that discretion, unless it appears that injustice has been, or is likely to be, worked thereby.

Undue influence, insufficient to invalidate a will made under its operation, may, nevertheless, exist in the form of bad companionship and bad example.

Undue influence, which suffices to invalidate a will, must be exercised by coercion or by fraud. To constitute coercion, actual violence need not be used; imaginary terrors will suffice.

To set aside a will made by a testator of competent mental capacity, the circumstances under which it was executed may be shown to have been inconsistent with any hypothesis other than that of undue influence.

Undue influence cannot be presumed. It must be established that such influence was, in fact, exercised in relation to the will itself.

Whether the Judge, before whom an issue directed by a Court of Equity has been tried, has or has not *mis-directed* the jury, one verdict does not bind the Court of Equity, which may, for its better satisfaction, direct a new trial.

*Quere*—Whether a married woman can validly consent to a particular form of order?

A married woman, having during her husband's life, and after his decease, acted upon such an order, was, nevertheless, permitted to make it a ground of appeal to the House of Lords.

A suit respecting property devised to a married woman was instituted against her and her husband. Decree for an account. The Master reported a sum due from both, which the Court ordered the widow to pay into Court within a limited time, the sum being composed of rents received from the property before the marriage, and during coverture and viduity.

*Quere*—Was the order valid?—*Boyse v. Rossborough*, 2 I. Jur. N. S. 265. (H. Lds.)—[S. c., 6 H. Lds. Cas. 2.]

## XIV. PREVENTED BY PROMISE.

## XV. CONSTRUCTION OF WILLS. See WORDS, CONSTRUCTION OF.

*As to Duty on Legacies.* See LEGACY DUTY. *Cumulative or Substitutional Legacies.* See LEGACY, VII.—PORTIONS, X.

*Estate taken by Trustees, &c., under Wills.* See *infra*.

1. *General Principles, Rules, and Examples of Construction, with the Cases that fall under them.*

a. *Generally.*

b. *Gift by Implication: what words amount to a Gift.*

c. *Gifts by rejecting words, or substituting one word for another.*

d. *When Gifts are enlarged or confined by the terms of Gifts over.*

e. *Gifts by way of Substitution.*

f. *Gifts or Powers for Maintenance, and Directions or Trusts to Convey or Settle.*

g. *Periods to which in general words are referable, and herein of "dying without issue" and of survivorship.*

2. *Generally.*

3. *Nature, Quantity, and Quality of Interest in Real or Personal Estate.*

a. *Generally.*

b. *Fee-simple, or Quasi Fee.*

c. *Absolute Interest.*

d. *Estate Tail.*

e. *Estate for Life, or other Limited Interest.*

f. *Joint Tenancy.*

g. *Tenancy in Common.*

h. *Estate Beneficial, or clothed with a Trust.*

i. *Whether to be enjoyed in Specie, or not.*

j. *Estate Vested, subject to be Devested: Period of Vesting.*

k. *Annuities.*

4. *What passes by.*

a. *Real Estate, and Copyhold.*

1. *In general.*

2. *In respect to particular Words of Description.*

b. *Personal Estate.*

1. *Generally: whether general Personal Estate, or Residue passes.*

2. *When Chattels, Stock, &c., pass, and by what words.*

c. *Property acquired after the Date of the Will.*

d. *Property Contracted to be Purchased or Sold.*

5. *Devises and Bequests, Valid or Void.*

a. *In general.*

b. *Remoteness and Perpetuity.* See PERPETUITY.

c. *Accumulations.*

d. *Mistake or Uncertainty in.*

6. *Description of Legatees: who take, and are capable of taking.*

a. *Legitimate Children, and Grandchildren.*

b. *Illegitimate Children.*

c. *Heirs, Heirs Male.*

d. *Issue.*

e. *Relations.*

f. *Next-of-kin.*

g. *Personal Representatives, or Legal Personal Representatives.*

h. *Executors.* See EXECUTORS, VII.

i. *Family: Name and Blood: next Eldest.*

j. *Nephews and Nieces: Uncles and Aunts, &c.*

k. *First and Second Cousins.*

l. *Government.*

m. *Servants.*

n. *When to be in esse.* See *infra*, LAPSED LEGACIES.

- o. *Whether per Capita or per Stirpes.*
  - p. *Mistakes.* See *supra*, XV, 5. d.
  - q. *Wrong or Imperfect Descriptions,*  
    *Ac.*
  - r. *Witness.* See PRACTICE, EVIDENCE.
  - s. *Classes.*
  7. *Words Precatory and of Recommendation, or creating an Executory Trust.*
  8. *Concerning Specific Legacies.* See LEGACY, X.
    - a. *Generally.* See *ibid.*
    - b. *Rights of Specific Legatees.* See *ibid.*
    - c. *Their Abatement and Ademption.* See LEGACY, I, III, X.
  9. *Concerning General Legacies, their Ademption and Abatement.* See LEGACY, I, III.
  10. *Concerning Lapsed Legacies.* See LEGACY, V.
  11. *Concerning Conversion.* See EXECUTORS, IX.
  12. *Of Vested Legacies, and Interests out of Personal Estate; Exoneration of.* See INTERESTS IN PROPERTY, II.
  13. *Of Vested Legacies, and Interest out of Real Estate.* See *ibid.*, III.
  14. *Changes on Real Estate: of Exoneration.* See ESTATE, VIII, IX—PORTIONS, III—COPYHOLD, I.
  15. *Conditional Legacies and Bequests.* See LEGACY, VI.
  16. *Of Payment and Appropriation of Legacies, &c.* See LEGACY, VIII.
  17. *Of the Satisfaction and Release of Debts and Portions.*
  18. *Of Bequests to Charity, and of Mortmain.*
  19. *Of Interest on Legacies, Intermediate Maintenance, and Disposition of Mesne Profits.* See INTEREST PECUNIARY, I.
  20. *Of the Surviving of Accruing Shares.*
  21. *Bequests to the separate Use of Married Women.* See HUSBAND AND WIFE, III.
  22. *Respecting Limitations of Chattels, and of Chattel and Personal Interest.* See ESTATE, IX.
  23. *Of Election.* See ELECTION, II.
  24. *Of the Residuary Personal Estate.*
    - a. *Rights of Residuary Legatee.*
    - b. *Rights of Next-of-kin.*
    - c. *Rights of Executors.* See EXECUTORS, VII.
  25. *Of Legacies, Portions, &c., under Will: how to be raised.* See LEGACY, VIII—PORTIONS, VI—ANNUITY, IV.
  26. *Of the Administration of the Estate: Duties, Powers, Rights, and Liabilities of Executors.* See EXECUTORS, IX, and *passim*.
  27. *More particularly of Devises, and of Real Estate.*
    - a. *Generally.*
    - b. *The operation of Devises of Land, &c., on Copyholds, Leaseholds and Mortgages.* See COPYHOLD, I.
  - c. *Rights, Powers, Duties, and Liabilities of Trustees.* See TRUSTEES.
  - d. *Rights, Duties, Powers, and Liabilities of Tenant for Life and Remainderman.* See ESTATE, III.
  - e. *Rights, Duties, Powers, and Liabilities of Heir-at-law and Devisee.* See DEVISEE—ESTATE, VIII—EXECUTORS, XI—HEIR-AT-LAW, I.
28. *Of Powers: their Execution: by whom: of the Estates created under Powers.* See POWERS, *passim*.
29. *Of Remainders, generally, under Wills.* See REMAINDERS & REVERSIONS—INTERESTS IN PROPERTY, IV, V.
- XV. 1. *General Principles, Rules, and Examples of Construction: with the Cases that fall under them.*
- a. *Generally.*
  - b. *Gift by Implication: what words amount to a Gift.*
  - c. *Gifts by rejecting words, or substituting one word for another.*
  - d. *When Gifts are enlarged or confined by the terms of Gifts over.*
  - e. *Gifts by way of Substitution.*
  - f. *Gifts or Powers for Maintenance, Directions or Trusts to Convey or Settle.*
  - g. *Periods to which in general words are referable, and herein of "dying without issue" and of survivorship.*
- XV. 1. a. *General Principles, Rules, and Examples of Construction: Cases that fall under them: generally.*
1. It is a well-settled rule of construction, never to put a different construction upon the same word when it occurs twice or oftener in the same instrument, unless there appear a clear intention to the contrary.  
Where a will contains a general absolute devise of real and personal estate, and in a subsequent clause the testator uses language plainly restricting the absolute gift in one species of property, but not in words confining it to that one, the restriction will be held applicable to both, to carry out his clear intention, unless there exists a clear necessity for excluding the other from its operation.  
The word "issue," in a will, may be held to mean "children," when such is the manifest meaning of the testator.—*Ridgeway v. Markittrick*, 1 Dr. & War 84. (C.)
  2. *Semble*—Stronger words are required to exonerate a personal estate from the payment of debts than of legacies.—*Lamphier v. Despard*, 1 Con. & L. 200; 2 Dr. & War. 59; 4 I. E. R. 335. (C.)
  3. A codicil is never held to revoke a will further than is necessary to give effect to the testator's intentions.—*Young v. Hassard*, 1 Dr. & War. 688. (C.)

1. V. devised the lands in question to trustees, to A.'s use for life; remainder to the use of A.'s first and other sons; in default of such issue, over. *Held*, that the words "in default of such issue" did not enlarge, by implication, A.'s life estate.—*Purcell v. P.*, 4 I. E. R. 558; 2 Dr. & War. 219, n.; 1 Con. & L. 371. (C.)

2. Under a devise of freehold property, among all such children of the testator as should be living at his death—*Held*, that, the testator having, by a codicil, revoked the devise as to one child, that revoked share went among all the other children, and did not descend to the heir.

When the gift is to a class, with a direction that, upon a contingency, one of the class is not to take, but there is no gift over of his share, the question is, what is the testator's intention; and, if an intention can be discovered, that such undisposed of share should go amongst the remaining objects of the original gift, this intention will, notwithstanding the rule in favour of the heir-at-law, enable the Court to decree against an intestacy as to that share.—*Shaw v. M'Mahon*, 2 Con. & L. 528. (C.)

3. When a testator directs that his estates shall descend as if he died intestate, the heir-at-law takes by his title by descent.—*Walcott v. Bloomfield*, 2 Con. & L. 577. (C.)

4. The question touching priority between legatees is a mere question of intention, which the Court is not at liberty to presume; but which must be made out from something apparent upon the face of the will itself.—*Pepper v. Bloomfield*, 3 Dr. & War. 499. (C.)

5. V., by will, directed that if his daughter married a professional gentleman, or a man embarked in trade or business, and not possessed of landed property whereon to charge a suitable provision for her, trust funds should be settled upon her for life; after her decease, the principal to the issue of her marriage; but that, if she married a gentleman possessed of landed estate, who made a suitable provision for her, and settled his estate on their issue, the trust fund should be paid to him. She married a country gentleman not possessed of any landed estate, and not a professional gentleman, or embarked in any trade or business. He afterwards purchased an estate, and offered to settle it upon being paid his wife's fortune. *Held*, that the trust fund should be settled according to the directions in the will, and that he was not entitled to a life interest therein.—*Briscoe v. B.*, 1 Jon. & L. 334: 7 I. E. R. 123. (C.)

6. The whole will must be looked to for the intention of the testator; and, though there is a direction to pay all debts or legacies, yet, if there is an intention shown to throw a particular debt or legacy upon the real estate, the Court is bound to give effect to it.—*Bateman v. Earl of Roden*, 1 Jon. & L. 356. (C.)

7. When there is a clear devise of lands, in construing the will the Court will not cut it down by means of an ambiguous codicil.—*Stannard v. Lodge*, 1 I. Jur. 221. (E.E.)

8. V., by will, directed the interest of the residue of his property to be paid to his three surviving daughters, and his son-in-law, the husband of his deceased daughter, A.; and, as to the principal, directed that it should be invested (subject to bequests) for the issue of A., and of his other three daughters; so that, after the decease of each of his daughters who should die and leave any issue, such issue should be entitled to receive the share of the interest of the property which his, her, or their mother respectively would have been entitled to receive; and that the principal should be given to such issue of his daughters respectively, share and share alike, on their respectively attaining age, or, if females, on their attaining age, or marrying with consent of their guardians thereafter mentioned: and that, if any of his daughters died without leaving any issue, the share of interest which she would have been entitled to should go to the issue of his surviving daughters, and to the issue of A.; and the share of the principal, whenever it arose, should go to the child or children of his daughters; and if any of his daughters should die leaving children, and any of them should die before being entitled to receive his proportion, the surviving child or children, issue of such daughters so dying, should receive it. He appointed guardians to his grandchildren. *Held*, that "issue" meant "children."—*Black v. Campbell*, 14 I. C. R. 92. (R.)

9. A bequest to several legatees, whose legacies were unequal, "to be equally divided between them, in proportion to their legacies," thereinbefore given them. *Held*, on the context and general scheme of the will, that the division should be in proportion to the legacies.

That, in ascertaining the proportions, a legacy bequeathed to one of the legatees, by a subsequent codicil, should be taken into account.—*Talbot v. Gordon*, 14 I. C. R. 397. (R.)

#### XV. 1. b. Gift by Implication; what Words amount to.

10. V. bequeathed £1500 to her mother for life, and desired that it should be given share and share alike between her two sisters, A. and B., after her mother's decease, in the event of their surviving her; but if neither survived her mother, she desired that the whole of the property should be left entirely to her mother, and placed at her disposal. B. only survived her mother. *Held*, that the gift to A. and B. was contingent, on the event of both surviving their mother; that there was a gift of the entire by implication to the survivor in case either of the sisters died in the mother's lifetime, and therefore that, in the events which had happened, B. took the whole

£1500, and no part of it went to A.'s representative.

*Scott v. Burghman*, 2 P. Wms. 68, and *Skye v. Barnes*, 3 Mer. 335, distinguished and approved of.—*Graves v. Waters*, 10 I. E. R. 234. (R.)

1. A devise of lands in trust for A. for life, then for his first and other sons in tail male; in default of such issue, over. *Held*, that A. took only an estate for life, and that a remainder in tail after the limitations could not be implied.—*Tucker v. Baker*, 11 I. E. R. 104. (C.)—[*Affid.*: 3 II. L. Cas. 106; 14 Jur. 771.]

2. When there is an indefinite bequest to the parent, and if he die without having or leaving children, over, the children do not take by implication.

When there is a bequest to the parent for life, and if he die without having or leaving children, over, the children are not entitled by implication.

When there is a bequest to the parent for life, and if he die without having or leaving children, over; and there are matters in the will to raise an inference in favour of the children; the Court is at liberty to take them in connection with the bequest, in the event of the parent dying without having or leaving issue; and to hold that the children are entitled by implication.

V. bequeathed to each of his grand-nephews, A. and B., an annuity for their respective lives; and in case of the death of either of them, leaving issue, directed that the annuity of him so dying should go to such issue, if more than one, share and share alike; the share or shares of such child or children as should die under 21, or before marriage, to go to and be equally divided amongst the survivor and survivors of such issue during their respective natural lives: if but one, the whole of the annuity to go to such only child for life; and in case of the death of either A. or B., without lawful issue then living, that his annuity should go to the survivor for life; and in case of the death of both A. and B., without leaving issue, or, leaving such, and that such issue should die before the age of 21 years, then, after the death of the survivor of such issue of A. and B., he directed that the two annuities should sink into his residuary personal estate. A. died without issue. *Held*, that there was a bequest by implication of A.'s annuity to the children of B.—*Kinsella v. Caffrey*, 11 I. C. R. 154. (R.)—[*Affid.*: 6 I. Jur. N. S. 277. (C.A.)]

3. A testator bequeathed annuities for their respective lives to each of his grand-nephews, A. and B.; and directed that, if either of them died leaving issue, his annuity should go to the issue, if more than one, share and share alike; the share or shares of such child or children as died under age, or before marriage, to be equally divided amongst the surviving issue during their respective lives; if but one child, the whole annuity to go to such only child for life. If either A. or B. died, without issue living at his death, his annuity

to go to the survivor for life. If both died without leaving issue; or leaving issue, which died before age, both annuities to sink into the residue. A. died without issue. *Held*, that there was a bequest by implication of A.'s annuity to the children of B.—*Kinsella v. Caffrey*, 6 I. Jur. N. S. 277. (C.A.)

4. V. bequeathed to his two sons all his property, real and personal, to have and to hold it in the most absolute manner; and declared his will to be, that his sons should, at their discretion, and according to their own judgment, allocate to the other members of his family, being his lawfully begotten children, such portions of that property and goods, be the same more or less, as to them should seem fit, and appointed them his executors. *Held*, coupling the will with an admission in the petition by the sons, of V.'s intention, that a trust had been created; and that they were trustees for V.'s other children as to V.'s entire property, both real and personal.—*Gray v. G.*, 11 I. C. R. 218. (R.)

XV. 1. c. *Gifts by rejecting words, or substituting one word for another.*

5. In a will or a deed, the word "or" may be construed to mean "and," and "and" may be construed to mean "or," if such a construction be necessary to effectuate the intention of the testator.—*White v. Supple*, 2 Dr. & War. 471; 1 Con. & L. 525. (C.)

6. Testator devised and bequeathed his interest in his freehold and chattel property to his grandson J., but if J. died before he attained age or married, then over. *Held* (reversing the decision of a Judge of the L. E. Court), that "or" should be read "and," and that J. had acquired an absolute estate, having attained 21, though he had not been married.—*In re Clegg's Estate*, 14 I. C. R. 70; 8 I. Jur. N. S. 21. (C.A.)

7. V. devised real estate, upon trust out of the rents, &c., or by demise, mortgage, or sale, to raise £1000 for each of his daughters, the interest on each sum of £1000 to be paid to each daughter, from his death, during her natural life; on trust, in the event of their being married, for their husbands and children; and upon the death of, and according, and when each daughter should die unmarried, or, being married, should die without leaving issue—sons who should attain twenty-one, or daughters who should attain twenty-one, or marry—upon trust, to pay the principal sum of £1000 provided for her, to and amongst all or any of V.'s other children, in such shares, &c., as each of his daughters so dying should by deed or will appoint; in default of such appointment, upon trust, to apply the principal sum of £1000 of her so dying, to and amongst V.'s then surviving children, and the issue of such of them as should be dead, in equal shares.

By a codicil, V. revoked his will so far as the sum of £1000 was given absolutely to each of his daughters; and declared his will to be,

that if his daughters or any of them remained single, they or she should only have an interest for their natural lives or her natural life, and no longer, in the said sum of £1000. *Held*, that the codicil revoked the power of appointment given by the will to the daughters who should die unmarried and without issue, but did not revoke the gifts in default of appointment of the shares of such daughters.

V. after reciting that he had devised to A. a house and lands for the lives of V.'s daughters, subject to the rent of £2. 10s. per acre, declared that the lease was so made for the use and benefit of his daughters and the survivor of them. No such lease was made; and V. by a codicil directed that his then surviving daughter should have the house, lands, furniture, and plate at their disposal. *Held*, that the daughters took the house and lands absolutely discharged of the rent of £2. 10s. per acre.—*Kellett v. K.*, 16 I. C. R. 63. (R.)

1. A codicil recited that the testatrix had in the Bank of Ireland "money not theretofore disposed of." By that codicil, she bequeathed that sum to trustees upon trust to pay legacies. She had not any "money" in the Bank of Ireland, but possessed government "stock" sufficient to pay the legacies. *Held*, that they were payable out of her general assets, and in equal priority with other legacies bequeathed by the will and prior codicils.—*Reilly v. Stoney*, 16 I. C. R. 295. (R.)

2. V. bequeathed money to his two daughters, share and share alike, to be paid to them by his executors in twelve months after their respective marriages, with the consent of his executors; and directed that his daughters should be paid a yearly sum, less than the interest of their shares, until their respective marriages as aforesaid; and that, from their respective marriages, each of them should be paid the full legal interest. Until their respective marriages, the remainder of the interest on their fortunes was directed to go to V.'s son; and, if V.'s daughters, or either of them, died before the age of 21 years, or day of marriage, her share of the sum so bequeathed was directed to go to V.'s son, to whom the entire sum should go, if both daughters died.

*Seem*—That the daughters' legacies did not vest until marriage.

*Held*, that "or" should be read "and;" and that therefore the legacies did not go over to the son on the death of his sisters unmarried; but remained undisposed of by the will, and divisible amongst V.'s next-of-kin.—*In re Cantillon Minors*, 16 I. C. R. 301. (R.)

3. V. bequeathed to his daughter, A., an annuity of £100, and to four other daughters annuities of £50 each, which were not to be paid to them until after their mother's decease, unless they married, or their mother had some particular reason for making them such payments. V. left A., if she was unmarried at her mother's death, an annuity of £500 thereafter, in addition to the £100 a-year previously bequeathed. If A. married, she was not to have more than £100

a-year, which she might leave as she pleased; and the £500 a-year was to merge in the real estate on which the annuities were charged. If his other daughters were unmarried at their mother's decease, and A. was then married, or dead, each was to have £100 a-year, in addition to the £50 a-year, as a maintenance for them: but, so long as A. received the annuity of £500, they were to have no more than an annuity of £50 each, as they would reside with her. If any daughter married without her mother's consent, or that of their brother after the mother's decease, she should have only a life annuity of £50 a-year, payable to her own receipt. V.'s wife predeceased him. At his death, A. and another daughter, E., were unmarried. *Held*, that after the determination of the annuity of £500 by A.'s marriage, E. was entitled to the annuity of £100, which did not determine when she married with her brother's consent.—*In re Newcomens Minors*, 16 I. C. R. 315. (R.)

#### XV. 1. d. When Gifts are enlarged or confined by the terms of Gifts over.

4. In ascertaining whether the words "die without issue," in a will made subsequently to the 1 Vic., c. 26, mean an indefinite failure of issue, a contrary intention within the meaning of sec. 29 is not to be inferred from the use of those very words.—*In re O'Beirne*, 1 Jon. & L. 352; 7 I. E. R. 171. (C.)

5. By will, before 1838, testator bequeathed a sum to trustees to permit his daughter to take the interest for life, and, if she should "leave any issue lawfully begotten," desired that the principal might be disposed of among her children as she should appoint; for want of appointment, equally; but "in case of failure of issue" of his daughter, directed the fund to be paid to A., B., C., and D. *Held*, that "failure of issue" referred to issue living at the daughter's death, and that the gift over was valid.

Testator bequeathed a fund to trustees to pay the interest to X. for life, and the principal among her issue, and in case of failure of issue (which was limited to those living at her death), directed that £500 of the trust-fund might be paid to A., £500 to B., £500 to C., and £500 to D. A. and B. died in the lifetime of X. *Held*, that their representatives were entitled to their shares, X. having afterwards died without leaving issue.—*Hanan v. Drew*, 10 I. E. R. 333. (C.)

6. V. bequeathed one-half of the interest of a sum to A. and B., and the other half to C. and D., during their natural lives; and after the death of A., B., C., and D., bequeathed the principal to E. V. appointed residuary legatees. A. died, and then B., leaving C. and D. surviving. *Held*, that no part of the principal or interest went to E. during the life of C. and D.

That the executrix of B., not the residuary legatees, was entitled to the interest of one-



half during the lives of C. and D.—*Gray v. Robinson*, 11 I. C. R. 205; 6 I. Jur. N. S. 233. (R.)

1. A marriage settlement gave a power to appoint amongst her children £10,000, to a testatrix, who, by will, appointed to each of three of her children one-sixth of this fund, and, in a subsequent part of the will bequeathed to each of them £1000. She directed that those legacies, and their respective shares of the appointed fund, should, within twelve months after her decease, be settled upon trust for those children for their respective lives, and, after their decease, for their issue, in such shares and proportions as they should by deed or will appoint; and if no issue, for such person or persons as they should by deed or will appoint to. The will then expressly provided that, if the settlements of the legacies and of the shares of the appointed fund were not made in the prescribed manner, the legacies should become absolutely forfeited, and should sink into the residue of testatrix's personal estate. *Held*, that the direction to settle the shares of the appointed fund in a manner not warranted by the power amounted to a superadded condition attempting to qualify a previous absolute appointment; and that no question of election was raised thereby.

That, owing to the express clause of forfeiture, the legatees could not take the legacies without settling their shares in the appointed fund according to the directions of the testatrix.—[*Moriarty v. Martin*, 3 I. C. R. 26, disapproved of.]—*King v. K.*, 15 I. C. R. 479. (C.)

#### XV. 1. e. Gifts by way of Substitution.

2. When there is a gift of lands by a codicil, "instead of" other lands given to the same devisee by the will—*Quere*, whether the gift in the codicil is not subject, by force of the words "instead of," to all the conditions and restrictions attached by the will to the gift for which the codicil substitutes the present one?—*Commissioners of Charitable Donations v. Cotter*, 1 Dr. & War. 498. (C.)

3. The doctrine of *cy-pres* was applicable to the construction of a will made in the exercise of a power of appointment.—*Stackpole v. S.*, 2 Con. & L. 506. (C.)

4. When a testator had given several legacies by a complete will and codicils, and, by a subsequent instrument purporting to be a "last will and testament," proceeded to give several legacies, different in amount, to the same legatees, but died suddenly before the second will was completed, and the Ecclesiastical Court granted probates of both instruments as one will—*Held*, that the legacies thereby given were cumulative.—*Armstrong v. Millar*, Long. & T. 557; 4 I. E. R. 659. (E.E.)

5. V., by marriage articles, agreed to settle £50 a-year, payable out of C., on his wife, if she became a widow. Afterwards, V. made a will, which contained this passage:—"I bequeath to my wife, during her life, the sum

of £50 yearly (£50 yearly being settled on her by me on our intermarriage), payable out of the lands of C." *Held*, that she took only one annuity of £50.—*In re Power*, Fl. & K. 282. (R.)

6. By will V. gave £2000 to his natural daughter for her separate use, the interest to be expended in her education. By codicil he gave her £3000 in addition. By a subsequent codicil, stating that he had not time to alter his will, to guard against risk, he charged all his property with £20,000 for his daughter (calling her by his own name) subject to the limitations and restrictions mentioned in his will. *Held*, that the £20,000 was in substitution of the gifts in the will and first codicil.—*Russel v. Dixon*, 11 I. E. R. 418. (C.)

7. A marriage settlement of £1269 (the wife's fortune) upon trust for the husband for life; and on his decease, for the wife for life; and on her decease, for the children of the marriage; reciting that the husband was not then able to settle a jointure upon the wife, empowered him to acquire the wife's fortune absolutely, if on his becoming entitled to adequate real estate he should by deed charge that estate with a jointure of £120 per annum for her, and with £1200 for the children of the marriage. He subsequently became seized in fee of real estate, yielding an annual income of £500, but never executed any deed charging it with a jointure or with portions.

He by will, reciting that, "inasmuch as his wife was entitled by marriage settlement to the sum of £130 sterling per annum by way of jointure, and being anxious further to provide for her," bequeathed "in addition the sum of £70 per annum; and also the interest of the money, the produce of the furniture of his house, so long as his children should be educated in and profess the Protestant religion; said sum of £70 and interest money to be paid by the trustees of his will, on the above conditions, and not otherwise." He then bequeathed all his property, real and personal, to his eldest son, charged with £800 for each of his (the testator's) younger children. The testator's wife being a Roman Catholic, he authorised the trustees to take proper steps for the education of the children in the Protestant religion, and to make provision for their maintenance and education out of the property bequeathed to his son. In a codicil the testator directed that the trustees should "have power to take out of his property and pay to his wife the said sum of £70 per annum; and also have charge of the produce of his furniture and other assets for payment of his legacy to her, and carry out the intention of his will, before any other charge whatsoever, provided she conformed to his wishes and did not interfere with the trustees in the education of the children in the Protestant religion."

A bond for £900, to the trustees of the settlement, mentioned in the settlement as the security for so much of the £1269, was found amongst the papers of the testator at his death. *Held*, that neither under the settlement, nor under the will and codicil, notwith-

standing the recital in the will, was the wife entitled to a jointure of £120 or £180; and that she was only entitled to a life interest in the £1269 under the settlement; and to the annuity of £70, and the interest of the proceeds of the furniture under the will.—*Peirce v. Locke*, 2 I. C. R. 205. (C.)

1. When two legacies, of different amount, are given by the same will to the same person, the legacies are to be considered cumulative, unless a contrary intention appears in the will.

When two legacies are bequeathed to the same person by different testamentary instruments, *e. g.*, one by the will, the other by the codicil; or when they are given by different codicils, and both are given *simpliciter*, the Court, in the absence of intrinsic evidence to the contrary, considers the legacies cumulative.

V., by will, after confirming the provision made for his wife by his marriage settlement, and reciting his intention to make a further provision for her by way of annuity, directed his executor to purchase £2333. 6s. 8d. stock, and transfer it to trustees, upon trust to pay the dividends to his wife, so long as she remained unmarried; and that on her marriage or death it should become part of the residue of his property. By codicil, reciting his will, and directing that the codicil should be annexed thereto, and taken as part thereof, and that it was his wish to increase the annuity bequeathed by will to his wife, he directed his executor to purchase £3333. 6s. 8d. stock, and transfer it to the same trustees, upon trust to pay the dividends to his wife, so long as she might remain his widow, and no longer; and that from and after her decease, or if she married again, the stock should form and be a portion of the residue of his property, to be disposed of as directed by his will; he ratified and confirmed his will and codicil in every respect. *Held*, that the legacies were cumulative, and that the widow was entitled to both annuities.—*Brennan v. Moran*, 6 I. C. R. 126; 2 I. Jur. N. S. 146. (R.)

2. V., a father, who had government stock standing in his own name, in 1838 transferred all except a small portion, into the joint names of himself and his son, A.; and in 1856 deposited moneys in a bank in their joint names. Small purchases of stock were at intervals made in their names, up to 1851; and joint deposits were made at intervals up to V.'s death in 1862. These investments constituted the bulk of V.'s property.

No definite provision for A. had been made by V., whose other seven children lived away, and were provided for. A. was married, but lived chiefly with V., whom he assisted in his business, and who during his life received all the dividends on the stock, and the interest on the deposit receipts; and also drew small portions of the principal money deposited.

By the practice of the bank, new deposit receipts were issued on every occasion of drawing the interest. On the first occasion of the joint lodgment, the manager of the bank

explained to V. that the effect would be to enable the son to draw the money after V.'s death. V. then, and on a subsequent occasion, intimated his intention that the son should do so without expense.

There was evidence that V., 18 months before his death, stated to a third person that he did not mean all his property to go to A. after his death; and a short time before his death refused to allow A. to meddle with the stock certificates and deposit receipts. Evidence of testamentary intention in favour of the other children was also given. *Held* (reversing the Lord Chancellor's decree), that there was an advancement for A. to the extent of the joint investments and deposits.

*Semle*—The re-issue by the bank, according to its practice, of new deposit receipts did not amount to a new investment.—*Fox v. F.*, 15 I. C. R. 90. (C.A.)

#### XV. 1. *f. Gifts or Powers for Maintenance: Directions or Trusts to Convey or Settle.*

3. V., by will, directed the trustees to call in money due to him, and invest it in the purchase of freehold estates in lands or hereditaments of a clear estate of inheritance for the use of his son, A., for life; after A.'s death, to the use of his first and other sons, according to seniority of age and priority of birth; if A. died without issue male, then in trust for V.'s second son, B., and the heirs male of his body, according to seniority, &c.; and desired that his (V.'s) sons, and the several persons, who should be in possession of such estates, should have a power to make leases not exceeding three lives or 31 years. *Held*, that A. was entitled to an estate tail in the lands to be purchased.—*Herbert v. Blunden*, 1 Dr. & Wal. 78. (C.)

4. Lands were settled to V.'s use, for life, remainder in fee to such one or more of his children as he should by deed or will appoint to; in default of appointment, to the children equally.

V. devised the lands to his wife, for life, upon condition that she thereout maintained and educated his children in such manner as his executors should think proper; and that, after defraying all necessary expenses, whatever sum remained in her hands at the end of the year should be accumulated as a fund to pay the legacies thereafter bequeathed by him. To each of his younger children, V. bequeathed £500; and devised the lands to his eldest son, in tail, with a direction that, if at his wife's death a fund sufficient to pay the legacies had not been accumulated, those lands, and others not subject to the power, should stand charged with the deficiency. *Held*, that the devise to the children was not invalidated by the prior devise to their mother, which was, nevertheless, void for excess of the power.

That, during her life, the amount of rents not being required to maintain the younger children, and pay the legacies, went as in default of appointment.

That the direction to maintain the younger children, and the bequests to them, were *pro tanto* a good execution of the power.—*Crozier v. C.*, 5 I. E. R. 540. (C.)

1. V., by will, directed that if his daughter married a professional gentleman, or a man embarked in trade or business, and not possessed of landed property whereon to charge a suitable provision for her, trust funds should be settled on her for life, and on her issue after her death; but if she married a gentleman possessed of landed estate, who made a suitable provision for her, and settled his estate on their issue, the trust funds should be paid to him. She married a country gentleman, not possessed of any landed estate, not a professional gentleman, not a man embarked in any trade or business. He afterwards bought an estate, and offered to put it in settlement on being paid his wife's fortune. *Held*, that the trust funds should be settled according to the directions in the will; and that he was not entitled to a life interest therein.—*Briscoe v. B.*, 7 I. E. R. 123; 1 Jon. & L. 334. (C.)

2. V. bequeathed a pecuniary legacy to each of his children, some of whom were minors; and bequeathed the residue of his property, after payment of all his just debts, &c., and the several legacies, to be equally divided between all his sons and daughters; and directed that the "interest of the legacies," thereby given to such of his children as should not be of age at his decease, should be paid to his wife, to be applied by her for and towards their maintenance and education. *Held*, that the interest of the respective shares of the residue, as well as that of the pecuniary legacies, was applicable to the maintenance of the minor children.—*Guinness v. G.*, 14 I. C. R. 218; 8 I. Jur. N. S. 24. (R.)

XV. 1. g. *Periods to which, in general, words are referable, and herein of "dying without issue," and of Survivorship.*

3. Devise to "children share and share alike." The first codicil appointed a guardian "during minority;" the second, provided that—"in the event of the death of any of the children, their portion be divided among the survivors, share and share alike." *Held*, that the phrase, "in the event of the death," meant death during the minority.

In a will, the phrase, "in the event of the death of" the devisee, is never construed to mean the event of a lapse by death before the testator dies, unless in case of necessity.—*Montgomery v. M.*, 2 I. E. R. 161. (C.)

4. V., seized and possessed of real and personal estates, devised a chattel interest to B., her executors, &c., and freehold and chattel estates and interests to C., her heirs, executors, &c., with a proviso that, if either should die unmarried, or, being married, should die without issue, the bequests so appointed for such of them so dying unmarried, or, being married, dying without issue, should go

and remain to the survivor of them, her heirs, executors, &c. *Held*, that the words "without issue" meant an indefinite failure of issue, not issue living at the death of the devisee.—*O'Donohoe v. King*, 8 I. E. R. 185. (E.E.)

5. Testator devised lands, to hold from the death of his widow, on trust, to secure an annuity, the first payment thereof to be made on the first day of May after his decease. *Held*, that the annuity commenced on the testator's death, although his widow was still living.—*Jackson v. Hamilton*, 9 I. E. R. 430; 3 Jon. & L. 702. (C.)

6. A power was given by will to successive tenants for life, to limit a rentcharge "for any woman or women whom they may respectively marry," by way of jointure and in bar of dower, "to be in proportion to the marriage portion they shall respectively receive with their respective wife or wives—i. e., £100 jointure for every £1000 they shall so actually receive as a marriage portion with their respective wife or wives, if they shall so think fit," not to exceed £500; "such grant, limitation, or appointment to be made either before or after marriage." *Held*, that the wife of a tenant for life, who afterwards came into possession, but who had been married before the will, was not an object of the power; there being no grounds from the rest of the will for giving a past meaning to the words of futurity.

*Semble*—That money of the wife, which had been settled to her separate use, with remainders to the husband and children of the marriage, was not "received" by the husband, within the meaning of the power.—*Dillon v. D.*, 11 I. E. R. 423. (C.)

7. Bequest of personalty, in equal shares, "to each and every of my children and their issue, whether sons or daughters, with benefit of survivorship." *Held*, that the testator's death was the period of survivorship.—*Caulfield v. Giles*, 12 I. E. R. 427. (R.)

8. The cases respecting the period to which survivorship shall be referred, reviewed and classified.—*Forrester v. Smith*, 2 I. C. R. 70. (R.)

9. V. devised lands to his son, G., for life; remainder to his first and other sons in tail; remainder to his daughters in common in tail; and, if either died without issue, then to his surviving daughter and the heirs of her body; in default of such issue, to his right heirs for ever. *Held*, that the word "surviving" meant "other."—*Smith v. Osborne*, 3 I. Jur. N. S. 41. (H.L.)—[S. c., 6 H. L. Cas. 375.]

10. V. by will, made in 1840, in case of his wife having a child after his death, left to that child eight shares he had in the N. Bank, and ten shares in the B. Bank. *Held*, that three children, born after the will, and before V.'s death, were entitled to the shares.—*White v. Barber*, 5 Bur. 2703, approved of.—*In re Lindsey*, 8 I. C. R. 239; 5 I. Jur. 97. (C.)

1. V., by will in 1845, bequeathed personal estates, in the following terms:—"The interest of which I leave to X., and he is never to demand the principal so long as the interest is satisfactorily settled; and, in case he shall die without male issue lawfully begotten, and arriving at the age of twenty-one years, it shall then descend to his brother Y., and his male issue lawfully begotten, and arriving at the age of twenty-one years; and, in case he should die without such issue lawfully begotten, then I bequeath the same to W. and his family, on his taking the name of M., so that the estate may remain in the family; the interest of all bonds which remain on the estate to continue to remain on the estate, and to descend from heirs to heirs, as above stated." *Held*, that, notwithstanding the 29th sec. of the Wills Act (7 W. 4 & 1 Vic., c. 26), the failure of issue intended could not be construed to be a failure of issue at the death of the first taker; a "contrary intention" appearing by the will; and that, consequently, the gift over was void for remoteness.—*Green v. Giles*, 5 I. C. R. 25; 1 I. Jur. N. S. 90. (C.)

2. A testator gave a life estate in funds, of which the principal was after that estate to be divided among several, and to the survivor, if any, died, without specifying the time of survivorship. *Held*, that the legacy did not vest until the death of the tenant for life.

The word "vest" *prima facie*, means "come into possession," and not "accrue in point of interest."

V. devised a life estate to B., and after B.'s death to six persons equally, with a declaration that "if any die without issue before his share vests, the same shall belong equally to the survivors." *Held*, that the word "vest" did not prevent the application of the above rule.—*Richardson v. Robertson*, 7 I. Jur. N. S. 269. (H.L.)

3. A testator bequeathed a legacy to a tenant for life, and after her death to the testator's surviving children. *Held*, that the survivorship referred to the death of the tenant for life.—*Shaw v. Magill*, 7 I. Jur. N. S. 298. (R.)

4. A testatrix bequeathed to each of two nephews and to a niece a legacy a-piece, on the happening of certain events; and directed that, if either or any of the legatees died before his or her legacy became payable, his or her share should go to the survivors or survivor. If all died before their legacies became payable, the aggregate of their legacies was bequeathed among a number of legatees, one of whom was appointed executor and residuary legatee, "to take to his own use the amount of any of the aforesaid legacies which may become void by the death of the respective legatees happening before my decease." One of the nephews and the niece died in the life of the testatrix. *Held*, that their legacies went to the surviving nephew.

*Held*, that the word "payable" referred to the death of the testatrix; and that "sur-

vivor" meant surviving at her decease.—*Dalton v. O'Beirne*, 8 I. Jur. N. S. 107. (M.O.)

#### XV. 2. Generally.

5. It is a well settled rule of construction, never to put a different construction on the same word, when it occurs more than once in an instrument, unless there appears a clear intention to the contrary.—*Ridgeway v. Mun-Kittrick*, 1 Dr. & War. 84. (C.)

6. V., by codicil, having devised lands to trustees for charitable purposes, and having recited that they were then let at a clear yearly rent of £237, which he directed to be appropriated in the particular manner specified in the codicil, to maintain an almshouse, &c., declared that, if the rent was increased by any new letting, the surplus so to arise should go to the only use of the person or persons of the S. & C. families, who should, for the time being, be lord or lords, lady or ladies, of the manor of D.; and, if those families did not protect those charities, or if those families became extinct, in either case the trustees should apply those surplus rents in addition to the former provisions for the charity. After V.'s death, those families sold D. *Held*, that they had not thereby become extinct within the meaning of the codicil.—*Commrs. of Ch. D. & B. v. De Clifford*, 1 Dr. & War. 245. (C.)

7. When legacies are given to children "subject to the same limitations" as portions to which they are entitled; the expressions put them on the same footing as to interest.—*Bredin v. B.*, 1 Dr. & War. 494. (C.)

8. *Semble*—The *dictum* in *Forth v. Chapman*, 1 P. Wms. 666, and the doctrine in *Dee v. Cooke*, 7 East, 269, "that, when there appears to be an intention on the face of a will to give the whole of a term of years away from an executor, a bequest of it, though only for a day, is a gift of the whole term, if the limitations over are void," cannot be sustained.—*Ker v. Lord Dungannon*, 4 I. E. R. 343; 1 Dr. & War. 509; 1 Con. & L. 335. (C.)

9. Exception to the maxim, *dies incertus in testamento conditionem facit*. V. bequeathed to his three daughters, A., B., and C., to A., £1500, to B., £1000, to C., £1200, which sums were to be paid to them respectively on their days of marriage, with lawful interest, to be computed from the day of his death, until they were fully paid. A. and C., surviving V., died unmarried. *Held*, that their legacies were vested.—*Vize v. Stoney*, 4 I. E. R. 64; 2 Dr. & Wal. 660. (C.)

10. *Semble*—Stronger words are required to exonerate personal estate from paying debts than from paying legacies.—*Lamphier v. Despard*, 4 I. E. R. 386; 2 Dr. & War. 59; 1 Con. & L. 200. (C.)

11. When there is some property which comes exactly within the words of a bequest,

it will not include other property to which it is doubtful whether the words apply.—*Ridge v. Newton*, 4 I. E. R. 389; 2 Dr. & War. 239; 1 Con. & L. 381. (C.)

1. *Seemle*—The rule in *Wild's case*, Repts. 16. a., does not apply to personal property.—*Heron v. Stokes*, 4 I. E. R. 284; 2 Dr. & War. 89; 1 Con. & L. 270. (C.)

2. When the Ecclesiastical Court has given probates of both instruments, as constituting one will or testamentary document, the whole is to be construed as one will.—*Armstrong v. Millar*, 4 I. E. R. 659; L. & T. 557. (E.E.)

3. The doctrine of *cy-pres* applies to the construction of a will made in exercise of a power.—*Stackpoole v. S.*, 6 I. E. R. 18; 4 Dr. & War. 320; 2 Con. & L. 506. (C.)

4. V. bequeathed to his wife F. all his household furniture and plate, and, subject thereto, he left all his property to his executors, in trust, immediately after his decease, or so soon as they conveniently could, to sell all his chattels (except his household furniture and plate, and his horse "Harkaway"), and invest the produce thereof; and as to his horse, desired that, should £1000 or upwards be offered for him, his executors should sell him; but that if that sum could not be realised for him, he should be kept so long as he should live, and let each season; and if sold, that the price should likewise be invested. V. then devised an annuity, and subject thereto left all the rest of his property in trust to pay the rents, issues, and the whole and entire produce thereof, to his wife F. for her natural life, and after her decease to convey it over. The horse was not sold, but let out as a sire. *Held*, that F. was not entitled during her life to the clear earnings of the horse.

*Seemle*—That a value should have been placed on the earnings of the horse, and that F. was entitled to the Court rate of interest on such value.—*Arnold v. Ennis*, 2 I. C. R. 601. (R.)

5. V. devised the lands of Q. in trust, as soon as conveniently might be after his decease, to sell them; and directed that their price, together with their rents and profits, until sold, should be considered as part of his personal estate, and applied in the same manner as his personal estate, which he gave, upon trust, to pay his funeral expenses, debts, and legacies; and in the next place, that its yearly amount, and the yearly rents and profits of the lands which should be purchased with such personal estate, or any part thereof, should be applied to pay his debts and legacies, until they were satisfied. The residue of his personal estate he gave upon trust, to lay it out in purchasing lands of inheritance in fee, to be conveyed to his grandson, T., and his heirs, subject to a charge for renewing chattel leases; and directed a term for years to be created out of such purchased lands for that purpose; and upon trust, that until a proper purchase could be made, the trust money should be laid out

at interest, and applied towards discharging the purchase-money. He directed his trustees to renew his chattel leases, which he bequeathed to T. for life. V. died in 1771. From that time, to 1837, T. continued in possession of Q., and of the chattel leases. From 1820 to 1837, he paid large sums for renewal fines. *Held*, that the accumulation of the rents of Q. was to cease at the end of a year from V.'s death, and that the rents from that period to 1820, when the trust to raise the renewal fines arose, belonged to T.; but that after 1820 the rents were to be set off against the renewal fines.—*Smith v. Dungannon*, 3 I. C. R. 316. (C.)

6. On W.'s marriage with A., the ptf., a mortgage term, and £6000 secured thereby, were assigned to trustees for W. for life, remainder to provide a jointure of £300 per annum for A., remainder for the first son of the marriage who should attain age. C. was the first son who attained age. W. died. C. became indebted by judgments to A. A.'s jointure and the interest on her judgments were regularly paid down to 1846. C. bequeathed all his money and securities for money to E., and constituted him sole executor. C. died in 1834. E. bequeathed his interest in the mortgage to his children, in various shares; £1200 part of it to his daughter, A. W., and a like sum to his son V., and constituted S. sole executrix. V. died in 1846, and S. proved his will. By deed made in 1850 between A. W. of the first part, S. of the second part, and G. of the third part, A. W. and S. in her own right, and as representative of C. and E., assigned to G., for value, £800, part of A. W.'s portion of the mortgage.

S. assented to the legacy to E., and by deed of 1849, made between E. and F., E. for value assigned his portion of the mortgage to F.

A. filed a creditor's bill against S., praying an administration of the estate of C. and V. *Held*, that A.'s judgments were not charges upon the bequeathed portions of the mortgage in priority to the claims of G. and F. That the lapse of time before the death of C., prevented A. from following his assets into the hands of a purchaser for value; and that the assignment by the specific legatee, with the assent of the executrix of the legatee and the executrix of the debtor, barred the claim of the ptf.—*Ward v. W.*, 4 I. C. R. 215. (C.)

7. V. devised specific real property on trust for his eldest son T., absolutely; and other specific real property to trustees during the minority of his second son D., to receive the rents and create an accumulating fund for the benefit of V.'s younger children; and after D. attained age, upon trust for him absolutely. V. created similar trusts of other property for the benefit of his other younger sons, and directed similar accumulations during the minority of those to be entitled to them. After sundry legacies, and some rather complicated provisions, V. bequeathed any sum which should remain out of his assets, or of the savings of his real, freehold, or chattel proper-

and all the residue of his estates, to and among all his children who should attain age, to be and share alike: but if no child save T. should attain age, he gave to his wife £1000, and authorised her to dispose of a house among his children; and as to the remainder of his property, which would have descended to such child, if living, he gave the same to his brothers and sisters. At the date of the will, T. had attained age; all the other children were minors. *Held*, that T. was not entitled to any share of the residue.—*Hanna v. Bell*, 7 I. C. R. 3. (C.)—[Affirmed: *ibid*, 221. (C.A.)]

V. 8. *Nature, Quantity, and Quality of Estate, or Interest in Real or Personal Estate.*

- a. *Generally.*
- b. *Fee-simple, or Quasi Fee.*
- c. *Absolute Interest.*
- d. *Estate Tail.*
- e. *Estate for Life, or other Limited Interest.*
- f. *Joint Tenancy.*
- g. *Tenancy in Common.*
- h. *Estate Beneficial, or clothed with a Trust.*
- i. *Whether to be enjoyed in specie, or not.*
- j. *Estate Vested, subject to be Devested: Period of Vesting.*
- k. *Annuities.*

XV. 8. a. *Generally.*

1. "It is my will that my trustees shall sell by auction all my coins and gems, except such as my wife shall choose to keep for her own use."

The wife chose to keep them all. *Held*, that she was entitled to do so.—*Vincent v. Percival*, 2 Jon. 635. (E.E.)

XV. 3. b. *Fee-simple, or Quasi Fee.*

2. V. devised his lands to his wife. By a separate clause he gave her specified chattels, and added, fourthly:—"I order my wife to pay the following legacies"—(enumerating them). He appointed her and another executors. *Held*, that the legacies were charged on the lands, and that the wife took the fee.

Neither the word "thereout," nor "paying," is required to make payment of a legacy a condition, so as to give the devisee the fee in the lands charged therewith.—*Johnson v. Brady*, 11 I. E. R. 386. (C.)

3. V., being entitled under a f.-f. grant to a farm called K., by his will, executed long before the passing of the Wills Act (7 W. 4 & 1 Vic. c. 26), made a yearly provision, consisting of a certain quantity of oatmeal, potatoes and turf, for his wife, and directed that this provision should be paid by his sons B., C., and D., in certain proportions. In two subsequent and totally distinct clauses of his will he devised as follows:—"Fourthly, I bequeath to my son C. one-half of that farm

called K., he paying yearly £2. 13s. 6d."—"Sixthly, I bequeath to my son D. the other half of K. aforesaid, he paying yearly £2. 13s. 6d." *Held*, that the fee-simple in the two moiety parts passed by these devises.—*M'Naghten v. Boyd*, 2 I. Jur. N. S. 177. (R.)

4. V., seized for lives renewable for ever of the reversion expectant on a term of 99 years in the lands of G., by deed dated the 16th March 1797, settled his interest in G. upon W. for life, remainders over, the ultimate reversion to himself in fee. On the 20th May 1797, V., by will, devised "whatever residue might remain of his fortune undisposed of by his will" equally amongst all his children, sons and daughters, and made a codicil in 1802, reciting that it was his intention to have divided the residue of his fortune between his wife and all his children, but that he had since considered that it would be "great ease" to his wife to leave to his children specific sums instead of their respective shares of the residue of his fortune; and he thereby bequeathed to his children specific sums "in lieu and stead of all residue of his fortune;" and after payment thereof left and bequeathed the rest and remainder of all such residue to his wife. All the limitations in the settlement of 1797 before V.'s reversion were exhausted after V.'s death. *Held*, that V.'s interest in the lands of G. passed by the residuary devise in the codicil.

The word "fortune," in a devise, *prima facie* includes both real and personal property.—*Spearing v. Hawkes*, 6 I. C. R. 297; 2 I. Jur. N. S. 406. (C.A.)

XV. 8. c. *Absolute Interest.*

5. Testator, seized of B., under a lease for lives renewable for ever, gave his wife his dwelling-house, a cow's grass for her in summer, and fodder for her in winter, yearly and every year, as long as she lived; with four bushels of potatoes, set, dug, and ground; with half a peck of flax-seed, and a cart of madeturf, brought and drawn up, yearly and every year. He then gave his son John four acres of land; and his son Andrew the remainder of his farm of B.; "and further, I allow my son Andrew to make good the aforesaid benefits that I do leave to my wife; to him the said Andrew, and my son John I do allow that they both shall, equally between them, be both alike in doing whatever labour belongeth to it." *Held*, that John took the absolute interest in the four acres devised to him.—*Morrrough v. Lord Dufferin*, 2 Jon. 719. (E.E.)

6. When a testator devised to trustees his "estate and interest" in farms of which he was seized for lives renewable for ever, in trust, after paying certain annuities, &c., to permit and suffer his nephew, A., to enjoy the same for his life; and, from and after his decease, to permit such son of his as should attain the age of 21 years to enjoy said lands; and on failure of such, remainder to his nephew, B., for his life; remainder to his first son, as before. *Held*, that a son of

A.'s, who attained the age of 21, and died in the lifetime of his father, took the absolute interest in those premises. — *Kirby v. O'Hea*, 2 I. E. R. 424. (E.E.)

1. Testator, seized of the lands of D. under a lease to him and his heirs *pur autre vie*, made his will, commencing thus:—"As to such estate and worldly substance as I am possessed of or entitled to, I dispose thereof in manner following." He then devised the lands of D., and all his estate and interest therein, to S. and his heirs, upon trust, to apply the rents in payment of debts until the same should be discharged; and, after the same should be discharged, to permit his heir-at-law to take thereout £40 a-year, for three years only; and, subject thereto, to the use of his sons T. and J., share and share alike, as tenants in common, and not as joint tenants. He also devised other lands for the benefit of his other sons and their families, by apt technical words; and bequeathed the residue of his personal property to his heir-at-law. There was not any residuary bequest of the real estate. *Held*, that T. and J. took the absolute interest in the lease of the lands of D.—*Bradshaw v. B.*, 5 I. E. R. 310. (E.E.)

2. V. devised B. to her nephew F., for life; remainder to his first and other sons in tail male; remainder to R. and several other nephews, successively, for like estates. She devised W. to R. for life; remainder to his first and other sons in tail male; with remainders over to F., and several other nephews, in like manner. Afterwards, by a codicil, V., reciting the gifts to F. and R., and declaring her wish to give R. the property devised to F.; and *v. v.*; she revoked those gifts, and devised the provision given by her will to F., to R., his heirs, executors, &c.; and in lieu thereof devised to F., his executors, &c., the property given by her will to R. *Held*, that the limitations over to the other nephews were revoked, and that R. and F. respectively took absolute interests in their gifts.—*Murray v. Johnson*, 3 Dr. & War. 143; 2 Con. & L. 104. (C.)

3. Bequest of personalty by will, executed after the 1 Vic., c. 26, to "A. and B., to be divided equally; with a request to A. that, should he die without lawful issue, the property which I bequeath him shall revert back to the sons of B." *Held*, that A. did not take an absolute interest in his moiety.—*In re O'Beirne*, 7 I. E. R. 171; 1 Jon. & L. 352. (C.)

4. V. gave a sum to her children who should be living at her decease; and, if she died without leaving any such issue, over. Having a power to appoint to D.'s children, V. gave £2000 to the separate use of A. (one of them); and, if she died without issue by her then husband, or any other whom she might thereafter take, that £2000 to be divided amongst other objects of the power. *Held*, that A. was absolutely entitled to the £2000.—*Caul-*

*field v. Maguire*, 8 I. E. R. 164; 2 Jon. & L. 141. (C.)

5. Bequest of chattels real to A. for life, remainder to his lawful issue, to be disposed of to them as he might think fit; on failure of his lawful issue, over. *Held*, to vest the absolute interest in A.—*Delap v. Hall*, 1 L. Jur. 312. (C.)

6. Devise of freeholds to B., "to be kept in trust for C.; that is, B. is to let the premises, and to give the rent to my son, C., for his support." *Held*, that C. took an absolute estate.

The 1 Vic., c. 16, put real and personal estates on a parity.—*Malcolmson v. M.*, 3 I. Jur. 150. (C.)

7. V. bequeathed a chattel interest to J. and T., and the survivor of them, and to the heirs of such survivor, not as joint heirs, but as tenants in common; and declared his will to be, that if both J. and T. died without issue, the share or shares of both, or such one of them as died without issue, should go to V.'s rightful heirs-at-law. T. bequeathed all his property of every description to J., and died. *Held*, that J. took the absolute interest in the chattel.

J. bequeathed the same interest to B. for life, without impeachment of waste, and from the decease of B., then to the use of the first son of B.; and the first and other sons of the first son, or the daughter or daughters of such first son; remainder to the second and other sons of B., successively, and their issue, male or female; for want of such issue male in B., remainder to his issue female, and for want of any issue in B., remainder over. *Held*, that B. took a life interest, with remainder to his first son absolutely.—*Murphy v. Johnston*, 6 I. C. R. 230. (C.)

8. A testator, having directed the accumulation of a fund, ordered that his executors should invest it in the funds, "the same to be, and remain to the use of J. and R. during their natural lives respectively, in equal moieties, with full power and authority to each to receive the interest thereof during their respective lives, with remainder over to the first and every other son of each, according to seniority of age and priority of birth; and in case of failure of issue male or female in each," then over. On the death of R. without having ever married—*Held*, that as he would under the limitations have taken an estate tail in realty, he took an absolute interest in his moiety of the fund.

*Semble*—That *Ex parte Wynch* (5 De G. M. & G. 188), and cases of that class, do not abrogate the old rule of construction; but relax the rule, where the testator's intention is clearly in favour of such a construction.—*Monteagle v. Langrishe*, 5 I. Jur. N. S. 403. (C.)

9. V. devised all his landed property to his son, R.; and in case his said son died under

the age of twenty-one years, gave his property to his nephew, E.; and in case his nephew, E. died under the age of twenty-one years, gave to his nephew, P. V. then directed his executors to realise his outstanding personal estate; and, reciting that he was entitled to a third, "ordered and directed that it might be distributed share and share alike between his son R., and his nephew E., or his (the nephew's) brother, P." R., E., and P., all survived V. *Held*, that the fund should be divided equally between R. and E.—*Carey v. J.*, 6 I. C. R. 255. (C.)

1. V. gave all his property, real and personal, to trustees, and directed that they should sell his freehold estate, and make up in account of his estate, so that they might be able to make a division among his nine children, to whom he left it in equal shares.

After other directions, he declared that he left the shares of his daughters to them, for their respective lives, free from the control of their husbands, with power to appoint those shares among their children, notwithstanding coverture. In a subsequent clause he directed that the shares of his sons, who should have attained twenty-one, at his death, should forthwith vest in them; and that the shares of the other sons should vest as they should afterwards respectively attain age, and the shares of daughters on marriage; and that the shares of sons who should die under twenty-one, and of daughters who should die unmarried, should go amongst the survivors as therein mentioned. J., one of V.'s daughters, married, and died without exercising her power of appointment, leaving one child. *Held*, that J. took an absolute interest in her share of the fund.—*M'Tear v. M'Dowell*, 11 I. C. R. 338; 6 I. Jur. N. S. 146. (C.)

2. V., after particularising his real and personal estate, bequeathed the residue thereof to his children living at his death, share and share alike; the shares of his daughters to be paid to them on their respective days of marriage, provided a settlement, with the approbation of his executors, was executed on the marriage of each; and if such settlement was not made, each of his daughters should be entitled to the interest of her share for life only, with a gift over. V. declared that if any of his daughters died unmarried, "she shall have power and liberty to dispose of, by will or otherwise, the sum of £500 of her share, and the remainder of her share is to be divided, share and share alike, amongst all my other children then living, except those who may have married without the settlement aforesaid." C., one of V.'s daughters, died intestate, and unmarried. *Held*, that C. took an absolute interest in her share, to the extent of £500, which was to be considered as a gross sum of money taken out of her share, and not as an aliquot part of her share; and that it was to be considered as personalty in C., and not as partly real and partly personal.—*In re M'Donnell's Estate*, 13 I. C. R. 268. (L.E.C.)

3. V. bequeathed moneys, lent on mortgage, to A. for life, remainder to his "first and other sons." The will also contained devises of fee-simple, freehold, and chattel lands to the first and other sons of A. successively. *Held*, that the first son of A. took the whole mortgage money absolutely.—*In re Stauntons Minors*, 14 I. C. R. 98. (R.)

4. By marriage settlement, two sums of £1000, one the property of the husband, the other that of the wife, were vested, in trust, to pay the interest from time to time, as received, or to permit the wife to receive and take "the said two several sums of £1000 respectively, and all interest, benefit, and advantage arising, or to arise therefrom," to her separate use; "said two several sums to be so received and taken" in full for her jointure, and in bar of dower; and if the husband survived her, to permit him, during life, to receive those two several sums, and all interest, &c., derivable therefrom; with power of appointment of those two several sums among the issue of the marriage, to the husband; in default of appointment, to such issue, in equal shares; in default of issue surviving at the death of the husband, those sums were to be disposed of as the husband should appoint. Provided that when the husband should acquire property in lands producing £200 a-year, and should settle a jointure of £200 a-year on the wife, subject to the same limitations as those sums were declared subject to, it should be lawful for him to receive those two sums for his own use. No issue of the marriage survived the husband. He died before the wife, without having settled any jointure, or made any appointment of the fund. *Held*, that the wife took only the interest of the fund for her life.

That the husband was entitled to the interest of the fund for his life, with a general power of appointment over the principal.

That no appointment having been made by him, there was a resulting trust in favour of the administrator of the husband as to £1000, and a similar trust to the wife's executor as to the other £1000.—*In re Lane's Trusts*, 14 I. C. R. 523. (R.)

5. V., seized in fee of the lands of "Baskin," and for life in entailed lands, was empowered by his marriage settlement to charge the entailed estates with £5000 for his own use. He mortgaged them to his brother, to whom, as the deed recited, their mother had bequeathed arrears of jointure (amounting to more than £5000) charged upon those estates, which V., to secure those arrears, thereby charged with £5000. Amongst the names of the mortgaged townlands occurred "Baskin." *Held*, that "Baskin" had been introduced by mistake, and was not charged with the mortgage debt.

V., by subsequent will, reciting that all his estates, except "Baskin," and the townland of K., were settled on his eldest son, devised (without mentioning what) to trustees, in trust, for his son B.; and then devised to them for his son C., K., together with other



specified premises. *Held*, that B. was absolutely entitled to "Baskin."

V. thereby further charged "said property, according to the power given me, with the sum of £1000 sterling, for my daughter Julia, in addition to her share of the sum charged by my marriage settlement." At V.'s death, the mortgage debt amounted to only £4688; so that £312 became thereby absolutely discharged from the mortgage. *Held*, that Julia was absolutely entitled to that sum.—*Montgomery v. M.*, 10 I. Jur. N. S. 102. (C.)

1. V. bequeathed the life use of all his funded property, moneys, and securities for money, to his sons, A. and B., share and share alike, for their lives, with power to them to invest it; and directed that, after their respective deaths, the issues and profits arising therefrom should go to their respective eldest sons born in wedlock, share and share alike, during each of their natural lives and life; and so on to the eldest sons of the eldest sons born in wedlock, in succession, share and share alike, on their attaining age respectively, subject to bequests, with cross limitations to A. and B.; if they both died without male issue, then among their female issue, as they should respectively appoint. At V.'s death there was not any son born to A. *Held*, that to carry out the general intent, the will must be construed to give A.'s eldest son, born after V.'s death, an estate tail in realty; and, therefore, that he took an absolute interest in his share of V.'s personality.—*In re Cleary's Trusts*, 16 I. C. R. 488. (R.)

#### XV. 3. d. Estate Tail.

2. Lands were devised in trust for A. for life, remainder in trust for her issue male and their issue male, in such manner as A. should appoint; and in default of such issue male, in trust for B. for life, remainder in trust for such of his issue male and their issue as he should appoint, and in default of such appointment then over. *Held*, that B. took an estate tail.—*Irwin v. Cuffe*, Hayes, 30. (E.E.)

3. V., by will, directed his trustees to call in money to which he was entitled, and invest it in the purchase of freehold estates in lands or hereditaments of a clear estate of inheritance, for the use of his son, A., for life; after his death, to the use of his first and other sons, according to seniority of age and priority of birth. If A. died without issue male, in trust for V.'s second son, B., and the heirs male of his body, according to, &c.; and desired that those sons, and the several persons who should be in possession of those estates, should have power to make leases not exceeding three lives or 31 years, at the full improved value. *Held*, that A. was entitled to an estate tail in the lands to be purchased.—*Herbert v. Blunden*, 1 Dr. & War. 78. (C.)

4. V., who had, under his marriage settlement, a power of appointing, by will or deed,

lands held *pur autre vie*, to any of his sons, for any estate not exceeding an estate tail, by will, reciting the power, devised the lands to a trustee, to the use of his third son for life; remainder to the trustee during his life, to preserve contingent remainders; remainder to the first and other sons of that son in tail; in default of such issue of his third son, to his other sons successively for life, with similar remainders to their first and other sons in succession. By a codicil, V. directed that other lands, included in the settlement, which he had by will devised to his sixth son, should, on the happening of a particular event, namely, the death of his eldest son without issue, belong to the third son in tail. The third son, in 1816, before the happening of the event on which he was to take the additional lands, executed a settlement, by lease and release, upon his marriage, by which, after reciting his title to the lands devised to him by the will, and that he was contingently entitled to the lands devised to him by the codicil, he settled all the lands upon himself for life; remainder to the first and other sons of the marriage in tail; and, in default of such issue settled the lands devised by the will, upon his brothers successively for life, remainder to their first and other sons in tail. In 1817 the event happened upon which the settlor became entitled to the additional lands; but he did not get possession of them. The first wife of the settlor died, leaving two sons; and in 1827, upon his second marriage he executed articles, by which he covenanted to settle the reversion in all the lands expectant upon the death of his sons without issue, upon the children of the second marriage. The sons of the first marriage died without issue, and a bill was filed by the children of the second marriage, after the death of their father, claiming all the lands under the articles. *Held*, that the appointment by the will by the third son gave him an estate tail, by the application of the doctrine of *cy-pres*.

That the limitations to collaterals in the third son's first marriage settlement were voluntary and void against subsequent purchasers.

That the Court would enforce the subsequent articles against the persons claiming under those limitations.

That as to the additional lands, the Statute of Limitations ran from the happening of the event upon which the title of the third son accrued; and that all claiming under the subsequent settlement were barred at the expiration of the statutable period.

That the persons claiming under the settlement of 1816 were not estopped by it from denying the right of the settlor to the additional lands.—*Stackpole v. S.*, 6 I. E. R. 18; 2 Con. & L. 489. (C.)

5. V. devised lands to his son A. and his heirs, for ever, and if A. died without lawful issue, desired that, after his death, all the property should go to his daughter and her heirs, and if both A. and the daughter died without lawful issue, desired that the property should go to his brothers. *Held*, an estate tail in A., not a

fee-simple, with an executory devise over.—*Jones v. Ryan*, 9 I. E. R. 249. (C.)

1. V., seized and possessed of real and personal estates, devises a chattel interest to B., her executors, &c., and freehold and chattel estates and interests to C., her heirs, executors, &c., with a proviso that, if either should die unmarried, or, being married, should die *without issue*, then that the bequests so appointed for such of them so dying unmarried, or, being married, dying *without issue*, should go to and remain to the survivor of them, her heirs, executors, &c. *Held*, that the words "without issue" meant an indefinite failure of issue, and not issue living at the time of the death of the devisee.—*O'Donohoe v. King*, 8 I. E. R. 185. (E.E.)

2. V., seized in fee, devised one moiety of his estate to his sister M. for life; remainder to her first and other sons in tail male; for want of such issue, remainder to her issue female, and the heirs of their bodies, with power to M. to charge £1000 for younger children; for want of such issue, remainder to his sister J. for life, with precisely similar remainders to her issue. The other moiety was limited to J. for life, and to her issue, and then to M. and her issue, in precisely the same way as the first moiety; for want of issue of M. and J., the whole to L. for life; remainders over.

V., by codicil, reciting the marriage of M. with D., devised one moiety to M. for life; remainder to the issue of M. successively and the heirs of their bodies, "as in said will limited, and, for default of such issue," to D. for life; remainder over, as in said will limited. The codicil contained the following clause:—"I ratify my will, with respect to my real estate, in every particular not hereby altered; the only alteration I intend hereby is, that if my sister Margaret should die without issue, or failing issue, that the said D., her husband, or any other husband she may have, should hold a moiety of my estate during his life." M., after the death of D., suffered a recovery to the use of herself, her heirs and assigns, for ever. *Held*, that, under the limitations in the will, M. took only an estate for her life, and that she did not take an estate in tail female, after the estate in tail male to her first and other sons.

That, from the words "in default of such issue, to D.," &c., in the codicil, there was no ground for implying an estate tail in M.; the word "such" being referential to the devise in the will to her sons in tail male, and her daughters in tail general.

That the devise in the codicil to D., or any future husband, if M. should die without issue or failing issue, was to take effect on the determination of the express limitations in the will to M.'s first and other sons in tail male, and to her daughters in tail general, and not on a general failure of M.'s issue, and that M. therefore did not take an estate tail by implication.—*Hamilton v. West*, 10 I. E. R. 75. (R.)

3. V. devised A. to his son S., for life, *sans waste*; remainder to trustees to preserve, &c.; after the death of S., to the use of his heirs male, in such shares and subject to such charges as S. should by deed or will appoint; if S. died without issue male, in trust, to permit V.'s second son, J., to receive the rents for life, *sans waste*; remainder to trustees, to preserve, &c.; after J.'s death, to the use of his male children, in the same manner, and with like power of appointment and charging as above; remainders over, in the same terms, to V.'s third son, T.; remainder to T.'s male children; remainder to V.'s right heirs. V. then devised B. to J. for life; remainder to his male children, as he should appoint; in default of appointment, to J.'s first son, and the heirs male of his body; like remainder to the second, &c., and every other son of J.; if J. died without issue male, to S., to be disposed of amongst his children as he thought proper. V. directed that if S. died without issue male, and therefore A. descended to J., and his issue male, then B. should immediately descend and go to T. and his issue male; and V. gave powers of leasing to S., J., and T., as they should respectively become seized. *Held*, that S. took an estate tail in A.—*Phillips v. P.*, 10 I. E. R. 518. (R.)

4. A devise of lands, in trust for A. for life, then for his first and other sons in tail male; in default of such issue, over. *Held*, that A. took only a life estate, and that a remainder in tail, after the limitation, could not be implied.—*Tucker v. Baker*, 11 I. E. R. 104. (C.) —[*Affd.*: 3 H. L. Cas. 106; 14 Jur. 771.]

5. Devise to testator's son, A., and to his issue, male and female, in such shares, manner, and proportions as he might by deed or will appoint, with power to jointure a wife; and in case of the death of A. without lawful issue, then to testator's three daughters, share and share alike, as tenants in common, and not as joint tenants, and to their heirs and assigns. *Held*, that A. took an estate tail.—*Whitsitt v. Thompson*, 12 I. E. R. 119. (C.)

6. Testator, being seized in fee of, among others, the lands of M., devised the said lands of M. to his daughter Martha, for life, remainder to her first and second sons in tail male, remainder to his daughters as tenants in common in tail general, with a series of successive remainders to several persons in tail, and an ultimate remainder to J. D. in fee. In a subsequent part of the will, testator devised the same lands, together with others, "unto my said daughter Martha, and the heirs of her body lawfully begotten; and for default of such heirs, to the use of all other the heir and heirs herein named, and for the uses mentioned, for ever." *Held*, that the two sets of limitations of the lands of M. were not irreconcilable; that Martha took under the will an estate in tail general in remainder, after the estate devised to her daughters as tenants in common in tail, and before all the estates and uses limited to other

"heirs" or devisees, according to the ultimate disposition of the will.—*In re Frew's Estate*, 7 I. C. R. 95. (I.E.C.)

1. V., by will, in 1822, devised all his freehold property, upon trust, to permit his daughter R., his heiress-at-law, to receive the rents and profits "for such term, time, and space, as my said daughter shall remain unmarried, or marry with the consent of one or both of my above named trustees. But in case my said daughter R. shall not marry with the consent of one or both of my said trustees," then she shall receive only an annuity of £60 for her life, and the residue of the property shall be invested in government stock for the benefit of her issue; "and in case of no issue, I bequeath such residue to my right heirs;" and if R. died unmarried, or without lawful issue, V. devised her property over.

V., together with other persons, was seized of the lands in question, together with other lands, by a lease for lives renewable for ever, made in 1744. In 1818, a partition was made of the lands. In 1825, V. died. In 1829, a renewal of the lease of 1744 was made to a trustee, upon trust, as to one moiety of the lands, for himself and his heirs; and, as to the other moiety, for the several persons entitled thereto, according to their respective rights. To that renewal, R. and the other persons interested under the lease of 1744 were parties. *Held*, that R. took, under the will, an estate *quasi* in tail, and that that estate was barred by the renewal of 1829.—*In re McNeale's Estate*, 7 I. C. R. 388; Dr. Rep. temp. Napier, 45; 3 I. Jur. N. S. 212. (I.E.C.); 3 I. Jur. N. S. 310. (C.A.)

2. Devise in trust for the testator's mother for life; then to his brother A., and his assigns for life; then to permit such one child of A., and the heirs of his or her body, to receive the rents as A. should by deed or will appoint to; in default of appointment, to go to A.'s eldest son, and the heirs of his body; and, if no son, to and amongst A.'s daughters, and to the heirs of their bodies, share and share alike; and in default of such issue, in trust for B., C., and D., successively for their lives, with similar remainders to them respectively as to A.'s sons and daughters, remainder over in fee, and a residuary devise to A., who by will appointed to his eldest son, who died in A.'s lifetime, and without issue. *Held*, that A. took an estate tail in remainder after the estate devised to his eldest son in default of appointment.

That the words, "in case there shall be no son," did not give an estate by implication to A.'s other sons.—*Ball v. B.*, 15 I. C. R. 517. (R.)

3. V., seized of lands under leases for lives renewable for ever, devised in 1824 all his freehold leases and interest whatsoever to trustees, and the heirs of their survivor, in trust, after payment of the head rents, to apply the clear yearly rents amongst his three daughters during their respective lives, in

equal shares, for their separate use; and, if any or either of them should die leaving lawful issue, then in trust, as to her share, for the use of such issue as she should by deed or will appoint; in default of such appointment, to the use of such issue equally, share and share alike. He directed that, if any of his daughters died without issue, her share should go to the survivor or survivors of them for the increase of her and their respective shares, to their separate use, and to go to their lawful issue, subject to the like power of appointment amongst them; and, if all his daughters died without leaving lawful issue, then in trust to pay the rents to his nephew during his life, and after the nephew's death, if he left lawful issue, in trust, as to one-half of the freehold and leasehold interests, to the use of such issue as he should appoint; in default of appointment, equally; and as to the remaining half to the use of his sister's children, in equal shares, and to their lawful issue; and, if his nephew died without issue, then as to the whole of his freehold and leasehold interests to the use of his sister's children, in equal shares, and to their lawful issue; if they should be then dead, then as to the whole in trust for the issue of his nephew; and, in case of the deaths of his nephew, and the children of his sister without issue, in trust to assign over the freehold and leasehold interests to his own right heirs. The trustees were given a power to lease from time to time, as they should remain seized and possessed by virtue of the trusts contained in the will, with the consent of the person or persons then entitled. *Held*, that the legal estate was devised to the trustees during the existence of the entire series of limitations; and that V.'s daughters took equitable estates in *quasi* tail in their respective shares.—*Sherwin v. Kenny*, 16 I. C. R. 138. (R.)

4. An owner in fee devised different portions to several of his sons respectively. Each devise was made to the devisee "and his heirs for ever." One devise was in these words:—"I leave my third son, M., the lands of G. for ever; but in case he should die unmarried, or without lawful issue, in that case he may will one-half of it as he pleases, and the other half to go, share and share alike, between my surviving sons and their families." The will concluded thus:—"All the bequests given to my son R., my son J., and my other three sons, M., C., and H., of my property, no part of it shall or will be liable to pay any debts they may contract, nor sell or mortgage same, but always go in the male line free of any debt of theirs." *Held*, that M. took an estate tail under the will.—*In re Thompson's Estate*, 16 I. C. R. 228; 10 I. Jur. N. S. 47. (C.A.)

5. V. bequeathed the life use of all his funded property, moneys, and securities for money, to his sons, A. and B., share and share alike, for their lives, with power to them to invest it; and directed that, after their respective deaths, the issues and profits arising there-

from should go to their respective eldest sons born in wedlock, share and share alike, during each of their natural lives and life; and so on to the eldest sons of the eldest sons born in wedlock, in succession, share and share alike, on their respectively attaining age, subject to bequests, with cross limitations to A. and B.; if they both died without male issue, then among their female issue, as they should respectively appoint. At V.'s death there was not any son born to A. *Held*, that to carry out the general intent, the will must be construed to give A.'s eldest son, born after V.'s death, an estate tail in realty; and therefore that he took an absolute interest in his share of V.'s personality.—*In re Cleary's Trusts*, 16 I. C. R. 438. (R.)

1. A testator nominated "———, as sole executor, leaving him all" testator's property "for the purpose of paying the following bequests, first paying all" his "just debts and funeral expenses." He then bequeathed the bill of Knocknarea for ever to his illegitimate son, Thomas, giving him full power to will and dispose thereof, if he should have a family; but, if he died without issue, then to the use of testator's illegitimate daughter, Jane, without further words of limitation, and appointed W. his executor. Jane, unmarried, predeceased Thomas, who died unmarried. *Held*, that the executor took the fee in Knocknarea, and that Thomas took an estate in *quasi* tail, the limitation over not being an executory devise, with a remainder in fee to Jane.

That W. was the executor and trustee whose name the testator had intended to insert in the blank.—*Ormsby v. Anderson*, 11 I. Jur. N. S. 66. (C.)

#### XV. 3. e. Estate for Life, or other Limited Interest.

2. V. devised his house in H—— street, whereof he was seized in fee, to his wife for life, with power for her to sell it; and directed the purchase-money, or so much thereof as should be necessary, to be applied by his executors in paying his debts; the surplus he gave to his wife for her own benefit. V. also devised B., whereof he was seized under a lease for lives renewable for ever, to his wife for life, subject to payment of his debts; and, after her death, devised the house in H—— street, if not sold, and also B., to his son, C., for life, subject to payment of his debts, with power to sell the house, the purchase-money to be applied as aforesaid. The surplus V. gave C. for his own benefit. After C.'s death, V. gave all the premises to the use of the issue of C., with power by deed or will to appoint same to all or any of his children or issue, male or female; in default of appointment, to the first and other sons in tail male; remainder to C.'s issue female, as tenants in common, and to their issue; in default of such issue, to V.'s two grand-daughters, D. and E., as tenants in common, for their lives, with several limitations over. V. declared his intention to be, that every person who should

come into possession of his estates by virtue of these devises, should hold as tenants for life only, and gave them leasing and jointuring powers; and appointed his son and daughter executor and executrix. C. entered after the death of V.'s wife, was discharged as an insolvent, and died without issue. *Held*, that C. took only a life estate.—*Flood v. Digby*, 1 Jones, 520. (E.E.)

3. A gift, by will, of personal annuities to A. and B., for themselves and their children, they being childless at the date of the will, or at testator's death, gives them only a life interest.

*Semble*—The rule in *Wild's case*, Repts., 16. a., is inapplicable to bequests of personal estate.—*Heron v. Stokes*, 4 I. E. R. 284; 2 Dr. & War. 89; 1 Con. & L. 278. (C.)—[Rev. 3 I. E. R. 163. (R.)]

4. Under a bequest, "in trust, for the use of my father, to be disposed of by him, share and share alike, as he by will or deed may appoint, among my brothers H. and J., and the daughter or daughters of S."—*Held*, that the father took a life estate; and that H. and J., and the daughters of S., were each entitled equally in default of appointment.—*Acheson v. Fair*, 2 Con. & L. 208; 3 Dr. & War. 512. (C.)

5. L. bequeathed to his daughter E., £500, to be laid out for her benefit, as thereafter directed; and directed that the £500 be invested in government stock, in trust that his executors, when convenient and eligible purchases offer, should lay it out in the purchase of lands in Ireland, or of rentcharges, annuities, or other beneficial estates and interests; and thereupon to settle them to the several uses, and subject to the powers, provisions, and limitations thereafter mentioned (as far as the nature of the several estates or interests to be purchased, and other contingencies, would admit of), that is to say, in trust, well and sufficiently to settle the estates to be purchased; and to begin payment of the rents of the estates and properties to be purchased for the use and benefit of his daughter as soon as she should attain age, or be married; and further, well and sufficiently to settle and secure the estates or properties upon her marriage, so that they, or any part thereof, should not be liable or subject to the control or intermeddling of any husband she might intermarry with, without the same, or any part thereof, being subject or liable to the debts, forfeitures, or engagements of her husband; with full power to his daughter, notwithstanding her covertures, to dispose of, by will, the estates and properties to be purchased, as she should think fit. The daughter married after attaining age. No settlement was executed on her marriage. The £500 were paid into Court by the executors, in a suit instituted for the purpose. Upon an application by the husband and wife to have the money paid to them—*Held*, per Pennefather, B., and Foster, B., that the daughter took but an estate for life in the lands to be purchased, with power

to dispose of them by will. *Per* Pennefather, B., and Richards, B., that the testator had manifested an intention that the interest given to his daughter should be settled to her separate use, independent of her husband; and that she should not have a power of alienation. *Per Curiam*—that the husband and wife were not entitled to be paid the £500.—*Marken v. Magrath*, 3 I. E. R. 566. (E.E.)

1. V. devised lands, held under a lease for lives, to his nephew, for life, and after his death to the issue, male and female, of the nephew by his then wife, to be divided among them in such manner, shares, &c., as the nephew should by will appoint. *Held*, that this devise gave the nephew a life estate, with a power of appointing the absolute interest among the children of his then marriage.—*Crozier v. C.*, 5 L. E. R. 415. (C.)

2. A devise of "all my real and personal fortune" to V. for life, and after his decease to "the first and every other son in succession" of V.; in default of such issue, to B. for life, with the same limitations to his sons; in default of such issue, to the daughters of V. and B.; in default of such issue to C. for life, with the same limitations repeated as to her sons and daughters; and in default of such issue to X. in fee. *Held*, to give successive life estates in all the limitations previous to the gift to X.—*Bevan v. White*, 7 L. E. R. 473. (C.)

3. Bequest of the use of plate, with power to dispose of such portion thereof as the legatee might think proper, preceded by an absolute gift of other chattels to the same person—*Held*, to give a life interest only in the plate, with a power of disposition over part of it.—*Espinasse v. Luffingham*, 9 I. E. R. 129; 3 Jon. & L. 186. (C.)

4. A devise of lands in trust for A. for life, then for his first and other sons in tail male; in default of such issue, over. *Held*, that A. took only a life estate, and that a remainder in tail, after the limitation, could not be implied.—*Tucker v. Baker*, 11 I. E. R. 104. (C.)—[*Affd.*: 3 H. L. Cas. 106; 14 Jur. 771.]

5. £1000 were left by will to M. By a codicil, if M. should marry, and not leave children or a child alive, that £1000 were to become the property of E. and F.; but if M. "should ever marry, and leave a child alive, or children, in that case she can leave the £1000," as she thinks proper, "to one, or amongst any children she might have." By a further codicil the £1000 were left "to M., but if she died without children, they were to become the property of E. and F." M. married, and died, leaving no child; but leaving a grandchild, the son of a deceased daughter, to whom she had appointed the £1000 on her marriage. *Held*, that the bequest was an absolute one to M., with an executory bequest over to E. and F. if she died without leaving issue living at her death, whether children or remoter issue,

which, in the events which had happened, had failed.—*In re Synge's Trusts*, 3 L. C. R. 379. (R.)

6. V. bequeathed to R. and W. £2800, upon trust, to lay out at interest, and pay the yearly interest to M., for her separate use, it being his will that the sum should not be liable to the debts of her husband, P., or any future husband; after her death, upon trust to pay the £2800 among the children of M., as she should appoint; in default of appointment, to such children equally, at twenty-one or marriage; and if M. died in the life of P., without issue, or if such issue died before twenty-one or marriage, then to pay the £2800, and all interest that then might be due thereof, to B. Residuary bequest to B. M. never had issue, and survived P. B. died in the life of V. *Held*, that M. was entitled to a life interest only in the produce of the £2800; and that in the event which had happened, the corpus of the fund, subject to that life interest, was not bequeathed by the will of V.—*Cole v. Lucas*, 5 L. C. R. 375; 1 L. Jur. 368. (C.)

7. Bequest of the interest of £500 to A. for life, and as to the principal, after the decease of A., and as "to all other property belonging to me, that I may die seized or possessed of or entitled unto, in trust, for the use, benefit, and behoof of B. and her children," without the control or intermeddling of her husband, to be paid in such manner as my trustees shall in their discretion think fit. *Held*, that B. took a life interest in all the property, with remainder to all her children born in A.'s life-time, before and after the death of the testatrix.—*Scott v. S.*, 11 L. C. R. 114. (R.)

8. V. bequeathed to his daughters, A. and C., £1000 each, to be left at interest by his executors and trustees, and the interest regularly paid to them; and should they marry, it must be with the consent of their brother, and even in that case their husbands were to have no control over principal or interest. The receipt of the daughters was to be a sufficient discharge of the interest. Should either or both of his daughters die without issue, they might, by will, dispose of £500 each of the £2000, to any of their brothers or sisters, or nephews or nieces, but to no other person; the remaining £1000 to be divided amongst his surviving children, share and share alike; and should his daughters, or either of them, wish to purchase an annuity with their share of the £2000 for their life or lives, with the consent, or under the direction and advice of their guardians, they were permitted to do so.

C. died intestate, and without issue. *Held*, that the daughters took life interests only in the £1000.

That as to £500 of C.'s share, a trust was created for the brothers and sisters, and nephews and nieces, living at her death, and that they were entitled equally to the £500, in default of appointment.

That the brothers of C., who survived her, were entitled to the remaining £500, her sisters having died before her.—*O'Neill v. Montgomery*, 12 L. C. R. 163; 6 I. Jur. N. S. 351. (B.)

1. An estate *pur autre vie* was devised to trustees to permit E., testator's eldest son, to have the use of same for life, and after his death to permit the first and other sons of E. to receive the profits for their lives, the eldest to be always preferred before the youngest; and on failure of issue male of E., remainder to testator's second and other sons in tail male, remainder to testator's right heirs. *Held*, that the limitation of the life estates was precise and clear; and that the words, "on failure of issue," could not be imported from where they stood in the will, so as to create an estate tail to the prejudice of the life estates; and that the words "issue" or "children" not being used, it did not come within the rule of *Roddy v. Fitzgerald*, 6 H. Lds. Cas. 823—*Burke v. Tully*, 9 I. Jur. N. S. 344. (C.)

2. V. bequeathed £1000 a-piece to her sons, A. and B., during their lifetime, with reversion to their children lawfully begotten; and charged property—over part of which she had a general power of appointment, and over the remainder of which she had a power to appoint in favour of her children—with £2000 to be levied and paid to a trustee for the use and benefit of A. and B.—*i. e.*, to pay the interest to them during their life equally; and after the decease of A. to pay £1000 to his lawful children, and, in default of such issue, to her own heirs; with a like bequest of £1000 to B.'s children, and, in default, &c., to her own heirs. *Held*, that A. and B. took only life interests.

That the bequests to their children were charged on the property over which D. had a general power of appointment.—*Clune v. Apjohn*, 17 I. C. R. 25. (R.)

3. V. bequeathed a house "to B., for her and children's sole use," and by the same will £1000 "to B., for herself and children's use." *Held*, that a joint tenancy was created between B. and her children living at the death of the testator.—[*De Witte v. De Witte*, 11 Sim. 41, followed.]—*Kirby v. West*, 2 I. Jur. N. S. 190. (C.)

#### XV. 3. f. Joint Tenancy.

4. By indenture of settlement of 12th May 1791, made in contemplation of the intended marriage of V., the fee of the lands of G. was conveyed to trustees, in trust, for V. for life; remainder to the children of the marriage in fee, in such shares, &c., as V. should appoint; and in default of appointment, share and share alike. There were five children of the marriage. V., by his will, made in 1827, having recited his power of appointment, and that he had provided otherwise for his eldest son, and obtained a release from him of all claims under V.'s marriage settlement, devised said lands of G. to trustees, upon trust, for his second son for life; remainder to that son's first and other sons in tail male; and in default of such issue, then in trust for testator's third son for life; remainder to that son's first and other sons in tail male;

and so on as to his fourth and fifth sons. Testator also devised other real estates, over which he had an absolute power of disposal, amongst his said sons; he also bequeathed a sum of £10,000, among them; and he directed that each of his sons should, within three months after testator's decease, execute to the trustees of testator's marriage settlement, a release of all claims under that settlement: and in case any son refused to do so, he revoked all devises and bequests in favour of such son. All the younger sons elected to take under the will. *Held* (reversing Judge Hargreave, in L.E.C.), that each younger son took an estate for life only, and not an estate tail in the lands.—*In re Dennehy's Estate*, 17 I. C. R. 97. (C.A.)

5. In a will, made in 1836, words were cancelled, but not made illegible. *Held*, that as to the personal estate bequeathed, the cancellation, though unattested, was complete.

V. by will directed that the premiums of a policy of insurance should be paid out of his real estate; and left all his property to his two daughters, A. and B., subject to his lawful debts, and under the control of his executors; and should either daughter die, or act contrary to the will of his executors, directed that she should be limited to one shilling; and should either die [within the term of twenty-one years] or unprovided for according to the will of his executors, the survivor was to inherit the entire; should both die at any period unprovided for, he willed his landed property to revert to his nephews, to inherit the entire, share and share alike; and, finally, should any of his daughters disobey the commands of his executors, that she should be limited to any sum they should appoint for her.

*Semble*—That A. and B. took as joint tenants; but, if not, B. took under the survivorship clause.

A., having attained age, married, and she and her husband afterwards, in the lifetime of the insured, assigned her moiety of the policy in trust. *Held*, that the joint tenancy in the policy was not thereby severed.

N.B.—The words in brackets were cancelled in the will.—*In re Barrett*, 8 I. C. R. 548. (R.)

6. Devise to testator's three illegitimate children of a yearly rentcharge on the lands of X., to be equally divided among the devisees share and share alike, to hold to the devisees and their heirs as joint tenants; and in default of heirs the rentcharge to merge in the testator's estate in X. A., one of the devisees, on her marriage put her share in settlement; the other devisees subsequently died intestate and unmarried. A., claiming the whole rentcharge, instituted a suit against the owners of X. *Held*, that the three devisees took estates in joint tenancy which was severed by the settlement; and that A. was entitled to only one-third of the rentcharge.

A devise to an illegitimate son and his heirs gives an estate in fee-simple.—*Daly v. Aldworth*, 8 I. Jur. N. S. 141. (C.)

1. Direction in a will :—that testator's wife and brother should be his residuary legatees, and enjoy all the benefits arising from that appointment—*Held*, to create a joint tenancy in the residue.—*M'Donnell v. Jebb*, 16 I. C. R. 359. (R.)

2. A testator bequeathed to his wife £1000 a-year during her life, and to A., his brother, £500 a-year during his life; and expressed a hope that they would "continue to live together in kindness and love as heretofore which cannot, in consequence of my brother's health, be long. . . . After the death of my wife and brother, my executors will dispose of all my property in the most advantageous manner."

By codicil the testator desired that his wife and brother should be his residuary legatees, and enjoy all the benefits arising from this appointment. *Held*, that the testator's wife and brother took the residue as joint tenants, and not as tenants in common.—*M'Donnell v. Jebb*, 11 I. Jur. N. S. 121. (C.A.)

#### XV. 3. g. Tenancy in Common.

8. V. devised all his real estates to D., remainder to his sons, in strict settlement, and, "in default of such issue male in the said D., then to the use of my nieces, J., R., and B., and the survivor of them, for the term of their natural lives, as tenants in common, and not as joint tenants; and from and after their decease, to the use of their first and every other son and sons lawfully begotten on their bodies, and the heirs male of their respective bodies successively, in equal proportions; the elder of such sons of each of my said nieces, and the heirs male of their bodies, being always preferred, and to take before the younger, and the heirs male of their bodies: for default of such issue male, then to the daughters of the said J., R., and B.; and for default of such issue, male or female, to the use of my right heirs male forever." *Held*, that J., R., and B., took as tenants in common for life, with remainder, as to the share of each, to her sons in tail, with immediate remainder to her daughters in tail.—*Connée v. Taaffe*, 12 I. C. R. 338; 6 I. Jur. N. S. 232. (C.)—[*Revd.*: 10 H. L. Cas. 64.]

4. The benefit of survivorship may be given to those who have life interests as tenants in common.

In gifts of personal estate the word "survivor" may be taken as referring to the period of distribution. Regarding real estate it is not equally settled that it applies to the determination of the prior limitation.

When that word is applied to a class of persons of whom individuals are named, its natural meaning is "the longest liver" of those named.

V. devised his estates in trust to the use of his nephew, F., and his issue male in strict settlement; and, for default of such issue male in F., to the use of my nieces, J., R., and B., and the survivor of them, for the term of their natural lives, as tenants in common and not as

joint tenants, without impeachment of waste; and, from their decease, to the use of their first and every other son and sons, and the heirs male of their respective bodies, successively, in equal proportions, the elder of such sons of each of my said nieces and the heirs male of their bodies being always preferred, &c.; and for default of such issue male, then to the daughters of J., R., and B.; and for default of such issue male or female, to my own right heirs. He directed that no son of a niece should take any benefit under the will, unless on assuming the testator's name. F. died without issue. J. had a daughter; R. and B. had a son a-piece. J. and R. died. *Held*, that the nieces took as tenants in common for life, with cross-remainders between them for life; that on the deaths of J. and R. the "survivor," B., took the whole for life; that the sons took a remainder, expectant on her death, as tenants in common in tail male; and that there was not any estate in any daughter of a niece until a total failure of issue male.—*Taaffe v. Connée*, 7 I. Jur. N. S. 229. (H.L.)—10 H. of Lds. Cases, 64.—[Reversing decision below: 12 I. C. R. 338. (C.)]

#### XV. 3. h. Estate Beneficial, or clothed with a Trust.

5. Testatrix devised all her fee-simple, freehold, and leasehold estate, to R. for life; remainder to J. for life; remainder, save a rentcharge, to the Commissioners of Ch. Don., in trust, to pay the head-rents, and to apply the annual profits to charities. *Held*, that R. and J. took beneficial interests for their lives.—*Commrs. of Ch. Don. v. Espinasse, Flan. & K.* 164; 3 I. E. R. 324. (R.)

6. V., seized of estates, devised them in trust "for the payment and discharge of the debts of his father." *Held*, a legacy, not a trust for the benefit of the creditors whose debts subsisted at the father's death.

That a creditor's debt, subsisting at the death of V.'s father, was payable, though barred long before V.'s death.—*Carr v. O'Connor*, 3 I. Jur. 185. (C.)

#### XV. 3. i. Whether to be enjoyed in specie or not.

#### XV. 3. j. Estate Vested, subject to be Divested: period of Vesting.

7. V., by will, gave £300 to her executors, with directions to place it out at interest, and pay the interest to her nephew for life, and, at his decease, divide the principal among all his children; if he should leave but one, the whole to such one child. V.'s nephew had two children, who died in his life. *Held*, that the children took vested interests in the legacy as tenants in common, with a gift over; in case there should be but one child, to that one, and that the representative of the child-*ren* who died was entitled to the legacy.—*Kimberley v. Tew*, 5 I. E. R. 389; 2 Con. & L. 366; 4 Dr. & War. 139. (C.)

1. Devise of houses to executors, in trust, to receive the rents for the support, clothing, maintenance, and education of testator's children, until they respectively attained age, or married; thenceforward, to A., B., and C., or such of them as should be then living. *Held*, that this last devise did not take effect in possession until after all the children attained age or married.

*Quere*—Was there an intestacy respecting the surplus rents beyond what was necessary for maintaining and educating the children during minority?—*Farran v. Smith*, 11 I. E. R. 254. (R.)

2. V., in pursuance of a power, appointed by will £5000 amongst his five daughters, in equal shares, and, reciting that he was possessed of specified lands, for a term of 21 years, with a *t. q.* covenant for renewal, bequeathed them, with £1000, to trustees, to pay the interest, proceeds, rents, and profits, to his wife for life; from her death, or in her life, if she should so direct, to raise by sale, mortgage, or otherwise, such a sum as, together with the provision thereby made for them, should make up to each of his five daughters on marriage, if in the life of his wife, with her consent; and, if unmarried when she died, then on their attaining age, or being married, £2000. Until payment of this additional provision, V. directed the trustees, on his wife's death, to pay each daughter, out of the rents and the interest of the £1000, so much as, together with the interest of the £1000, would produce £120 a-year; and, after his wife's death, and payment of the additional portions, to assign the residue to his son. The wife did not, during her life, direct the additional provision to be raised. *Held*, that a daughter, who attained age, but predeceased her mother, did not take a vested interest in the additional provision.—*In re Brabazon*, 13 I. E. R. 156. (C.)

3. V. devised lands to A. for life; remainder to his sons successively in tail; remainder to B. for life; remainder to his sons successively in tail; remainder to V.'s nieces, C. and D., and the survivor, for their respective lives, as tenants in common. He also bequeathed to D. £1000, charged upon his real and personal estate, to be by her distributed among her younger children, in such shares as she should think proper, provided always that if D. should, under the foregoing limitations in the will, get into possession of the lands, then the £1000 should not be paid unto her for the purpose aforesaid. D. survived V., but died; her life estate in remainder in the lands never having taken effect in possession. *Held*, that she took a vested interest in the £1000 at V.'s death, subject to be divested on the happening of the contingency; and that interest was payable upon the legacy from V.'s decease.—*Finucane v. Studdert*, 1 I. C. R. 140; 3 I. Jur. 114. (C.)

4. V., having three unmarried daughters, A., L., and C., bequeathed to A. and L. £2000 each, and to C. £2500, to be invested

for their benefit, and there to remain until their day of marriage; and, if one or more of them died before marriage, the portion or portions of her so dying should go to and be divided between his surviving daughters, share and share alike; if only one should survive, then to her. If all of them died before marriage, then their portions should be divided between all his sons. Testator had also three married daughters. C. married, and died in the life of A., who died unmarried, leaving L. surviving. *Held*, that C.'s personal representative was entitled to a moiety of A.'s share.—*In re Jackson's Trusts*, 14 I. C. R. 473. (C.A.)

#### XV. 3. k. Annuities.

5. S., to whom, by settlement (executed in 1800), an annuity of £200, by way of jointure, was secured in the event of her surviving her husband, continued, for many years after her husband's death in 1809, to receive payment of the same from the hands of her step-son, H., the inheritor of the estate upon which the annuity was charged. In 1830, the annuity being two years in arrear, S. wrote to her step-son, a letter, wherein, after expressing her wish to do what she could to serve him, she stated that she would feel happy in thenceforth giving up the £200 annuity, which he had paid her since her husband's death, and would also make him a present of the £400, the amount of the arrears then due. In 1834 H. died. By will he charged his real estates with payment of an annuity of £200 to his step-mother. By a codicil, after stating that he had been most reluctantly constrained by circumstances to alter the bequest, he substituted an annuity of £100 for that of £200 granted by his will. The bequest of the smaller sum was accompanied by a declaration, that it was upon condition that S. should not seek to raise the annuity of £200 secured by the settlement of 1800, which, the testator stated, she had, in a letter written long since, expressed her intention to relinquish in his favour. S. died in 1837, having previously, by will, appointed the ptf. her residuary legatee and sole executor. S. had never sought for or demanded the annuity secured by the settlement, or that granted by the will, after the date of her letter. The ptf. having filed a bill to raise the arrears of the annuity secured by the settlement, the Court dismissed it, so far as it claimed relief in respect of the arrears which accrued in the life of H., but directed an account of what was due from his death to the death of S.—*Langley v. L.*, 2 I. E. R. 313. (E.E.)

6. V. by will gave an annuity (which he directed his eldest son W. to pay) to his daughter B., for life, with power to her to dispose of it to all or any of her children, by any writing, witnessed by two or more credible witnesses. B., by will, reciting this annuity as one for ever, devised it to her two sons, share and share alike. W., by will subsequent to B.'s will, ratified the annuity given to B., and as bequeathed by her, and directed



his eldest son, his heirs and assigns, to pay it. *Held*, a perpetual annuity.—*Burke v. Lambert*, 2 Dr. & Wal. 608. (C.)

1. V., by will, declared "that his property, together with what his wife was entitled to, should produce to her an annuity of £100; to each of his daughters £100 per annum, for themselves and their children;" and gave all the residue of his property to his son. By a subsequent codicil, executed after the death of one of his daughters, he directed that if his son died, without leaving issue male, then, after the decease of his wife and of his surviving daughter, his remaining property should be equally divided between his sister and her daughters by her then husband, and his sister-in-law, and any children of her's by his late brother. Neither of the daughters had children at the date of the will or of the death of V. *Held*, upon the will and codicil, that the daughter did not take a perpetual interest in the annuity.

*Semble*—That if it had rested upon the will alone, she would have taken a perpetual interest in it.

*Held also*—That on the death of the son without issue male, the property was divisible *per capita*.

A gift of an annuity, not pre-existing, *simpliciter*, without reference to any property from which it is to spring, gives but a life interest.

The rule in *Wild's case* (Rep. 16, a.) does not apply to personal chattels.—*Heron v. Stokes*, 4 I. E. R. 284; 2 Dr. & War, 89; 1 Con. & L. 284. (C.)—[*Revg.*, on re-hearing, 3 I. E. R. 163. (C.)]

2. Testator, seized of an estate for lives renewable for ever, demised it, subject to a rent of £400 per annum, to H., his brother-in-law, for life; and having, in the commencement of his will, recited this demise, and that he was entitled to the profit rent of £400 per annum, devised same amongst his three sisters, A., B., and C., in manner following:—to A. £150 yearly, to her separate use, for ever, without the control of her husband, to be issuing and payable out of the lands and premises; to B., £150, in the same terms; and to C. £100, in the same terms; "said three sums making together the sum of £400 yearly, reserved and payable to him (the testator) by said lease so made to said H.;" and then devised the reversion, share and share alike, amongst his four sisters, A., B., C., and D., wife of H., after payment of the said bequests of £400 yearly. By a second codicil he revoked the gift of £150 per annum to A., and devised £100 yearly, part of the £150, to the husband of A. for life, remainder to M. for life, remainder to M.'s issue male for ever, share and share alike; and devised the remaining £50, to D. for ever. *Held*, that the annuitants under the will and codicil were entitled to perpetual interests in their several annuities.

When a man has a rent payable out of his own estate, and disposes of that rent only by will, yet in favour of the intention, the whole estate will pass.—*Ashton v. Adamson*, 1 Dr. & War. 198, 209; 1 Con. & L. 325. (C.)

3. When an annuity is bequeathed without words of limitation, and unaccompanied by a reference to some fund for its payment, the legatee will not take more than a life interest therein.

If there be reference to a particular fund for the purpose; *Semble*—That this amounts to a dedication of the fund for the purpose of the annuity, and confers a perpetual annuity therein.—*Heron v. Stokes*, 2 Dr. & War. 89; 1 Con. & L. 270; 4 I. E. R. 284. (C.)

4. Testator devised a freehold estate to his wife, and, in addition thereto, an annuity of £1000 for her life, charged upon all his real estate, except the portion before devised to her; and empowered her to take all remedies for the recovery thereof, as in cases of rent service were usual. He then charged all his debts upon his real estate (except the portion devised to his wife), in aid of his personal estate; and, after giving several legacies charged upon his real estate, except that devised to his wife, devised three other annuities, in the very same terms that he had employed in the gift of the annuity to his wife. *Held*, upon the true construction of this will, that the annuitants were not entitled to any priority over the legatees.—*Creed v. C.*, 1 Dr. & War. 416; 4 I. E. R. 525. (C.)—[*Revd.*: 11 Cl. & F. 491.]

5. Testator devised all his estates to his wife for her life, and charged them with an annuity of £50 for his niece, payable from day of his death; and with a further annuity of £50 for the same niece, to commence from the day of the wife's death. *Held*, that those annuities were successive, and not cumulative.—*Bayley v. Quin*, 2 Dr. & War. 116. (C.)

6. V. bequeathed to his trustee and executor all the property whereof he should die seized or possessed, upon trust (amongst other purposes) to "receive and retain, for his own proper use and benefit, a sum of £250, and also to retain and keep thereout, for his own use, one annuity of £20 yearly, to commence immediately after V.'s decease, to reimburse him for his trouble and expense in receiving the said rents, and keeping the necessary accounts." *Held*, that this annuity was to endure only during the continuance of the trusts created by the will.—*Henrion v. Bonham*, Dr. Rep. temp. Sug. 476. (C.)

7. V., possessed of considerable real and personal estate, primarily charged the real estate with the payment of annuities to his wife, his two daughters, and his son, and desired that his trustees should, during the lives of his wife and daughters, accumulate the rents of the real estate for the purposes of his will, and on their deaths devised those estates over. He also bequeathed £3000, £34 per cent. stock, upon trust, out of the interest and dividends, to pay an annuity of £105 to his youngest daughter for life, and upon trust as to the principal, if she married with the consent of the trustees, for her issue; but if she married without such consent, then, as to £1000, upon trust as she should appoint, and

as to the remaining £2000, that it should form part of V.'s estate, to be applied as he should direct. V. also directed that if the annuities given to his wife, and daughters, and son, should be unpaid for four months after due, the trustees should, "out of the accumulation of the moneys in their possession, exclusive of the £3000 so left to his youngest daughter, and which he directed should be left untouched for the purposes of his will, pay and assist in discharging the annuities so in arrear; and should, out of the moneys which should next come to their possession, replace the sums" so advanced. He directed that the trustees should, after first paying those annuities and the several legacies charged upon one of his real estates, invest the rents of that estate in government stock, and pay thereout to his grandchildren living at his death, £300 each, and any deficiency in those legacies he desired should be made good out of his other real estates. And all his other property, of what nature soever, including a policy of insurance, he devised and bequeathed to his trustees to invest for the purposes of his will. And as to the proceeds of that policy, and the remainder of his personal property, invested or to be invested, as well as the overplus of his income not thereby disposed of, excepting the £3000 left as above to his youngest daughter, and excepting such parts of his personal property as might be necessary to be applied in payment of the annuities and legacies bequeathed by him, he directed that it should remain invested during the lives of his wife and daughters, and until his grandchildren should attain twenty-one or marry, with interest at £5 per cent., to commence from one year after his death. Then came a clause directing that any surplus which should remain, after satisfying the several purposes of the will, should be applied by the trustees in payment, or assisting in payment of £5000, charged by settlement on one of his real estates for the younger children of his late son, J.; and if such surplus should be more than sufficient to discharge that sum, that surplus to be paid to such younger children in equal shares, on attaining twenty-one or marriage; subject, however, to the payment and discharge of all and every the sums and charges thereinbefore charged and created on said general fund by the will. *Held*, that the annuity of £105, given to V.'s youngest daughter, was not reduced by the 7 & 8 Vic., c. 5, which lowered the rate of interest upon £3½ per cent. government stock to £3¼ per cent.; and that the trustees should make up any deficiency arising in the dividends of the sum of £3000 out of the accumulated fund.

That the residuary bequest to the grandchildren generally of the testator was inconsistent with the residuary bequest to the younger children of his son, J., and therefore that the latter bequest must prevail.—*Fitzpatrick v. Knarborough*, 13 I. E. R. 338. (C.)

1. V. bequeathed to A., his executors, &c., an annuity charged on all her property. Under the decree, a specific sum of £3¼ per cent.

stock was transferred to the separate credit thereof to pay the annuity. Afterwards that stock was reduced to £3¼ per cent., while other funds were still in Court, though appropriated to other purposes. *Held*, that A. was entitled to have a further sum invested in stock to make the dividends suffice to pay the annuity.—*Comrs. of Ch. D. & B. v. St. Lawrence*, 9 I. E. R. 560; 3 Jon. & L. 561. (C.)

2. V. by will bequeathed annuities to each of his daughters, severally, with power of appointment to their children, and if any daughter died without leaving issue, her annuity to go to his sons, to be equally divided between them; but if either of his sons died before such event happened, that son's proportion in such annuity to go to such issue as he should leave; and if any son died without issue, to V.'s other sons, except he or they should leave a widow or widows, and if so, to such widow or widows during her or their lives; and after to his sons or the issue of such sons as may have died. V. then devised his freehold and leasehold property to his four sons, A., B., C., and D., in the following proportions:—To A. one-third, to B. one-third; the remaining one-third to be divided between C. and D., after payment of the annuities, providing that in ten years after his death his "income" should be equally divided between his four sons, after payment of the annuities, with the following provision:—"Having left to my eldest son D. one-fourth of my income, to take place in ten years after my death, it is my will that then he shall have his choice either to take the one-fourth of the income as mentioned above, or to take instead of one-fourth of the income the house and demesnes of X. and Y., subject to the marriage settlement of the said D., and subject also to a sum of £500 and interest at six per cent. on said sum of £500;" and after a bequest of his furniture, &c., "I appoint my executors residuary legatees, in trust first with the produce of such property to pay each of my daughters (naming them) £5 each, and such further sum as shall be necessary for their maintenance until the first payment of annuity shall be made to them." He then named D. and C., and his son-in-law, executors. In the following year he added a codicil, naming C. as executor in place of D., with the following clause:—"And with the view of removing any doubts that may exist as to the continuance of annuities to my daughters (naming them), it is my will, and so intended by me, that the same respectively be only payable during their respective lives, and in the event of their dying leaving children, the share of such daughters so dying to survive to their children, and subject to appointment as in my will named." *Held*, that the several annuities did not become extinct upon the death of each daughter respectively.

That X. and Y. (D. having elected to take them) were exonerated from paying the annuities.

That the residuary legatees did not take a beneficial estate in the residue.—*Stevell v. S.*, 7 I. Jur. 145. (C.)

1. V., tenant for life without a leasing power, had made a lease, in 1832, to F., for three lives or 31 years. G., sister of E., petitioner in the suit, being one of the *c. q. vies*. F. left the country in 1834, and up to the commencement of this suit had not been heard of. G. entered into possession of the demised premises. The rent having fallen into arrear, an ejectment was brought by V., but subsequently V. and G. arranged that G. should pay the rent in arrear and give up possession; and that she should receive an annuity for life to the amount of the profit rent in the premises. There was no written agreement produced, except letters from V., and B. his son, to G., relative to the payment of the annuity. Upon the death of V., B. took possession as his heir-at-law, being also his personal representative; and having refused to continue paying the annuity, upon the ground that V. had no power to create such a charge beyond his own life, G. filed a petition praying for an order that B. should pay what was due on account of the annuity; for a decree that the annuity was an equitable charge upon the lands demised; for the appointment of a receiver; and that the annuity should be payable out of the assets of V. *Held*, that G. was entitled to a personal annuity for her life, and that the assets of V. were liable thereto.

That the real estate was not liable to the charge.

That the petition was not bad for multifariousness or misjoinder.—*Gibbon v. Cloncurry*, 7 I. Jur. 171. (C.)

2. V. devised several annuities, which she directed only to be a lien upon and charged on the yearly income of her lands, real, freehold and chattel real, but not upon any other personal estate; and directed that if that yearly income fell short of paying the annuities, the deficiency should equally and proportionably be upon all such annuities, each to receive according to the magnitude of such annuity, and in proportion thereto; but no such deficiency to be vested upon her personal estate; and devised the residue of her property, real and personal, after satisfying and discharging said annuities, &c. The income of the lands was insufficient to pay the entire of the annuities. *Held*, that the annuities, being charged on the income of the lands only, were, for each year, satisfied by payment of a proportionable share; and that the arrears were not charged on the future rents.—*Fitzgerald v. O'Connell*, 11 I. C. R. 437. (R.)

#### XV. 4. What passes by.

##### a. Real Estate, and Copyhold.

###### 1. Generally.

###### 2. Respecting particular Descriptive Words.

##### b. Personal Estate.

###### 1. Generally: whether general Personal Estate, or Residue passes.

###### 2. When Chattels, Stock, &c., pass; by what Words.

###### c. Property acquired after the Date of the Will.

###### d. Property Contracted to be Purchased or Sold.

#### XV. 4. a. Real Estate.

##### 1. Generally.

##### 2. Respecting particular Descriptive Words.

#### XV. 4. 1. a. Generally.

8. When a man has a rent payable out of his own estate, and disposes of that rent only by will, yet in favour of the intention the whole estate will pass.—*Ashton v. Adamson*, 1 Dr. & War. 209. (C.)

4. By will reciting that the testator was entitled to a remainder in fee expectant on the death of his wife, he devised the same, after the death of his wife, to his son W. for life, and after his decease to the child or children of W.; and for default of such issue to his own right heirs. By codicil he retracted the devise to W., and gave to his wife and grandchildren (issue of his son J.) what he originally allotted to W. *Held*, that the remainder in fee passed by the codicil to the wife and grandchildren.

*Semble*—The gift in the will to the children of W. was revoked by the codicil.—*Madden v. Kirwan*, 7 I. E. R. 570. (C.)

5. A. and B., having a joint power of revocation and new appointment, by deed and fine, reciting an agreement that A. should, in manner therein after mentioned, secure to B. payment within twelve months of £12,000, and the interest on £8000, irrevocably revoked the uses of the former settlement, and appointed the lands to trustees for 550 years, upon trust, so soon as conveniently might be (but with A's written consent, if, during or within twelve months from the date of the deed, and afterwards of their own authority), to raise £20,000, by sale or mortgage; provided that, if that sum should not be raised by the end of the twelve months, the deed, and every clause and thing therein, to be void; and the fine should enure to confirm the several estates and interests in the lands, subsisting immediately before the deed of revocation was executed. *Held*, that the money was to be raised within twelve months; if not raised within that time, or if A. died before it was raised, and within the twelve months, the deed was to be void. That, the money not having been raised within that time, the old uses, including the power of revocation, revived.

The ultimate limitation of the use, in the former settlement, was to A. in fee. After the expiration of the twelve months, A. made his will, devising all his estates. Afterwards, A. and B., by deed, revoked the uses of the settlement, and limited the use to A. in fee. The deed revoking the uses of the settlement operates as a revocation of the will. The will was made before, the deed of revocation

after, the 1 *Vic.*, c. 26. *Held*, that the reversion in fee, whereof the devisor was seized at the time of his decease, did not pass by his will.—*Lord Langford v. Little*, 2 *Jon.* & *L.* 613. (C.)

1. V. devised all his property, real and personal, to his wife and his unmarried daughters, B. and C., and to the survivor; and if C. should marry, and leave issue her surviving, that her share, and the shares of her mother and of B., if they survived her, should be divided amongst such issue; and if C. should not marry, that upon her death, and that of her mother and B., the entire of V.'s property should go to the issue then living of his married daughter, D.; and if no issue of D., that the entire of his property should vest in the R. C. Bishop of G. V. then devised one-third part of his interest in lands, part of his property, to his nephew, E. *Held*, that V.'s wife and unmarried daughters took subject to the devise to E., which was to have immediate operation upon V.'s death.—*Walsh v. Ryan*, 2 *I. Jur. N. S.* 297. (R.)

2. V., having, by will, in 1837, bequeathed legacies, proceeded thus:—"To my son I give, devise, and bequeath all my lands and tenements, rights, and credits, *subject to the legacies aforesaid and my debts, the remainder of my property* to be disposed of by him to and amongst his children, in such shares and proportions as he shall think fit." The words in italics were interlined. The last clause in the will declared the interlineations, as well as the original text, to be in V.'s handwriting. In 1839, he added a codicil, whereby he merely made a declaration respecting one of the legacies given by the will. In 1845, the son predeceased V., without having made any appointment amongst his children. *Held*, that the will gave the son a power, coupled with a trust; and that, accordingly, his children were entitled as well to the real as to the personal estate of V., in equal shares.—*Hutchinson v. H.*, 13 *I. E. R.* 332. (C.)

#### XV. 4. a. 2. *Respecting particular Descriptive Words.*

3. V. being entitled to two distinct interests in land called K., in the county of C., one a freehold interest derived under H., the other a chattel interest derived under B., which was not to commence until the determination of the freehold, made his will, and thereby desired that all his freehold interests in the counties of C. and W. (except his interest in K., which he held under B.) should be sold, and the proceeds of the sale be divided between his children. In a subsequent part of the will he desired his chattel interest in K. to be sold immediately upon the determination of the freehold interest therein, and the proceeds thereof to be divided in a certain manner. *Held*, that the exception referred to the chattel interest only in K.; and that the freehold interest therein was to be sold immediately, against the claim of the heir-at-

law of V.—*Gurly v. G.*, 2 *Dr. & Wal.* 463. (C.)  
—[*Affid.*: 8 *Cl. & F.* 743.]

4. Devise of real estate to W. and his heirs, on trust, to receive the rents, and apply them in discharging testator's (V.'s) debts and legacies; then to convey part thereof to V.'s brother, R., for life; the residue, and R.'s share, after his death, to such of W.'s sons as should, at W.'s death, be his second son, for life; remainder to his first and other sons in tail male; remainder to the third, fourth, and every other son of W. successively, in strict settlement. The will concluded thus:—"And as to all my personal estate, &c., subject, however, to my debts and legacies heretofore bequeathed, I give and bequeath same to my relative, W., whom I appoint executor of this my will; and also, in case of any residue, I appoint him my residuary legatee." The debts and legacies having been all paid, and R. having died in the life of W.—*Held*, that the residuary clause was confined to the personal estate; and that the rents did not pass under it to W. for life.—*Wills v. W.*, 1 *Dr. & War.* 439. (C.)

5. V., being seized and possessed of freehold and chattel leases, devised as follows:—"I give, devise, and bequeath my farm of B. to my grandson M., and every kind of stock thereon, together with one-third of every other property that I now possess, and am entitled to." He then made similar devises of others of the farms, and the remaining two-thirds of the residue to two other grandsons respectively. He then left £18 a-year to his wife, "to be paid to her during her life by my said three grandsons, share and share alike, or by their heirs or executors." He then directed £300 to be invested on a certain event, "the said sum to be deducted equally from and out of the property herein first bequeathed to my said three grandsons, who, or their heirs, on the fall of any lease, are to be equal sufferers, pursuant to their respective proportions." A., at the date of his will, was seized of the farm of G., but did not devise it by name. *Held*, that either there was to be no contribution, but that each was to bear his own loss, or that the lands devised *nominatim* were those only which were to be contributory; and that consequently the farm of G. was not liable.

*Semble*—That, the claim was bad for uncertainty.—*Spinner v. Dwyer*, 2 *Con. & L.* 432, 440. (C.)

6. Testator was seized of one estate in fee-simple, and of another settled by marriage articles upon himself for life; remainder in tail to his first and other sons, &c.; in default of such issue, to his own right heirs, provided that, "in case he should die without issue, or intestate, the said lands" were to go to L., her heirs and assigns. By will he devised all his "unsettled estate." *Held*, that the reversion in fee in the settled estates passed.—*The Incorporated Society v. Richards*, 1 *Dr. & War.* 258; 1 *Con. & L.* 58; 4 *I. E. R.* 177. (C.)

1. An absolute interest in leaseholds bequeathed to trustees, in trust for two *c.g. trusts*. *Held*, to pass.—*Bradshaw v. B.*, 5 I. E. R. 810. (E.E.)

2. V. devised part of his real estates to his son W. in settlement, and other parts in fee, and the residue, not specifically devised, to W., whom, with E., he appointed executor and executrix. V., by codicil, reciting the death of W., and the devises of the particular estates to him, devised them, if E. died without issue in his wife's life, to his wife for life; with remainder to R., and appointed E. his "sole executrix and residuary legatee." V. died seized of estates other than those specifically devised. *Held*, that E. did not take the residuary realty.—*Hillas v. H.*, 10 I. E. R. 134. (C.)

3. V. being entitled to one-sixth of leasehold lands under the will of J., and having a power of appointment over another sixth under the will of C., both wills being nearly of equal date, devised all "his property" in the lands bequeathed "by the will of C.," speaking of it as property of which he was possessed, and giving it for purposes in common with other property which he owned absolutely. *Held*, merely a *falsa demonstratio*, and to apply only to the property he was entitled to under J.'s will.—*Lendrick v. Russell*, 10 I. E. R. 269. (C.)

4. V. devised to his wife his lands. By a separate clause he gave her chattels, and then added: "fourthly, I order my wife to pay the following legacies," which he enumerated. He made her and another executors. *Held*, that the legacies were charged on the lands; and that the wife took the fee.

Neither the word "thereout" nor "paying" is required to make the payment of a legacy a condition so as to give the devisee the fee in lands charged with it.

The costs of a suit in the nature of an ejectment bill to recover devised property on a construction of a will, though doubtful, are not within the rule in administration suits, that they come out of the estate.—*Johnson v. Brady*, 11 I. E. R. 386. (C.)

5. A testator in his will described himself as "of Fleenstown;" devised "this townland and sixty-eight acres of M." to his son W.; and concluded thus:—"My will is, that any deficiency there may be of chattel property for payment of the pecuniary legacies, the same will be made up by my son W. out of this farm, it being the principal part of my property." *Held*, that the words "this farm" applied to Fleenstown alone.—*Kennedy v. K.*, 8 I. Jur. 141. (C.)

6. V., by will, gave to his daughters M. and E. legacies of £6500 each, charged upon his estate of C., and gave to his sons all the residue of his property. By deed the sons arranged that C. should be conveyed to W. the eldest son, charged with sums of £4000 each for the younger sons. E., who had no

assets save the legacy of £6500, by will gave T., one of the sons of V., a legacy of £446. M. also had no assets save the legacy of £6500, and by will gave T. a legacy of £400. F., another of the sons of V., died intestate, and T., as one of his next-of-kin, became entitled to a distributive share of his assets, including the £4000 charged on C. T. by his will bequeathed his patrimony bonds and judgment debts charged on the estate of Clonea. *Held*, that the word "patrimony" included T.'s distributive share of F.'s charge of £4000, but did not include the legacies under M.'s and E.'s wills.

The word "patrimony" is not necessarily restricted to property derived directly from a father.

T., by will in 1845, bequeathed personal estates, in the following terms:—"The interest of which I leave to X., and he is never to demand the principal so long as the interest is satisfactorily settled; and in case he shall die without male issue lawfully begotten, and arriving at the age of twenty-one years, it shall then descend to his brother Y., and his male issue lawfully begotten, and arriving at the age of twenty-one years; and in case he should die without such issue lawfully begotten, then I bequeath the same to W. and his family, on his taking the name of M., so that the estate may remain in the family; the interest of all bonds which remain on the estate to continue to remain on the estate, and to descend from heirs to heirs, as above stated." *Held*, that notwithstanding the 29th sec. of the Wills Act (7 W. 4 & 1 Vic., c. 26), the failure of issue intended could not be construed to be a failure of issue at the death of the first taker, a "contrary intention" appearing by the will; and that consequently the gift over was void for remoteness.—*Green v. Giles*, 5 I. C. R. 25; 1 I. Jur. N. S. 90. (C.)

7. V., by will, being seized of freehold estates, and possessed of chattels real, directed his executors to make out an inventory of his effects, which were to be sold by auction; and if he died "possessed of any funded or other property," to sell all for the benefit of his children. He also appointed his brothers trustees to his "children and property," and in the event of their declining to act, desired that his "property and children" should be placed under the Court of Chancery. *Held*, that the word "property" in the above general clause passed the real estates.

V., at the time of making his will, was seized in *quasi* fee of the lands of A., but the will contained an erroneous recital, that A. was settled on his eldest son. *Held*, that from the operation of the above general clause, A. must be taken to be excluded.—*Chibborn v. C.*, 2 I. Jur. N. S. 381. (C.)

8. Direction in a will to pay a debt by "annual instalments," out of rents and profits of real estate. *Held*, to mean payments out of rents and profits *de anno in annum*; not out of the *corpus* of the estate.—*Ker v. Hardman*, 3 I. Jur. N. S. 45. (C.)

1. V., seized of freeholds, and possessed of chattels real, by marriage settlement limited them, subject to his own life estate, to the issue of the marriage, to be distributed as he should appoint.

V., by will, reciting his settlement, directed his chattels to be sold, and the produce applied in payment of funeral and testamentary expenses, and debts, and of the charges on his real estate; and devised the residue to his then unmarried daughters, as tenants in common. He gave provisions, in satisfaction of their claims under the settlement, to two of his sons, and devised portion of the settled lands, and all others of which he should die seized, or have a power over, to his unmarried daughters, in equal shares.

By deed of 1st Aug. 1860, made on the marriage of S., one of V.'s daughters unmarried at the date of the will, he charged the lands of D., part of the settled estate, with £600 for S.; and by codicil of the same date, revoked the gifts to her in his will. *Held*, that V. by the words in his will, "his real estate," did not mean to include the lands comprised in the settlement; and that the £600 were not charged upon his personal estate.—*Ellis v. E.*, 13 I. C. R. 484. (C.)

2. In 1830, V. made his will, the draft of which purported to devise all his lands, situate in several counties, among others in the county of Sligo, where the lands in the lease were situate, and "elsewhere in Ireland," to trustees, upon trust for his second son. Before the execution of the will, V. drew a pen through the word "Sligo," without making it illegible. *Held*, that evidence was not admissible to show that he intended that the lands in Sligo should not pass by the will.—*Phibbs v. Cooper*, 7 I. C. R. 422. (R.)

3. V., being seized of the lands of A., B., C., and D., under a lease, by will, reciting that he was possessed of a lease for lives renewable for ever, of lands, which were denominated A., B., and C., directed that they should, as soon after his decease as possible, be sold, and after payment of his just debts, be equally divided between W. and L., as tenants in common and not as joint tenants. He then specified the debts "affecting those lands," and, after legacies, appointed W. residuary legatee of all his real and personal estate and effects. The specified debts were judgment debts which had been registered as mortgages against all the lands comprised in the lease. *Held*, that D. was included in the specific devise.—*West v. Lawday*, 14 I. C. R. 209. (R.) —[*Affirmed: ibid*, 340; 8 I. Jur. N. S. 23. (C. A.)]

4. V., being seized of real estate, made her will, dated the 10th May 1849, and thereby did "give and bequeath to her brother-in-law A., everything she might die possessed of, with the exception of her furniture; and appointed him her sole executor and residuary legatee." *Held*, that the real estate passed to A. under the will.—*In re Gyles's Estate*, 14 I. C. R. 311; 8 I. Jur. N. S. 315. (L.E.C.)

5. V. made his will, reciting that under the will of J., he was seized in fee of the lands of N. and W., and possessed of leasehold interests in the lands of N., and the lands of B. The will then recited that V. believed that he would have personal property, exclusive of his chattel interests in land, sufficient to pay off his debts and funeral and testamentary expenses. It then recited his desire to give E. all his said fee-simple and leasehold estates, he (E.) paying £10,042. V. then devised to E. all his "estate and interest in the aforesaid lands and houses, upon the terms of his paying to me or my executor the said sum of £10,042."

V., at his decease, was entitled, under the will of J., to the lands of C. B., which had been held for a term which had expired before the date of V.'s will. *Held*, that the lands of C. B. did not pass to E. under V.'s will.—*Mooney v. M'Donnell*, 15 I. C. R. 84. (C.A.)

6. V., having previously disposed of all his property, real and personal, bequeathed all the rest, residue, and remainder of his properties, debentures, funded, and securities, &c., to be equally divided, share and share alike, amongst his then surviving children as residuary legatees. *Held*, that real estate, the devise of which had failed, passed by that clause.—*Loftus v. Stoney*, 17 I. C. R. 178. (R.)

#### XV. 4. b. *Personal Estate.*

1. *Generally: whether general Personal Estate, or Residue passes.*
2. *When Chattels, Stock, &c., pass, by what Words.*

#### XV. 4. b. 1. *Personal Estate generally: whether general Personal Estate, or Residue passes.*

7. V., after bequeathing several legacies to his relations, and for charitable purposes, said, in his will:—"To meet these I have £200 in the Bank of Ireland. The little matters of furniture will be sold. If anything shall remain, after all being paid, the Rev. Mr. G. will divide it amongst the poor." At his death, V. had not any such sum as £200 in the Bank of Ireland; but his property consisted of £1462. 2s. 8d., of £3½ per cent. stock, and £52 in cash. *Held*, that the general residue of his estate passed under the residuary clause.—*Gaffney v. Hevey*, 1 Dr. & Wal. 12. (C.)

8. The right to set aside a conveyance improperly obtained by a solicitor from his client, is devisable.—*Uppington v. Bullen*, 2 Dr. & War. 184; 1 Con. & L. 291. (C.)

9. V. by will, after bequeathing legacies, and directing his debts to be paid, ordered all his effects to be sold by auction; such money or valuables as he died possessed of to be handed over to D., to be applied to the use of M., to a certain amount during her life; if after her demise any residue remained, such

residue to be expended in masses for his soul's sake; and directed a security in the hands of J. to be applied as above directed. "My Royal Canal stock is to be sold; also, my Grand Canal debentures, as necessity may require, at the discretion of my executors." *Held*, that the whole of the residue, including the stock and debentures, was disposed of under the residuary clause, and passed to the executors on the death of M.

That the bequest for masses for the testator's soul was valid, and not void as a superstitious use.—*Read v. Hodgson*, 7 I. E. R. 17. (R.)

1. A testator, having specifically bequeathed to several persons, including A., moneys which he possessed in government and other securities, directed that five persons named, should each receive £100; and added:—"to pay this £500, my just debts, and funeral expenses, a sufficiency will be found in my bankers' and agent's hands, with the interest due on my funded property; and whatever sum or sums should be over, it is my will should be the property of A." *Held*, that the bequest to A. was a general residuary bequest of the entire estate.—*Vincent v. Fitzgerald*, 2 I. Jur. 177. (C.)

2. V., by will dated in 1837, bequeathed legacies, and proceeded as follows:—"To my son, I give, devise, and bequeath all my lands and tenements, rights and credits, *subject to the legacies aforesaid, and my debts; the remainder of my property* to be disposed of by him to and amongst his children in such shares and proportions as he shall think proper." In 1839 he added a codicil, by which he merely made a declaration with reference to one of the legacies. In 1845 the son died, in V.'s life, and without having made any appointment amongst his children. V. having died—*Held*, that the will gave the son a power coupled with a trust, and that accordingly his children were entitled as well to the real as to the personal estate of V. in equal shares.

*Semble*—The general personal estate of V. would have passed under the words "rights and credits" alone, even if the interlineations had not been made.

The effect of interlineations considered.—*Hutchinson v. H.*, 13 I. E. R. 332. (C.)

3. V. having devised all his real estate to certain persons, and bequeathed "the sum of £11,086" in British stock to his nephews, bequeathed to his niece, F., "whatsoever sum or sums he had in Irish £3½ per cent. consols." After some other specific legacies, he stated it to be his will that five of his female relatives, whom he named, should receive each £100 to purchase rings. The will then proceeded thus:—"To pay this £500, my just debts, and funeral expenses, a sufficiency will be found in the hands of Messrs. Coutts and Company, my bankers, and Messrs. Cox and Company, my agents, with the interest due on my funded property, with any balance that might be in my private agent, G.V.'s hands; and

whatever sum or sums should be over, it is my will should be the property of my dear niece, F." *Held*, that the last mentioned bequest to F. comprised the general residue of the testator's personal estate, and was not limited to the residue of the funds indicated by him as sufficient to meet the legacy of £500, and his debts and funeral expenses.—*Vincent v. Fitzgerald*, 2 I. C. R. 256; 2 I. Jur. 177. (C.)

4. V., living in India, and possessed of a share of a sum charged on lands in Ireland, made his will in India; and thereby, after making several bequests in Company's rupees, proceeded as follows:—"I desire that my plate, clothea, horses, and books, with the exception of those my wife shall select, together with all my other personal property, with the following exceptions, be sold to the best advantage, and the proceeds appropriated to the liquidation of my just debts; the balance, if any, to be handed over to my wife to assist in defraying her expenses to England." He then bequeathed his watch and chain, and mathematical instruments of every description, and his professional books, to his brother-in-law, and appointed executors for India, and executors "at home." *Held*, that the share in the Irish charge passed as part of V.'s "other personal property."—*Armstrong v. A.*, 9 I. C. R. 487; Dr. Rep. temp. Napier, 280. (C.)

5. By will of 1821, a testator devised the lands of C., which he held for three lives and thirty-one years, to trustees and their heirs, in trust to permit his wife to receive an annuity; and on further trust, to apply a yearly sum to raise £500 for his daughter; and, subject to the annuity and charge, devised the interest in the lands to his son R., and his heirs; and as to all the rest, residue and remainder of his property, consisting of stock, &c., and other property not thereby disposed of, gave, devised, and bequeathed it to his wife, subject to the discharge of his just debts, and directed her to apply it, in the first instance, in discharge of them; and in case of his said residuary property being insufficient to pay his just debts, he charged other lands therein before devised to his son J. with a portion of the deficiency, and the lands therein before devised to his son R. with another portion of the deficiency. R. died in his father's lifetime. *Held*, that the reversionary term of thirty-one years in the lands of C. passed by the residuary clause.

Lapsed bequests of personal estate will pass by a residuary clause, unless an intention be apparent to exclude them.—*Blackford v. Long*, 7 I. C. R. 87. (R.)

6. V., by will, after directing his debts to be paid, and bequeathing legacies, left all the residue of his personal estate to his executors, in trust, to pay the interest to his wife, A., for life. *Held*, that the reversionary interest in the stock transferred to the trustees to answer the jointure passed by the residuary bequest, no intention to exclude it appearing by the will.—*Napier v. Staples*, 10 I. C. R. 344. (R.)

1. V., after reciting that £50,000 were charged on estates, and bore interest at £4 per cent., and were payable, subject to a power of appointment, to the male issue of his marriage, and in certain events, reverted to him, bequeathed that sum, upon trust, to pay out of the interest an annuity to his wife, and the residue of the interest to his granddaughter for life; and directed that, with the exception of that sum so charged, all his debts, legacies, and legacy duties, &c., should be paid and payable out of such portions of his estate as were not specifically bequeathed; and directed that all his legacies should be paid within twelve months after his decease, without any deduction for legacy or stamp duty, and that all his legacies should bear interest at the rate of £5 per cent. from the time of his death; and further directed that his executors should pay the legacy duties payable on the legacies, and that all legacies thereby bequeathed should be payable without any deduction whatever. *Held*, that the £5000 were payable free from legacy duty.—*Ferguson v. O'Gilby*, 12 I. C. R. 411. (R.)

XV. 4. b. 2. *When Chattels, Stock, &c., pass; by what Words.*

2. V. bequeathed to her "uncle, P., the interest on £200, being part of a greater sum, in government stock, now remaining in" her name in the Bank of Ireland; after his death, "this principal sum of £200 to be divided equally between the children of P." Neither at the date of her will, nor at her death, had V. any stock in her name; but she was entitled to £1000 stock standing in her mother's name, whose executrix and sole residuary legatee V. was. *Held*, that the legacy was specific, and that £200 of the stock, standing in the name of her mother, passed to the legatee.—*Power v. Leneham*, 2 Jon. 728. (E.E.)

3. Under a bequest of "all my Irish funded property, standing in my name in the Bank of Ireland," government debentures, which were in the hands of the testator's bankers at the date of his will, do not pass.

*Semble*—They would not pass under the description of "Irish funded property" generally.—*Ridge v. Newton*, 4 I. E. R. 389; 2 Dr. & War. 39; 1 Con. & L. 381. (C.)

4. *Semble*—Stronger words are required to exonerate personal estate from payment of debts than of legacies. A gift of household furniture, plate, house linen, and all other chattel property, is not a general bequest of the entire personal estate, but merely of personal estate, *ejusdem generis*.—*Lamphier v. Despard*, 1 Con. & L. 200; 2 Dr. & War. 59; 4 I. E. R. 335. (C.)

5. A bequest of "foreign bonds and other securities"—*Held*, to pass foreign securities only, notwithstanding that testator had a very large personal estate vested in the British funds.—*Ferguson v. Ogilby*, 2 Dr. & War. 548; 1 Con. & L. 554. (C.)

6. Leaseholds for lives—*Held*, not to pass under a bequest of £1500, "together with any further property," but to pass under a residuary devise of the testator's "worldly estate and fortune not heretofore or hereby disposed of." The word "property" is quite sufficient, if not restrained by the context, to pass real estate.—*Acheson v. Fair*, 2 Con. & L. 208; 3 Dr. & War. 512. (C.)

7. A mere gift of money may pass whatever is the representative of money. The expression "money" may represent the entire personal estate.—*Stratton v. Hilles*, 2 Dr. & War. 51. (C.)

8. I. O. U.'s do not pass under a specific legacy of money and securities for money.—*Barry v. Harding*, 7 I. E. R. 317; 1 Jon. & L. 475. (C.)

9. Money in the hands of the salesmaster whom a testator was in the habit of employing, is not "ready money," within the meaning of these words in a will.—*Smith v. Butler*, 9 I. E. R. 398; 3 Jon. & L. 565. (C.)

10. V., after devising fee-simple estates to A. for life, with remainder to his first and other sons in tail, and like remainders to B. for life, and to his sons in tail and to several others, bequeathed real and personal chattels, in trust, to permit A. to receive the issues and profits for life, and after his decease, to permit "each and every of the several other persons aforesaid, to whom an estate for life in the real estates was herein before limited, successively and as each of them shall become seized of said real and freehold estates under the aforesaid limitations thereof, to take and receive the rents, issues, and profits thereof, for and during the term of his and their natural life and lives respectively; and from and after the decease of the last of the said last-mentioned tenants for life as shall become seized in manner aforesaid, or if none of them shall so become seized, then, from and after the decease of the said A., upon trust to grant, assign, and convey" the chattels "to such person or persons as shall then become seized of the said real and freehold estates under any of the limitations aforesaid." *Held*, that the chattels vested in a son of A., who was tenant in tail of the real estates at the death of A.; and did not vest in an elder son of A., a prior tenant in tail who died in the lifetime of A., or remain in contingency until the death of the last of the successive tenants for life.—*Potts v. P.*, 9 I. E. R. 577; 3 Jon. & L. 353. (C.)—[*Affd.*: 1 H. L. Cas. 671.]

11. Under a devise to A., of testator's house, with the lands adjoining thereunto, as then used and occupied by himself, and also all the household and other furniture, pictures, plate, books, and all other things whatsoever usually therein, or considered as belonging thereto, except only cash, bank notes, and securities for money; neither carriages, carriage and riding-horses used by testator to accommodate himself and his family, nor farming stock and utensils used by him in



cultivating said lands, pass, although some were usually in the stables and on the lands, and were there at the testator's death.—*Pennefather v. Bury*, 9 I. E. R. 586; 3 Jon. & L. 727. (C.)

1. By an ante-nuptial settlement, £7356, the property of the wife, were vested upon trust that, in case the husband, V., should within six months, by covenant and by a mortgage of hereditaments belonging to him, secure payment to them of £4000, they should pay £4356 to him out of the trust money (£356 out of the sum so paid to be for his own use); and upon trust, as to the residue of the trust-money left after payment of the £4356, for the wife for her separate use during the joint lives of husband and wife, and to the survivor of them for life; and after the decease of the survivor, upon trusts for the children of the marriage; if no children, upon trust for the wife absolutely if she survived V., but if she died in his life, upon trust as she should appoint; in default of appointment, upon trust for V. absolutely. As to the mortgage debt of £4000, it was declared that the trustees should stand possessed thereof, and of the securities for it, upon trust to pay the interest to V. for life; after his decease, to the wife for life; after the decease of the survivor, upon the same trusts as to the principal of the mortgage debt as were declared of the residue of the trust-money, for the benefit of the children of the marriage; if no children, upon trust for V., his executors, &c., absolutely. Shortly after the marriage, V. mortgaged W. for £4000, to the trustees, who thereupon paid him £4356. By will, V. gave other trustees all his property, real and personal, upon trust to hold the lands of W. and B., first to fulfil the trusts of his settlement; then for his nephew S. for life; and after his death to his children as he should appoint; remainder over. Several of these remainders over were to females "as *femmes soles*." V., after bequeathing stock to his sister M. and her children, proceeded thus:—"I wish to alter a portion of that part of my will above relating to the funded property bequeathed for M. or her family: should my wife have a child by me, they are to pay S. £500 out of it; should such child or children survive me, my heirs, though life-tenants, may cut, sell, and carry away turf off said lands, and cut timber as well off the demesne of W. as in the churchyard therein." There was also the following clause:—"I give to my beloved wife all our furniture, horses, and moveables at Chester, as well as all her own fortune not included in our marriage settlement, for her sole use as a *femme sole* should she marry again." V. died without issue. *Held*, that by the devise of W. and B. upon trust to fulfil the trusts of the settlement, V. operated both those estates with the mortgage debt; but that he did not devise them upon the same limitations as were contained, in regard to the mortgage debt, in the settlement; and accordingly that neither V.'s wife took, nor would the children, if there had been any of the marriage, have taken any estate or interest in those lands under that devise,

save as securities for the mortgage debt, but were excluded in favour of S. and the other devisees over.

That V.'s ultimate absolute interest in the £4000 mortgage debt passed to the wife under the bequest to her of all her own fortune not included in the marriage settlement.—*O'Reilly v. Smyth*, 1 I. C. R. 349; 3 I. Jur. 229. (C.)

2. V. bequeathed to his wife F. all his household furniture and plate, and subject thereto left all his property to his executors, in trust, immediately after his decease, or so soon as they conveniently could, to sell all his chattels (except his household furniture and plate, and his horse "Harkaway"), and to invest the produce thereof; and as to his horse, desired that, should £1000 or upwards be offered for him, his executors should sell him; but if that sum could not be realised for him, that he should be kept so long as he should live, and let each season; and that, if sold, the price should likewise be invested. He then devised an annuity, and subject thereto left all the rest of his property in trust to pay the rents, issues, and the whole and entire produce thereof, to his wife, for life, and after his decease to convey it over. The horse was not sold, but was let out as a sire. *Held*, that F. was not entitled during her life to the clear earnings of the horse.

*Semble*—That a value should have been placed on the earnings of the horse, and F. was entitled to the Court rate of interest on such value.—*Arnold v. Ennis*, 2 I. C. R. 601. (R.)

3. V., by will, after devises and bequests, left the residue of his property to his brother, whom he appointed his executor. By codicil, he left to his wife one-fourth part of all moneys which he might be possessed of at his decease, for her own absolute use and property; and left her the life interest, during her life, of the other three-fourths of the moneys. He also left her a house, together with all furniture, wines, carriages, horses, linen, china, and other effects there and elsewhere in England; and by another codicil bequeathed to his wife other property in England, which he particularly described.—*Held*, that £3 per cent. stock, consols, and bank stock, did not pass under the bequest to the wife.

A bequest of "moneys," unless aided by the context, will not pass stock in the funds.

The word "effects" will comprise the entire personal estate of the testator, unless restrained within narrower limits by the context.—*Dunally v. D.*, 6 I. C. R. 540. (R.)

4. V., living in India, and possessed of a share of £10,000, charged on lands in Ireland, made his will in India, and thereby, after making several bequests in Company's rupees, proceeded as follows:—"I desire that my plate, clothes, horses, and books, with the exception of those my wife shall select, together with all my other personal property, with the following exceptions, be sold to the best

advantage, and the proceeds be appropriated to the liquidation of my just debts; the balance, if any, to be handed over to my wife, to assist in defraying her expenses to England." He then bequeathed his watch and chain, and mathematical instruments of every description, and his professional books, to his brother-in-law; and appointed executors for India, and executors "at home." *Held*, that the share in the Irish charge passed as part of A.'s "other personal property."—*Armstrong v. A.*, 9 I. C. R. 487; *Dr. Rep., temp. Napier*, 280. (C.)

1. Bequest, after several pecuniary legacies, "of all my bonds, shares in the bank, to A., by paying the above-mentioned sums." The testator was possessed of several bonds, upon which judgment had been entered, and of some which were barred by the Statute of Limitations. *Held*, that the moneys due on the judgments entered on the bonds passed by this bequest.—*Mercer v. M.*, 10 I. C. R. 505; 5 I. Jur. N. S. 296. (C.)

2. V., having no government or railway stock, but having stock-in-trade, which he specifically bequeathed, farming stock, furniture, plate, and a small quantity of wine, &c., directed by will that his wife should have the use of all his furniture, stock, and house linen, and all his plate, until his son B. should have arrived at the age of twenty-one years. *Held*, that the farming stock passed by the bequest.

Two persons carried on business in partnership: one died, having bequeathed his stock-in-trade.

*Semble*.—That his executor was chargeable with a moiety of the value of the stock-in-trade at the time of his death.

V. held lands from B., under an agreement for a lease, at a rent of £54. A receiver was appointed over B.'s interest; and the rent was abated by the Court to £33. V. died, having appointed C. executor and guardian of his children. B.'s interest was sold in the I. E. Court, and purchased by C. The rental and conveyance referred to the agreement, but stated that the lands were held at the abated rent (£33). *Held*, in a suit to administer V.'s estate, that C.'s executrix was entitled to credit for the abated rent only.—*Creagh v. C.*, 13 I. C. R. 28. (R.)—[*Affid. ibid.*, 504; 7 I. Jur. N. S. 406. (C.A.)]

3. Bequest of "all my right and title to my property in the town of R., namely, my dwelling-house and household furniture, and all things now therein, in my possession, especially my car-horse, and covered and side-cars." *Held*, that bank notes, known by the testator to be in the house at the time when the will was made, passed to the legatee.—*Mahony v. Donovan*, 14 I. C. R. 388. (C.A.)—[*Affg.* 14 I. C. R. 462. (R.)]

4. V. devised and bequeathed all his real and personal estate to his daughter, subject to the following conditions, and to the further disposition of his property in the event of the non-observance thereof:—First, that his daughter should not marry a cousin-

german. If she made such a marriage, he gave her £1000, subject to the next condition; and left all his property, that should remain after payment of the £1000, to his brother and his brother's wife, and the survivor of them; and, after such survivor's death, left his farms of C. and O. to their sons and their issue as tenants in common; with like remainder to his brother's unmarried daughters; and all the residue of his property, save his said farms, he left to his nieces, after payment of the £1000. Second condition:—That, if his daughter should marry, a jointure of £200 a-year should be settled on her, and £4000 at least should be secured to the issue of such marriage. In the event of such a jointure, and the £4000 not being so secured, he left all his property, if his daughter did not marry a cousin-german (or, if she did, then in lieu thereof, said sum of £1000), after such marriage, upon trust, to pay its annual income to her, for her separate use; and after her death to dispose of all his property, or of the sum of £1000 among her issue, as she should appoint; if there should be no issue, as she should direct; but, having regard to the condition that, if she married, and died without lawful issue, the lands of C. and G. should go in the manner therein mentioned. He left all the residue of his property, save those farms, to his nieces, subject to a sum which he empowered his daughter to dispose of in a certain event, which did not occur. She married her cousin-german, who made no settlement, and died without issue, and without having made any appointment of the £1000. *Held*, that her administrator was entitled to it.—*Welby v. Cormick*, 16 I. C. R. 74. (R.)

5. A testator, V., directed his household furniture, &c., to be sold, and the produce thereof, with other moneys, to be laid out in stock; the interest to be paid to his wife for life; after her death, the stock to be sold, and one-half of the produce paid to H., eldest son of his niece, E.; the other moiety to be divided equally among E.'s children. Secondly; V. left all stock, &c., of which he should die possessed to his wife for life; and directed that, after her death, it should be sold, and £3000 of the produce paid to H.; the remainder to be divided equally among all E.'s other children. He appointed executors. Thirdly; V. devised his lands in France to his wife for life; after her death, one-half to go to H.; the other moiety to be divided equally among all E.'s other children. He appointed an executor of his property in France, and directed that his executors should not be liable for any loss which might happen in placing out his property according as his will directed, except for wilful neglect, &c.; and that, if H. died before he attained age, the "said property and effects" should go to V.'s nearest heirs on his mother's side, equally. E. was his next-of-kin, and his nearest heir on the side of his father and of his mother. H. died under age. *Held*, that the words "my said property and ef-

fects" did not mean all V.'s property, but was confined to that portion thereof which had been devised and bequeathed to H.

That those words were not confined to the clause in which they occurred, but applied to all the property which H. would have taken.

That E., though next-of-kin, and heir on the father's as well as on the mother's side, took H.'s share under that third clause.

The word "said" applies to the immediate antecedent.—*In re Willomier's Trusts*, 16 I. C. R. 389. (R.)

**XV. 4. c. Property acquired after the Date of the Will.**

[See 1 Vic., c. 26.]

**XV. 4. d. Property contracted to be Purchased or Sold.**

1. *Quere*—Whether the devisee of an estate which the testator, after making his will, contracts to sell, is entitled to the purchase-money?—*Saunders v. Cramer*, 5 I. E. R. 12; 3 Dr. & War. 87; 2 Con. & L. 54. (C.)

**XV. 5. Devises & Bequests; when Valid or Void.**

a. *Generally*.

b. *Remoteness and Perpetuity*. See PERPETUITY.

c. *Accumulations*.

d. *Mistake or Uncertainty in*.

**XV. 5. a. Generally.**

2. V., possessed of £4000 stock, bequeathed £2000 of it to X.; £1000 of the remainder he bequeathed for the use of the Protestant school of St. Peter's parish, and another £1000 for the use of the school attached to the Episcopal Chapel in B.-street. The chapel in B.-street had no school attached to it; B.-street was in St. Peter's parish. *Held*, that with regard to the second £1000, the will showed a general charitable intention, which might be executed *cy-pres* in favour of Protestant schools in St. Peter's parish. It was referred to the Master to settle a scheme.

The costs, down to, and including the hearing, were ordered to be paid out of the residue; the costs of the reference to be borne by the fund.—*Daly v. Att.-Gen.*, 11 I. C. R. 41; 5 I. Jur. N. S. 297. (C.)

**XV. 5. b. Remoteness and Perpetuity. See PERPETUITY.**

3. V., by a codicil, reciting that specified lands produced a clear yearly rental of £237, devised them in trust for charitable purposes. V. then directed that, if the rents were increased by any new letting, the surplus so to arise should go to the sole use of the person or persons of the S. & C. families who, for the time being, should be lords or ladies of the manor of D.; and, if those families did not protect those charities, or if the families became extinct, in either case, the trustees were directed to apply the surplus rents as an addition to the provision already made for the

charity. *Held*, that the gift of the surplus rents to the members of the S. & C. families was a good equitable devise in fee; and that the gift over to the trustees of the charity was void for remoteness.—*Connors v. Ch. D. & B. v. Clifford*, 1 Dr. & War. 245. (C.)

4. V., entitled to leaseholds for years, bequeathed them to trustees on trust to permit his grandson, B., to take the profits during life; after his decease to permit such person who, for the time being, would take by descent as heir male of the body of B., to take the profits until some such person should attain age; then to convey same to that person, his executors, &c.; but, if no such person should live to attain age, then in trust to permit such person and persons successively, who for the time being would take by descent as heirs male of the body of V.'s son, the father of B., to take the profits until one of them should attain age; then to convey same to such heir male first attaining age, his executors, &c. At the death of B., his son and heir, A., having attained age, entered into possession of the leaseholds. V.'s next-of-kin filed a bill against A. *Held*, that he had not a good title to the leaseholds;—that the bequest to the heir male of the grandson attaining age was void for remoteness, and therefore that the next-of-kin of V., at his death, became entitled to their distributive shares of the property on B.'s death.—*Lord Dungannon v. Smith*, 12 Cl. & F. 546; 10 Jur. 721.—[Affg. Fl. & K. 638. (R.); 1 Dr. & War. 543, n.; 5 I. E. R. 84.]

5. A testator bequeathed leaseholds in trust to apply the rents for the maintenance of his grandson, A., until he should attain 21 years; and then to permit A. to take the rents and profits for his life; and from and after his decease to permit the person who for the time being would take by descent, as heir male of the body of A., to take the rents and profits thereof until some such person should attain the age of 21 years, and then to convey the same to such person on attaining the age of 21 years.

*Semble*—That all the limitations after that to A. for his life, were void for remoteness.

When the first limitation is void, all those following it are void also.—*Ker v. Lord Dungannon*, 1 Dr. & War. 509, 539, 540; 1 Con. & L. 385; 4 I. E. R. 343. (C.)

6. V. bequeathed chattels real upon trust to permit his grandson to receive the rents for life, and after his death to permit the person who, for the time being, would take by descent as heir male of his grandson, to receive the rents until some such person should attain age, and then to convey to such person so attaining twenty-one. But if there should be no such person who attained twenty-one, then to permit the persons successively who would take as heirs male of V.'s son, to receive the rents until some such person attained twenty-one, and then to convey to the first such person so attaining age. The eldest son of V.'s grandson attained twenty-one, and survived his father. *Held*, upon demurrer, that the limitations after the life interest

given to V.'s grandson were void for remoteness.—*Smith v. Lord Dungannon*, 5 I. E. R. 84. (R.)

1. A money fund was settled in trust for the issue of the marriage of V. and his wife; after their deaths, in such shares, &c., and at such times as V. should appoint. V., by his will, appointed the fund to his three sons in equal shares; "their respective portions to be paid to them as and when they should attain their respective ages of twenty-five years, and not before." *Held*, that the appointment was void for remoteness.—*Massey v. Barton*, 7 I. E. R. 95. (R.)

2. V., by will, in 1806, bequeathed a chattel lease to R. and the heirs of his body; and if R. should happen to die without issue, then to C. and the heirs of his body; and if both R. and C. should happen to die without issue, then to J. and the heirs of his body. V. then directed that if R. and C. died without issue in the life of J., "whereby J. would become entitled to the said premises," £2000, bequeathed to J., should be paid to other persons; and further, that if R., C., and J. should all happen to die without issue, or if R. and C. should die without issue in the life of J., and he should refuse to pay the £2000, if he had received it under the will, then, and in either of such cases, V. gave the lease to G. and the heirs of his body. He then directed that, if "by either of the events aforesaid happening in the lifetime of G., he should become entitled to the lease," then he should pay the £2000 bequeathed to him to other persons; and if R., C., J., and G. should all happen to die without issue, or if R., C., and J. should die without issue in the lifetime of G., and he should refuse or neglect to pay over the £2000, then, and in either of such cases, he gave the lease to T. and the heirs of his body; and if by "either of the events last mentioned happening in the lifetime of T., he should become entitled to the lease," then he was to pay over £2000 to certain persons.

R., C., and J. all died without having a child, in the lifetime of G. and T. G. did not pay over the £2000. *Held*, that the bequest to T. was too remote, and did not entitle him to the lease.

V. then gave other lands to X. and the heirs of his body; and if he should "happen to die without issue living at the time of his death," then V. gave these lands to R. and the heirs of his body, and to C. and the heirs of his body the first named chattel lease; and if X. and R. should "die without leaving issue," then he gave the second set of lands to C., and the lease to J. and the heirs of his body. V. then declared that, if X., R., and J. should "die without issue," or if J., becoming entitled to the lease by the last bequest, should omit to pay over £2000 to the persons named, then he gave the lease to G. and the heirs of his body; and directed that, "in case X., R., and C. should die without issue as aforesaid," then the second set of lands should go over to J. and the heirs of his body, and the lease should go to G. and the heirs of his

body; and if J. and G. should respectively become entitled to the lands devised to them, in case of the deaths of X., R., and C., without issue, in the life of G., then G. was to pay £2000 bequeathed to him over to certain persons. And if "X., R., C. and J., should die without issue as aforesaid," then he gave to "G. and the heirs of his body the second set of lands, unto T. and the heirs of his body, and his several estates and interests in the leasehold lands." *Held*, that the words "die without issue" were to be read in all those bequests "die without leaving issue;" that the word "and" in the last clause might be transposed, and placed immediately before the words "unto T. and the heirs of his body," and that X., R., C., and J. having all died childless, T. was entitled to the lease.—*Falkiner v. Hornidge*, 6 I. C. R. 551. (C.)—[*Affid.*: 8 I. C. R. 184. (C.A.)]

3. Bequest of a portion of a chattel real "to my son J., and if J. dies without a lawful male heir, his part of the land falls to his brother R. I also order that the part of the lands which I bequeath to my son J. is to fall to his youngest son without any incumbrance." *Held*, that J. did not take an absolute interest in his portion of the lands, and that the gift over to R. was not too remote.—*Dodds v. D.*, 11 I. C. R. 374; 6 I. Jur. N. S. 75. (C.A.)—[*Affg. decision*, 10 I. C. R. 476; 5 I. Jur. N. S. 357. (C.)]

4. Bequests to unborn sons which did not vest within 21 years after the death of the testatrix—*Held*, void.

Limitations over within 21 years, which depended on a void gift—*Held*, void.—*Armstrong v. West*, 8 I. Jur. N. S. 144. (M.O.)

#### XV. 5. c. Accumulations.

5. When the limitations (which are valid) of an estate have annexed to them trusts for accumulation which are in their creation invalid, by reason of their indefiniteness, the Court, when dealing with the instrument, will not support the trusts for accumulation so far as the testator might have carried them; but will reject them altogether.—*Ker v. Lord Dungannon*, 4 I. E. R. 843; 1 Dr. & War. 509; 1 Con. & L. 335. (C.)

#### XV. 5. d. Mistake or Uncertainty in.

6. V. bequeathed all her property, real and personal, to her son; and, in the event of his receiving a sum of £450 or thereabouts, to which she considered herself entitled, she requested that he would add to that sum £50, to make up £400 which she left to her granddaughter. V. received the £450. *Held*, that the legacy, as to the £450, was not specific or demonstrative, but conditional on the son's receiving the £450; and that the granddaughter was not entitled to be paid that sum out of the general assets of the testatrix. That "£400" should by construction be read "£500."

Though the Court may inspect the original will of personal estate, with a view to its con-

struction, it has not jurisdiction to decide that the probate is erroneous.—*Taylor v. Creagh*, 8 I. C. R. 281. (R.)

**XV. 6. Description of Legatees: who take, and are capable of taking.**

- a. *Legitimate Children, and Grandchildren.*
- b. *Illegitimate Children.*
- c. *Heirs; Heirs Male.*
- d. *Issue.*
- e. *Relations.*
- f. *Next-of-kin.*
- g. *Personal Representatives, or Legal Personal Representatives.*
- h. *Executors.* See EXECUTORS, VII.
- i. *Family: Name and Blood: next Eldest.*
- j. *Nephews and Nieces: Uncles and Aunts, &c.*
- k. *First and Second Cousins.*
- l. *Government.*
- m. *Servants.*
- n. *When to be in esse.* See infra, Lapsed Legacies.
- o. *Whether per Capita or per Stirpes.*
- p. *Mistakes.* See supra, XV, 5. d.
- q. *Wrong or Imperfect Descriptions, &c.*
- r. *Witness.* See PRACTICE, EVIDENCE.
- s. *Classes.*

**XV. 6. a. Legitimate Children and Grandchildren.**

1. V. bequeathed specified property, after his wife's death, thus:—"To our three children, H. and J. now residing with me, our sons, and the before-named A., our daughter." This last member of the sentence had been stroked with a pen, as if to obliterate the words; but they remained quite legible. Afterwards, V. re-acknowledged the will in the presence of three witnesses. *Held*, that the descriptive words, "our three children," were sufficient to entitle A. to take, even if the obliteration was complete, which it was not.—*Boyd v. Martin*, 2 Dr. & Wal. 355. (C.)

2. A general gift of the corpus of a fund to the children of A., described as "her children," after a previous gift of the interest to her for the maintenance of her children, W. and R.; *Held*, to be confined to the two before-named, and not to include after-born children.—*In re Connor*, 8 I. E. R. 401; 2 Jon. & L. 456. (C.)

**XV. 6. b. Illegitimate Children.**

3. *Semble*—Every gift to illegitimate children not in *esse* is void; and there is no distinction between cases in which they are described by reference to a particular father, and when not.—*In re Connor*, 8 I. E. R. 401; 2 Jon. & L. 456. (C.)

4. A. devise to an illegitimate son and his heirs gives an estate in fee-simple.—*Daly v. Aldworth*, 8 I. Jur. N. S. 141. (C.)

**XV. 6. c. Heirs; Heirs Male.**

5. V. devised upon trust, "and, in case my said son M. shall leave no child or children him surviving, then upon trust to convey so much of my estate of X. as shall be worth or can be let for £130 as aforesaid, without prejudice as aforesaid, to my own right heirs for ever." M. died without issue. *Held*, that "right heirs" meant the person who was heir at the death of the testator; not the person who was heir of the testator at the death of his son and heir, M., without issue.

*Locke v. Southwood*, 1 My. & Cr. 411, considered.—*In re Mathews's Estate*, 2 I. Jur. N. S. 47. (I.E.C.)

**XV. 6. d. Issue.**

6. When a will contains a general absolute devise of real and personal estate, and in a subsequent clause the testator uses language plainly restricting the absolute gift to one species of property, but the words do not confine it to that one, the restriction will be held applicable to both, in order to carry out his clear intention, unless there exists a plain necessity for excluding the other from its operation.

The word, "issue," in a will, may be held to mean "children," when that is the testator's manifest meaning.—*Ridgeway v. Muskitrick*, 1 Dr. & War. 84. (C.)

7. The word "issue" throughout marriage articles was confined to children, when in some clauses it was used as synonymous with "children."

The articles directed that if there should be no issue of the marriage, or all such issue should die in the husband's lifetime, the property should go to the husband, "issue" being held to mean children, after the usual clauses for vesting shares at twenty-one, &c., and survivorship and accruer. *Held*, proper to introduce a clause giving the fund to the husband absolutely in the event of his surviving the children.

The articles gave no direction, in case of no child's share vesting and some surviving the father; the property would have resulted to him. *Held*, proper to introduce also an express limitation to him in the latter event, though this would be the legal effect without one.—*Roche v. R.*, 8 I. E. R. 714. (C.)

8. V. bequeathed to her daughter A. the interest of £500 for life, and after her death to A.'s daughter B., upon her attaining age; and if B. died in the life of her mother, and if A. left no lawful issue living at her death, that sum was to go to V.'s grandchildren share and share alike; but if A. should have issue living at her decease, the £500 to go to and amongst such issue as she should appoint; for want of appointment, share and share alike; if A. had but one child living at her death, the £500 to be paid to such one child. B. died in her mother's (A.'s) lifetime, leaving nine children. A. died without children. *Held*, that "issue" in the will meant

"children;" and that the grandchildren of the testatrix were entitled to the fund in preference to the children of B., who were great-grandchildren of V.—*Murphy v. Segrave*, 6 I. C. R. 417; 2 I. Jur. N. S. 385. (R.)

1. A testator bequeathed four houses to his brother for life, then to the wife of his brother, and after the decease of them both, "to such of their children or issue as should survive them, to take and hold under the will; if more than one child, to take in equal shares; the issue of such children also to derive upon the death of their parents." One of the testator's nephews died before his mother,—*Held*, that his children did not take under the term "issue."—*Draper v. D.*, 4 I. Jur. 221. (C.)

2. V. bequeathed legacies, to his nephews and nieces, and directed that if any or all of them should leave legitimate issue, that issue respectively should have, possess, and enjoy the bequest which he made and intended for the parents of such issue respectively; but the sums devised to such of his nephews and nieces respectively as should not leave issue should go to the survivors or survivor of his said nephews and nieces, and to their issue. *Held*, that "issue" meant all the descendants, and that the survivors of the nephews and nieces, at the death of one of them, took her share absolutely.—*In re Kavanagh's Will*, 13 I. C. R. 120. (R.)

3. V., by will, directed the interest of the residue of his property to be paid to his three surviving daughters, and his son-in-law, the husband of his deceased daughter A.; and as to the principal sum directed that it should be vested (subject to certain bequests) for the issue of his late daughter A., and the issue of his other three daughters, so that after the decease of each of his respective daughters who should die and leave any issue, such issue should be entitled to receive the share of the interest of the property which his, her, or their mother respectively would be entitled to receive, and that the principal should be disposed of and given to such issue of his daughters respectively, share and share alike, on their respectively attaining age, or if female issue on their attaining age, or marrying with the consent of their guardians, therein after mentioned; and if any of his daughters died without leaving issue, then that the share of interest which said daughters so dying would be entitled to should go to the issue of his surviving daughters, and the issue of his deceased daughter A.; and the share of the principal sum whereon the same arose should go to the child or children of his said daughters; and if any of said daughters should die leaving children, and any of them should die before being entitled to receive his proportion, the surviving child or children, the issue of such daughter so dying should receive it; and he appointed guardians to his said grandchildren. *Held*, that "issue" meant "children."—*Black v. Campbell*, 14 I. C. R. 92. (R.)

4. V., owner in fee, by will, left his third son, Meredith Thompson, the lands of G., for ever; "but in case he should die unmarried, or without lawful issue, in that case he may will one-half of it as he pleases; and the other half to go share and share alike between my surviving sons or their families." The will ended in these words:—"All the bequests given my son, Robert Thompson, my grandson, Meredith Thompson, son to my son John, and also my other three sons, Meredith, Charles, and Hugh Thompson, of my property no part of it shall or will be liable, or pay any debts they may contract, nor sell or mortgage same; but always go in the male line, free of any debt of theirs." Meredith Thompson died without issue, having executed a disentailing deed of the lands of G., and devised them to B. and his heirs. *Held*, that Meredith Thompson took an estate tail under V.'s will.—*In re Thompson's Estate*, 14 I. C. R. 517; 9 I. Jur. N. S. 193. (L.E.C.)

#### XV. 6. e. Relations.

5. Bequest of personalty "to my relatives not named in my will, to whom and in what proportional sums my executors shall think fit and expedient." Testator appointed two executors—one proved the will, and died, the other renounced. *Held*, the surviving executor, not claiming to exercise the power of selecting the objects of the bequest, that this power was entirely gone, and the distribution of the fund devolved on the Court.

The testator at his death left surviving him children, grandchildren the issue of a deceased child, brothers, nephews, and nieces, some the issue of a living brother, and others the issue of two deceased brothers; and in his will left legacies to all his children, to one brother, and to all the issue of one living brother. *Held*, that the parties entitled under the bequest were the grandchildren, who were the next-of-kin according to the Statute of Distributions, omitting those to whom legacies had been left by the will.

The petition was filed by the nephew and nieces not named in the will, but their claim was displaced by the coming in of the grandchildren, who, having filed a charge, were declared entitled to the entire fund. *Held*, that there being a question for the Court upon the construction of the will, and the petitioners having instituted the suit upon fair grounds, and brought a fund into Court, the petitioners, though failing, should have all their costs of the petition as the first charge upon the fund in Court; and that the grandchildren now saying that they did not want the declaration of the Court upon their rights made no difference.—*Ryan v. R.*, 1 I. Jur. N. S. 275. (M.O.)

#### XV. 6. f. Next-of-kin.

6. It is now settled that the words "next-of-kin," when used *simpliciter*, mean "nearest."—*Heron v. Stokes*, 4 I. E. R. 296; 1 Con. & L. 270; 3 Dr. & War. 89. (C.)

1. V. bequeathed all her personal estate to her executors, upon trust, to place it out at interest for the sole use of E., until she attained age, or married; and directed them to draw the interest during E.'s minority, or until her marriage, and apply it towards her maintenance and education; and, when E. should attain age, or marry, then to pay the principal and interest to her, as and for her own proper money; and, if E. died under age and unmarried, V. bequeathed the money and interest to her next-of-kin, share and share alike, as tenants in common; if but one, the whole to that one. At V.'s death, E. was her sole next-of-kin, but afterwards died under age and unmarried. *Held*, that the trust fund belonged to E.'s personal representative—not to V.'s next-of-kin at E.'s death.—*Murphy v. Donegan*, 8 Jon. & L. 534. (C.)

XV. 6. g. *Personal, or Legal Personal Representatives.*

2. A bequest to the representatives of the late mercantile house of A. and K., or to such person or persons as should be entitled at testator's decease to their personal property, in satisfaction of a debt due by the testator's father—*Held*, claimable by the legal representative of the surviving partner, as representing the firm of A. and K., and not by the persons beneficially entitled to the properties of A. and K.—*Kerrison v. Redington*, 11 I. E. R. 451. (C.)

XV. 6. h. *Executors.* See EXECUTORS, VII.

3. A will did not name any executor, but the testator named A. and B. "trustees, to carry out his will as named, with full power to take full charge of any property he left." *Held*, that they were executors according to the tenor.—*Hasler v. Salmon*, 11 I. Jur. N. S. 140. (P.)

XV. 6. i. *Family: Name and Blood: next Eldest.*

4. Bequest to younger sons as tenants in common, and, if any of them died before the distribution, not leaving any wife or children, his share to go to his next eldest brother, and so on to the youngest. The fifth son having died without leaving a wife or child, his share was *held* to go to the sixth.—*Fitzgerald v. F.*, 12 I. C. R. 442; 7 I. Jur. N. S. 9. (C.)

XV. 6. j. *Nephews and Nieces, Uncles and Aunts, &c.*

XV. 6. k. *First and Second Cousins.*

XV. 6. l. *Government.*

XV. 6. m. *Servants.*

5. V. bequeathed to each of his servants who should have been living in his service for six months before his decease, the amount of one year's standing wages. B. had been living in the service of V., as a gardener, for more than six months, at a rate of wages payable by a weekly allowance in money, and by the use of

a house and certain rations, calculated to amount to £52 a-year in value. *Held*, that B. was not entitled to any legacy under the above bequest.—*Breslin v. Waldron*, 4 I. C. R. 333; 7 I. Jur. N. S. 135. (C.)

XV. 6. n. *When to be in esse.* See *infra*, LAPSED LEGACIES.

6. Bequest of personal estate, in equal shares, to each and every of my children and their issue, whether sons or daughters, "with benefit of survivorship." *Held*, that the period of survivorship was, the death of the testator.—*Caulfield v. Giles*, 12 I. E. R. 427. (R.)

XV. 6. o. *Whether per Capita or per Stirpes.*

7. Under a bequest, "to be equally divided between my sister and her daughters, and my sister-in-law and her children," the property is to be distributed *per stirpes* and not *per capita*.

It is abundantly clear that a bequest substituted for another which has failed to take effect, is subject to the same conditions, and is to be construed in the same way as that for which it is substituted.—*Heron v. Stokes*, 8 I. E. R. 163. (C.)

8. Testator, by a codicil to his will, directed property to be equally divided between A. and her daughter, and B. and her children. *Held*, that the property was divisible *per capita* and not *per stirpes*.—*Heron v. Stokes*, 2 Dr. & War. 89; 1 Con. & L. 270; 4 I. E. R. 284. (C.)

XV. 6. p. *Mistakes.* See *supra*, XV. 5. d.

XV. 6. q. *Wrong or Imperfect Descriptions, &c.*

9. P., having four sons, A. R. P.; J. P.; R. P.; and G. P.; in some passages of his will spoke of A. R. P. by that designation, and in others as "my son, A." He devised certain property "to the children of my sons A., R., and G." *Held*, that on the construction of the whole will, the children of A. R. P. and G. P. only were meant, to the exclusion of the children of R. P.

*Semble*—The Court may look at the punctuation of a document, to discover indications of the intention; but if the punctuation be confused, little weight can be given to any inferences drawn from it.—*Pope v. P.*, 4 I. C. R. 66; 6 I. Jur. 297. (C.)

10. V. by will leaves to F., M. F., and to "his sister M. F., my granddaughter, share and share alike, said M. F. now living in France with her uncle M.," all his estates. M. F. was not then living, nor had she ever lived, while her sister C. F. was living, and had lived for some time with the said uncle M. *Held*, that extrinsic evidence was admissible to explain the ambiguity in the will.

That there was not such a perfect balance of probabilities as to suspend the action of the Court.

That the name should control the description, and that M. F. was therefore entitled.—*In re Plunket's Estate*, 11 I. C. R. 861. (L.E.C.)

## XV. 6. r. Witness. See PRACTICE, EVIDENCE.

## XV. 6. s. Classes.

1. Under a devise of freehold property among all such children of the testator as should be living at his death—*Held*, that the testator having, by a codicil, revoked the devise as to one child, that revoked share went among all the other children, and did not descend to the heir.—*Shaw v. M'Mahon*, 4 Dr. & War. 231; 2 Con. & L. 528. (C.)

2. V. bequeathed the residue of his property to trustees, upon trust, to have same invested, to form a fund for payment of annuities, one for K. during the minority of any of his children, for their maintenance and education, until the youngest should attain 21, or be married; and another for the education of the children of S., in like manner; and as to all the residue he bequeathed the same to and amongst the children of his sister S., and of his brothers C. and W., share and share alike; and directed that the share coming to the said children respectively should be paid to each of them on their respectively attaining (if boys) age or, if girls, age, or being married.

At V.'s death W. had no child, but there were five children of C. and six of S. then living.

Four years after V.'s death, D., a child of C., attained 21, and in the interval a daughter, E., was born to W. *Held*, that the members of the class to take were ascertained upon the attainment of 21 by D., and that E. was entitled to a share.—*Scott v. S.*, 3 I. Jur. N. S. 205. (C.)

3. V. bequeathed to his four daughters unmarried £2000 each on their day of marriage with the consent of his trustees, with interest by way of maintenance in the meantime; and directed that if one daughter died unmarried her fortune and legacy should go to and be divided equally among such of his married sons and daughters as might have issue at her death. The four unmarried daughters survived V. One of them died unmarried, and without issue. *Held*, that her legacy was divisible among V.'s sons and daughters who, being married at the date of the will, survived her, and had issue living at her death.—*Elliott v. E.*, 14 I. C. R. 482; 6 I. Jur. N. S. 349. (R.)

4. Legacies were bequeathed to A., B., C., and D., to be paid to them on their marriage; but in case any of them married without the consent of their mother, then a gift over to the others; "and if any of them should die unmarried, or marry without such consent, then the sum so bequeathed should go and be paid to the survivors or survivor of them." A. married with consent, and dying left B., C., and D. surviving, who all died unmarried. *Held*, that V.'s personal representative was entitled to three several legacies, and that the words "survivors or survivor" in the will ought to be read "others or other."—*M'Blain v. Swanton*, 9 I. Jur. N. S. 122. (C.A.)

## XV. 7. Words Precatory and of Recommendation, and herein of Executory Trusts.

5. Testator, seized of B. under a lease for lives renewable for ever, gave his wife his dwelling-house, a cow's grass for her in summer, and fodder for her in winter, yearly and every year, as long as she lived; with four bushels of potatoes, set, dug, and ground; with half a peck of flax-seed, and a cart of made turf, brought and drawn up, yearly and every year. He then gave his son John four acres of land; and his son Andrew the remainder of his farm of B. "And further, I allow my son Andrew to make good the aforesaid benefits that I do leave to my wife. To him, the said Andrew, and my son John, I do allow that they both shall, equally between them, be both alike in doing whatever labour belongeth to it." *Held*, that John took the absolute interest in the four acres devised to him.—*Morrrough v. Lord Dufferin*, 2 Jon. 719. (E.E.)

6. V. devised his property to trustees. The will contained the following passages amongst others:—"The said sum I will shall be taken from my real, freehold, and personal property; the residue to be divided between them by my said trustees share and share alike, at such time, and in such manner, as to my said trustees shall seem most expedient, subject to this limitation," &c.; shares of sons, in certain events, were to go to survivors, "subject, however, to such jointure as my said sons, or any of them, may settle on any wife," &c. Premises were devised to the son carrying on the testator's business, "at such reasonable rent as my trustees shall think proper." "I further will my trustees shall lend out at interest" sums bequeathed in the way prescribed. A small annuity was given to W., "to be paid to him by my said trustees out of the issues," &c. A codicil bequeathed other property "to be divided equally among," &c., "agreeable to the real intention of my will." *Held*, that the provisions of this will did not constitute executory trusts.—*Boswell v. Dillon*, 6 I. E. R. 389. (C.)

7. V., seized in fee of three estates, devised one of them, called the Tempo estate, to his daughter, L., for life; remainder to her issue in tail; in default of such issue to his nephew Robert James, for life; remainder to Robert James's issue in tail, with several remainders over. The ultimate reversion in fee remained undisposed of.

V. then devised his two remaining estates to his other daughters in strict settlement, but made no disposition of the ultimate reversions in fee.

V. was also seized of divers freehold lands, and possessed of considerable personal property. He devised various parts of the former to different persons; and, bequeathing some pecuniary legacies, concluded his will thus:—"I leave and bequeath the rest, residue, and remainder of my properties, both freehold and personal, of whatsoever nature and kind I may die possessed of, to my brother Robert; and if my said brother Robert shall survive, I request and desire that he shall convert all



the personal property into fee-simple property, and at his decease leave the same entailed on his son, Robert James, in the same manner as I have myself entailed the Tempo estate." *Held*, that the freehold estates, which passed under the residuary devise, as well as the residuary personal property, were within the trust to entail.

That this trust should be executed by giving a life estate to Robert James, with remainder to his sons and daughters in tail, according to the limitations of the Tempo estate.—*Tennent v. T.*, 7 I. E. R. 361; 1 Jon. & L. 379; Dr. Rep. temp. Sugden, 161. (C.)

1. In 1839 V. bequeathed the residue of his property to his brothers A. and B., to be divided equally, with a request to A. that "should he die without lawful issue the property which I bequeath him shall revert back to my nephews, sons of my brother B." *Held*, that A. was entitled to the interest of the fund during his life only; and that the sons of B. were entitled to the principal.—*In re O'Beirne*, 7 I. E. R. 171; 1 Jon. & L. 352. (C.)

2. V. bequeathed a farm to P., with a direction in the will that his widow should have her diet and lodging in the house. *Held*, that on refusal by P., the widow could enforce the direction by bill in Equity against P.

A bequest to a widow, of diet and lodging, provided she wished to remain in a certain house—*Held*, not forfeited by her leaving the house; but that she was entitled subsequently only from the time of demand made.—*Ryan v. R.*, 12 I. E. R. 226. (C.)

3. £1000 were left by will to V. By a codicil, if V. should be married, and not leave children or child alive, the £1000 were to become the property of E. & F.; but if V. "should ever marry, and leave a child alive, or children, in that case she can leave the said £1000 as she thinks proper, to one, or amongst any children she may have." By a further codicil, the £1000 were left "to V.; but if she died without children it was to become the property of E. & F." V. married, and died, leaving no child, but leaving a grandchild, the son of a deceased daughter, to whom she had appointed the £1000 on her marriage. *Held*, that the bequest was an absolute one to V., with an executory bequest over to E. and F., if V. should die without leaving issue living at her death, whether children or remoter issue, which, in the events which had happened, had failed.—*In re Synge's Trusts*, 3 I. C. R. 379. (R.)

4. V. having, under his marriage settlement, a power of appointing amongst his children £1500 (which was, in default of appointment, to be divided amongst them equally); and having only two sons, H. and W., appointed to H. £1; to W. £1; and the residue to W., adding:—"I request him to have the same invested on mortgage or in the purchase of lands, and settled on himself for life, with remainder to his child or children as he may appoint; with remainder to such child or children of my son H. as he may appoint; with remainder to my own right

heirs." V., out of his own property, conferred by will other benefits upon W. *Held*, that W. was bound to elect between his rights under the settlement and his rights under the will.

W. having, during his lifetime, done acts which were held to amount to an election to take under the will, and having died without children—*Held*, that the precatory words in the will constituted a valid trust in favour of the children of H., although they were not objects of the power contained in the settlement.—*Moriarty v. Martin*, 3 I. C. R. 26; 4 I. Jur. 321. (C.)

5. F. was seized of real estate, subject to a mortgage of £4000, over which J. had a power of appointment amongst her children. F. was also possessed of large personal estate; and by will desired that all his debts, which he stated to be very trifling, should be paid out of his assets by his executrix. He then bequeathed all his property, real and personal, to J., and earnestly recommended that if S., the son of J., should, during his future life, follow such line of conduct as should merit her full approbation, she should appoint the £4000 to him, and should add £16,000 from F.'s personal property, also all his landed property; all which he wished her to grant to S., by deed or will; conditionally, and in case he should conduct himself so as to merit and possess her full approbation, and he pursued her advice, but not otherwise; but if he should misconduct himself, and not merit her entire approbation, and not obey her as his mother and guardian, she might dispose of all the properties in such manner as, and to whom she thought fit. *Held*, that upon the true construction of the whole will, which was very lengthy and informal, the words of recommendation did not create an absolute trust in favour of S.

The rule with respect to precatory words in a will is, that there must be a complete withdrawal of discretionary power from the legatee, or there is no trust created.

*Held also*, that F. intended the £4000 to be continued on the security of his estate, and not to be paid off out of the personality.—*Lefroy v. Flood*, 4 I. C. R. 1; 6 I. Jur. 273. (C.)

6. A testator having declared, by parol, to his residuary legatee, trusts, to which he wished £2000 to be applied, afterwards made a codicil, stating that he had instructed the residuary legatee as to the disposition of his property. *Held*, that the parol trusts could be enforced against the personal representative of the residuary legatee.—*Att.-Gen. v. Dillon*, 13 I. C. R. 127; 7 I. Jur. N. S. 251. (C.A.)

7. Testator devised to his wife his house at G., and declared it to be "his earnest wish that his sister should reside at G., with his wife, during her life." *Held*, that there was not any trust created in favour of testator's sister.—*Graves v. G.*, 13 I. C. R. 182. (C.)

8. Bequest:—"My wish is this, that my dear brother, M. G. Waters, will get the sum

of £1000 of my money, which is lodged in the Bank of Ireland. I also wish my dear sister, Charlotte Waters, will get the sum of £500 of the money I have lodged in the Bank of Ireland. Now, my dear sister, Susan, I wish you to get the remainder for yourself and daughters after my death—I mean the money that remains in the Bank of Ireland.” Testatrix never had any cash account with the Bank of Ireland, nor money lodged therein on deposit receipts; but possessed government new £3 per cent. stock standing in her name in the books of that bank. *Held*, that the stock passed under the bequest of “money;” and that the two legacies should be paid in money, not in stock, and were not liable to her debts and funeral expenses.—*M’Causland v. Waters*, 10 I. Jur. N. S. 265. (C.)

1. Testator appointed his ever dear and beloved wife residuary legatee, to have and to keep for her own use any further sum or sums of money I may die seized or possessed of . . . convinced she will never desert my dear and beloved children, . . . and at her death divide whatever she may have among the most deserving of her children; . . . and my will is, if ever she shall marry, she shall forfeit all title, power, or control over my children and property, and shall have but £60 a-year during her natural life; and that all power and authority vested in her shall devolve on (persons named). *Held*, merely a recommendation, not legally binding the widow to divide whatever she had among her children at her death; and that a bequest to grandchildren was good.—*Tuohy v. Burke*, 10 I. Jur. N. S. 292. (C.)

**XV. 8. Concerning Specific Legacies. See LEGACY, X.**

- a. *Generally. See ibid.*
- b. *Rights of Specific Legatees. See LEGACY, X.*
- c. *Their Abatement and Ademption. See LEGACY, I, III, X.*

**XV. 8. a. Concerning Specific Legacies generally.**

2. Testatrix bequeathed to her “uncle, P. P., the interest on £200, being part of a larger sum of government stock now remaining in my name in the Bank of Ireland;” and, after his decease, “the said principal sum of £200” to be equally divided between the children of P. P.

Neither at the date of the will nor of her decease, had the testatrix any government stock standing in her own name in the Bank of Ireland; but she was entitled to £1000 government stock standing in her mother’s name. She was her mother’s executrix and sole residuary legatee. *Held*, that the legacy was specific; and that £200 of the stock standing in her mother’s name passed to the legatee.—*Power v. Lenehan*, 2 Jon. 728. (E.E.)

3. V., by marriage articles, agreed to settle £50 a-year on his wife (if she became a widow), payable out of C. Afterwards V., by will, bequeathed “to his wife, during her life, the sum of £50 yearly (£50 yearly being settled

on her by me on our intermarriage), payable out of the lands of C.” *Held*, that the widow took only one annuity of £50.—*In re Power*, Fl. & K. 282. (R.)

4. On the construction of the entire will, annuities were held successive, not cumulative.—*Bayley v. Quin*, 2 Dr. & War. 116. (C.)

5. V., by will, after devises and bequests, left the residue of his property to his brother, whom he appointed executor. By codicil, he left to his wife one-fourth of all moneys which he might be possessed of at his decease, for her own absolute use and property; and left her the life interest, during her life, of the other three-fourths of those moneys. He also left her a house, together with all furniture, wines, carriages, horses, linen, china, and other effects there and elsewhere in England; and by another codicil bequeathed to his wife other property in England, which he particularly described.—*Held*, that £3 per cent. stock, consols, and bank stock, did not pass under the bequest to the wife.

A bequest of “moneys,” unless aided by the context, will not pass stock in the funds.

The word “effects” will comprise the entire personal estate of the testator, unless restrained within narrower limits by the context.—*Dunally v. D.*, 6 I. C. R. 540. (R.)

6. V. being possessed of a chattel reversion, and of a profit rent in a house which he had leased to a tenant, with an option to redeem the rent by payment of £400, bequeathed all his real and personal property to his son and mother, whom he appointed executors, upon trust, to pay £25 a-year to his wife for life, out of the profit rent of the house, and directed, that if the tenant paid the £400, his executors should place it, together with whatever sum or sums there might be in the Bank of Ireland to his credit, and whatever sum or sums might appear, entered in his name, or his grandchildren’s names, in the Savings Bank; and together with whatever cash might be had after paying his just debts, funeral expenses, and legacies, at interest, and pay the interest to his wife for her life, and, at her decease, divide the sum between two of his grand-daughters. The tenant did not pay the £400. *Held*, that the profit rent of the house, after the wife’s death, was cash applicable to the trusts of the will.

*Semble*—V.’s interest in the house was devised to the executors upon the trusts of the will.—*Taylor v. Bunne*, 13 I. C. R. 382; 7 I. Jur. N. S. 26. (R.)

**XV. 8. b. Rights of Specific Legatees. See LEGACY, X.**

**XV. 8. c. Their Abatement and Ademption. See LEGACY, I, III, X.**

7. V. devised the lands of D. to trustees, to the use of her son, C., the ptf., for life, re-

mainder to his sons in tail. She then bequeathed, amongst other annuities, one of £100 to the deft., H.; and charged the annuities on "the lands so devised to the use of" her "son, Y.," and on the residue of other lands which she directed to be sold.

A subsequent codicil contained this clause: "And whereas I did by my said will give the lands of D. to the use of my said son, Y., as therein, now I do hereby revoke so much of my said will as gives said lands of D. to my said son, Y.; and I direct that my trustees shall stand seized of the said last mentioned lands to the use of my daughter, H., for her life, in addition to what I left her by my said will." *Held*, that V. merely meant to substitute one devisee for the other, and did not intend to discharge D. from contributing to the payment of the annuities with which the will charged them.

A codicil is never held to revoke a will further than is necessary to effectuate the testator's intentions. — *Young v. Hassard*, 1 Dr. & War. 638. (C.)

1. A tenant for life had a power, by deed or will, to charge a jointure, not exceeding £100 a-year for every £1000 which he should actually and *bona fide* receive with his wife. On his marriage, a life estate of his wife, in a chattel interest in lands, was conveyed to him for life. The tenant for life received before the date of the will about £2000 out of the rents of the lands. *Held*, that the charge by his will of a jointure of £200 a-year was valid if £2000 was received, and that if that sum was not received the jointure should abate proportionably. — *Brereton v. Barry*, 11 I. C. R. 97. (R.)

XV. 9. *Concerning General Legacies, their Ademption and Abatement. See LEGACY, I, III.*

2. Testator bequeathed to his natural daughter £2000, and, by a codicil, £3000 in addition; and by a subsequent testamentary instrument, stating his wish to alter his will, charged his estates with £20,000 for her. *Held*, that the £20,000 were substituted, and that the three gifts were not cumulative. — *Russell v. Dickson*, 1 Con. & L. 284; 2 Dr. & War. 133. (C.)

3. G. being entitled to a lease for years, determinable on three lives, of the lands of K., devised it to his wife for life, and, after her death, to his son, H., and his grandson, R., and the longest liver of them. Shortly afterwards he surrendered the lease and took a new lease of K. By a codicil made after the surrender and acceptance of the new lease, he directed his executors to pay out of a fund the head rent of P., and fulfil any payment he might thereafter appoint; and "relinquished the settlement made on R., on that occasion." By a second codicil of the same date, he vested £4500, in trust to pay the head rent of K., during his wife's life, and after her death to extend the interest in K., if that could be accomplished.

The trustees took no steps to extend the interest, although it could have been accomplished, until after the expiration of the lease, when it could not be done. *Held*, that the first codicil did not revoke the devise of K.; that H. and R. were entitled to the £4500; and that it did not go to G.'s next-of-kin. — *O'Shea v. Howley*, 7 I. E. R. 56; 1 Jon. & L. 391. (C.)

XV. 10. *Concerning Lapsed Legacies.*

4. V., after several bequests, directed the investment of the residue of his property; and bequeathed thereout to M. an annuity during life, with liberty to will it, or the principal thereof, to any or all of his children, in such proportions as she might think fit: in default of appointment to his children, share and share alike; and that the surplus, if any, of his property, after satisfying the bequests, should be added to each bequest proportionately to its amount. M., by will, reciting the power, gave S. so much of the stock as would, at the price on the day of her decease, produce £700; to E., in like manner, £700; and gave all the rest, &c., of said government stock upon trust to pay the interest thereof to her daughter I., for her separate use; remainder as I. should appoint. S. died in M.'s life, leaving issue. *Held*, that the legacy to S. lapsed, and did not fall into the residue bequeathed to I., but passed, as undisposed of, under V.'s will, the gift of the residue being a specific bequest. — *In re Browne*, 2 I. Jur. N. S. 315. (C.)

5. V., having a general power of appointment over a fund which was settled on her husband for life, by will bequeathed several legacies thereout, and the remainder or residue of the fund, share and share alike, to her sisters; and, as to "any other" residue or moneys or property not specified and disposed of, directed it to be given, share and share alike, to her then surviving sisters who might be living at the time when her will and the bequests therein might become available. One of the sisters died in V.'s life. V. predeceased her husband. *Held*, that the lapsed share of the deceased sister passed under the general residuary clause to the surviving sisters.

That those sisters only who survived the husband took under the general residuary clause. — *Hickson v. Wolfe*, 7 I. C. R. 452. (R.) — [Affd.: 9 I. C. R. 144. (C.A.)]

6. V., after various bequests, left all his remaining properties, on trust, upon his wife's death, to divide his plate amongst his surviving children; and bequeathed to all his "daughters then unmarried his house" (a freehold), "furniture, pictures, &c., to have and enjoy the same; and to the last married, as long as she pleases, or any one of them in succession; then in remainder to the next male heir, upon the express condition," that the house should be kept in repair (to which purpose he appropriated property), same being for, and intended as a residence for two of his grand-daughters; it being his will, wish,

and desire that it should be maintained as a family mansion. At his death, V. had five daughters, of whom four were unmarried; a grandson, son of the married daughter, and two grand-daughters, his co-heiresses, daughters of a deceased son. All V.'s daughters married during his wife's life. *Held*, that the gift to V.'s daughters was limited to daughters who should be unmarried at his wife's death, and had failed.

That the gift to the "next male heir" had failed, because, if those words were words of limitation, and meant the next male heir of a daughter who should take under the preceding gift, that gift had failed; and, if they were words of purchase, there was not any person to answer the description of "next male heir" of V., at his, or at his wife's decease.—*Lofthus v. Stoney*, 17 L. C. R. 178. (R.)

**XV. 11. Concerning Conversion. See EXECUTORS, IX.**

**XV. 12. Of Vested Legacies, and Interests out of Personal Estate, Exoneration of. See INTERESTS IN PROPERTY, II.**

1. V., by will, directed that his funeral expenses and simple contract debts be immediately paid, in the first instance, out of his personal estate, if sufficient, and if not, out of the sale of lands and houses at C. He then devised all his real estates (except a part specifically bequeathed), and all his personal estate and chattel property, in trust, in the first place, to pay out of his personal estate, in six months at the furthest after his decease, all his debts, funeral expenses, and legacies thereby bequeathed; and upon further trust, to raise out of C. £2000, and to pay the interest of it to his daughter F. for life; with limitations over; in the event of their not taking effect, the £2000 were to sink and become part of the residue of his personal estate. He devised his real estates in strict settlement, giving a life estate in them to F.; and, after reciting that on the marriage of his daughter, E., he perfected to trustees two bonds for £2000 and £4000, and declaring his intention that the £2000 bequeathed to F. and the £6000 due to the trustees of E., should be paid out of C., he directed that C. should be sold, and the produce applied in paying those sums; and if C. should not be sufficient to pay them, "making in the whole" £8000, he directed the deficiency to be paid out of the profits of his lands of B., or by sale or mortgage of a competent part thereof, and empowered his trustee to sell them. He bequeathed the residue of his personal estate to the trustee, upon trusts; and, in order to save him trouble, directed that F. should call in all the debts due to him, and dispose of all his personal estate, and thereout, in the first place, pay his debts and legacies; and, after payment thereof, pay over the residue to the trustee, whom he named executor. *Held*, that the personal estate was exonerated from the bond debts of £2000 and £4000, the same being charged on B. and C.

The Court is bound to look at the whole will, in order to collect an intention to exonerate the personal estate. When there is a general direction to pay all debts and legacies, and a clear intention to throw particular debts or legacies on the real estate, the Court is bound to effectuate that intention, and to exonerate the rest of the property.—[An error in report of *Hancox v. Abbey*, 11 Ves. 179, corrected.]—*Bateman v. Lord Roden*, 7 L. E. R. 240; 1 Jon. & L. 356. (C.)

2. V. gave his estates, real and personal, in Ireland, after payment of all his just debts, funeral and testamentary expenses, on trusts, chiefly for the use of a cousin. V. gave all his real and personal property in England to such uses as his widow should appoint; in default of appointment to her for life, remainder to the same uses as his freehold estates in Ireland; provided that if his personal estates in Ireland should be insufficient to pay his debts and legacies, they should be charged on his freehold and leasehold estates in Ireland; and he exonerated his real and personal estates in England therefrom. V. died in England. *Held*, that his funeral and testamentary expenses in England were, as well as his Irish testamentary expenses, charged on his Irish estates, in exoneration of the English personalty.—*Coote v. C.*, 9 I. E. R. 197; 3 Jon. & L. 175. (C.)

3. V., by will, reciting that H. had married in opposition to his wishes, yet that it was not his intention to disinherit him, but to charge his real estates with the payment of legacies, bequeathed to J. £2000, directing same to be paid twelve months after his decease. V. then charged all his real estates with the payment of his debts and legacies; and devised same, subject to a mortgage for £14,000, which he charged thereon in exoneration of his personal estate, to trustees for 1000 years, upon trust for sale, and payment of his debts and legacies; subject thereto, to the use of H. for life; remainder over. By codicil he revoked all the uses after the term. *Held*, that the personal estate was not exonerated from payment of the legacy.

V., by will, bequeathed to trustees, in trust, a policy of assurance for £2000. By indenture of a prior date, V. had assigned the policy to B., a mortgagee, as a collateral security for £14,000, which under the will was charged on the real estates in exoneration of the personalty. Upon V.'s death, B. received the amount of the policy. *Held*, that the devisees were entitled to stand in his place for that amount.—*Osborne v. O.*, 2 I. Jur. N. S. 219. (C.)

**XV. 13. Of Vested Legacies and Interests out of Real Estate. See *ibid*, III.**

**XV. 14. Charges on Real Estate: of Exoneration. See ESTATE, VIII, IX — PORTIONS, III—COPYHOLD, I.**

4. Testator, by will, confined exclusively to real estate, after devising same among the several members of his family, concluded by "desiring that all his just debts should be

paid as soon as convenient after his decease." *Held*, that the debts were charged upon his real estate.—*Harding v. Grady*, 1 Dr. & War. 430; 4 I. E. R. 371. (C.)

1. When a testatrix devised real estate to A., charged with annuities and legacies, and by a codicil revoked that devise, and devised the lands to B., and "confirmed her will in every other respect"—*Held*, that the lands were charged in the hands of B.—*Young v. Hassard*, 1 Dr. & War. 638. (C.)—[*See s. c.*, 8 I. C. R., App. vii. (R.)]

2. V. directed his debts and legacies to be paid by his brother B., to whom he devised a real estate in tail male, after the decease of his wife and another, to whom he had given life estates therein. He then gave B. the timber growing on the devised lands, to pay his debts and legacies; and bequeathed two legacies, which he directed should not be paid for five years, as it was his wish that the timber should not be cut for that period. He then directed the produce of the timber, after payment of the two legacies, to be paid to his wife. *Held*, that the general personal estate was the primary fund for the payment of the debts, and the produce of the timber was liable only in case that proved deficient; but that the produce of the timber was the primary fund for the payment of the two legacies.—*Lamphier v. Despard*, 4 I. E. R. 334; 2 Dr. & War. 59; 1 Con. & L. 200. (C.)

3. Testator devised a freehold estate to his wife, and gave her specific chattels. He then gave her an annuity charged upon all his real estate, except that before devised to her, with power of distress, and directed the first payment to be made on the first of the gale days which should occur after his decease. He then charged his debts upon all his real estate (except that devised to his wife), in aid of his personalty; and gave another annuity in terms similar to those used respecting that given to his wife. He then gave pecuniary legacies, which he charged on all his real estate (except that devised to his wife), in aid of his personalty, and gave two other annuities, in terms similar to those in which he gave the former annuities. *Held*, reversing a decree of Lord Plunket's, that, as regarded the real estate, the annuitants had no priority over the legatees.—*Creed v. C.*, 4 I. E. R. 525; 1 Dr. & War. 416. (C.)

4. Testatrix devised fee-simple lands and leaseholds for years to Y. and his issue, and other fee-simple lands to H. and her issue, and charged all the lands so devised, with the payment of the annuities bequeathed by her will. The freehold and leasehold are liable to contribute, in proportion to their respective value at the decease of the testatrix, to the payment of the annuities; and the leasehold are not liable in the first instance.—*Young v. Hassard*, 1 Jon. & L. 466. (C.)

5. V., by will, directed her debts to be paid; devised her real estate to her brother; and directed that all costs due to her law agent,

D., should be paid out of the devised real estate. V. died in 1813, indebted to D. for a considerable amount of costs, and on a promissory note. The owner of the real estate, and V.'s executors, resided out of the jurisdiction from 1815. In 1817 that owner's agent paid money to D., who, in 1819, filed a bill to recover his demand out of V.'s assets. The debts, being out of the jurisdiction, no subpoena was served. In 1828 D.'s executrixes filed a bill of revivor. The debts, being still beyond the jurisdiction, no subpoena was served. In 1838 another bill of revivor was filed, and subpoenas were served upon the debts., who were still beyond the jurisdiction. *Held*, that the real estate was charged with the amount of the promissory note, as well as with the costs.—*Foster v. Thompson*, 6 I. E. R. 168. (C.)

6. A testator charged the estate of C. with debts, and devised the residue of his real estate (which included C.), to his widow, for life, with remainders over; and then gave her all his personal estate not theretofore bequeathed; and at the end of his will devised and bequeathed a pecuniary legacy to be payable after the death of his widow. *Held*, that the legacy was not charged on the real estate.—*Smith v. Butler*, 7 I. E. R. 467; 1 Jon. & L. 692. (C.)

7. A testator having an estate charged with his wife's jointure, but held for an interest which must expire immediately after his own death, devised to his son all his property, subject to the jointure, and £70 per annum for his wife, which £70 he thereby charged on all his property. *Held*, that the jointure was not charged by implication.—*Doolan v. Smith*, 9 I. E. R. 426; 3 Jon. & L. 547. (C.)

8. V. devised his real estates to the use of trustees for years, on trusts for his wife for life, or *dur. vid.*, and after the decease or second marriage of his wife, and subject as aforesaid, and without prejudice to the same, upon trust to raise out of the lands, by sale, &c., for all or any part of the residue of the term, £3500, which he bequeathed to three persons. He desired that the several sums might be paid to the legatees respectively "as soon after his decease as might be convenient," and that in the meantime they should be paid interest thereon at the rate of £5 for each £100 by the year. *Held*, that the legatees were not entitled to interest out of the wife's life estate, but that it was to be raised after her decease or marriage out of the residue of the term.—*Pennefather v. Bury*, 9 I. E. R. 586; 3 Jon. & L. 727. (C.)

9. V. devised to his sons, to be disposed of as after mentioned, all his estate in W., and to the survivor, &c., of his sons; and all his estate in P., subject to his proportion of the head rent; and also subject to and in trust to pay out of the rents thereof an annuity to his daughter, and the remainder of the rents until she should be paid £500. Then followed a bequest of an annuity of £40 charged on parts of W. There was a residuary devise to the

three sons. *Held*, that the bequests to his daughter were charged only on P. and not on any part of W.—*Borough v. Williamson*, 11 I. E. R. 1. (C.)

1. The whole will must be looked to for the testator's intention. Though the will contains a general direction to pay all debts or legacies, yet, if there is an intention shown to throw a particular debt or legacy upon the real estate, the Court must effectuate it.—*Bateman v. Lord Roden*, 7 I. E. R. 240; 1 Jon. & L. 356. (C.)

2. V. bequeathed all his property to be invested, and out of the proceeds to pay his daughter C., £10,000, on her attaining age, or marrying, if she married under age, provided she married with the trustees' consent, but not otherwise. He directed them to pay out of the interest a sum for maintenance until C. should attain age, or marry with consent; the surplus to be invested and then paid to her. After like bequests to other daughters, V. bequeathed all the residue to his daughters, C. and the others, share and share alike; and directed that, if any daughter or daughters died before she or they attained age and unmarried, her portion and her share of the residue should be divided, share and share alike, amongst the survivors. A codicil directed that, if any daughter married under age without consent, the interest only of her or their portion or portions should be paid to her or them for life, for her or their separate use; after her or their decease, the principal to be divided equally among the children of any such daughter, to be paid at 21 or marriage, with interest from the mother's death. C. married P., with consent, and died under age, leaving a son, who died under age and unmarried. *Held*, that the £10,000 vested in C.'s son, and passed to P., as his representative: that the marriage referred to in the bequest of the residue meant a marriage with consent: that the portions referred to in the codicil did not include the residue: that therefore, C.'s share in the residue did not vest either in C. or in her son.—*Hackett v. Lord Oxmantown*, 12 I. E. R. 534. (C.)

3. By an ante-nuptial settlement, a sum of £7356, the property of the wife, was vested in trustees upon trust that, in case the husband should within six months, by covenant and by a mortgage of certain hereditaments belonging to him, secure payment to them of £4000, they should pay £4356 to him out of the trust money (£356 out of the sum so paid to be for his own use), and upon trust, as to the residue of the trust money left after payment of the £4356, for the wife for her separate use during the joint lives of husband and wife, and for the survivor of them for life; and after the decease of the survivor, upon certain trusts for the children of the marriage; and if no children, upon trust for the wife absolutely if she should survive the husband; but if she should die in his lifetime, upon trust as she should appoint, and, in default of

appointment, upon trust for the husband absolutely. As to the mortgage debt of £4000, it was declared that the trustees should stand possessed thereof, and of the securities for the same, upon trust to pay the interest to the husband for life, and after his decease to the wife for life; and after the decease of the survivor, upon the same trusts as to the principal of the mortgage debt as were declared of the residue of the trust money for the benefit of the children of the marriage; and if no children, upon trust for the husband, his executors, administrators, and assigns absolutely. Shortly after the marriage, the husband executed a mortgage of Whiteacre for the sum of £4000, to the trustees, who thereupon paid over to him the sum of £4356. By his will the husband gave to certain other trustees all his property, real and personal, upon trust to hold the lands of Whiteacre and Blackacre, first to fulfil the trusts of his settlement, then for his nephew S. for life, and after his death to his children as he should appoint, remainder over. Several of these remainders over were to females "as *femmes soles*." The testator, after bequeathing certain stock to his sister M. and her children, proceeded thus:—"I wish to alter a portion of that part of my will above relating to the funded property bequeathed for M. or her family. Should my wife have a child by me, they are to pay S. £500 out of it; should such child or children survive me, my heirs, though life tenants, may cut, sell, and carry away turf off said lands, and cut timber as well off the demesne of Whiteacre as in the churchyard therein." There was also the following clause: "I give to my beloved wife all our furniture, horses, and moveables, at Chester, as well as all her own fortune not included in our marriage settlement, for her sole use as *femme sole*, should she marry again." The testator having died without issue—*Held*, that by the devise of Whiteacre and Blackacre upon trust to fulfil the trusts of the settlement, the testator operated both those estates with the mortgage debt, but that he did not devise them upon the same limitations as were contained, in regard to the mortgage debt, in the settlement; and accordingly that neither the wife of the testator took, nor would the children of the marriage, if there had been any, have taken, any estate or interest in those lands under that devise, save as securities for the mortgage debt, but were excluded in favour of S. and the other devisees over.

*Held also*, that the ultimate absolute interest of the testator in the £4000 mortgage debt passed to the wife under the bequest to her of all her own fortune not included in the marriage settlement.—*O'Reilly v. Smyth*, 1 I. C. R. 349. (C.)

4. When a mixed and general fund of real and personal estate, in the nature of a residuary fund, is created by a testator to pay his debts and legacies, and for the general purposes of his will, the costs of a suit conversant about the disposition and administration of that general fund will be properly payable out of the whole of it; and must be borne rateably by the real

and personal estate constituting that fund. This is so, although by lapse or by operation of law the whole or part of that fund becomes undisposed of, and returns to the heir-at-law or next-of-kin. But when a mixed fund is dedicated by the testator to specific purposes, and distinguished by him from his general personal estate, that part only of the mixed fund which consists of personal estate will be resorted to for payment of costs, if the general personal estate be insufficient to defray them. And when a mixed fund is dedicated to specific purposes, and directed by the testator, on the occurrence of a certain event, to sink into and become part of his general personal estate, and that event does not happen, if the general personal estate prove inadequate to discharge the costs, their payment will be decreed out of that portion of the mixed fund which consists of personalty only.—*Cane v. Fitzgerald*, 2 I. C. R. 216. (C.)

1. V. devised lands in trust for R. for life, remainder to his first and other sons successively in tail male, remainder over; and directed that R. "shall charge and incumber" those lands "for the younger children of him the said R., or of such person as shall be seized of the same under the limitations before mentioned, with a sum not exceeding £2000." A. died in 1794. R., in 1825, his creditors then being in receipt of the rents and profits of the lands, executed a deed charging the lands with £2000 for his daughters, M. and C., share and share alike, with legal interest from the date of the deed until the time of payment. R. died in 1848, without any issue except M. and C. *Held*, that the £2000 was a valid charge upon the lands in favour of M. and C.

That interest was payable upon that sum from the time of the death of R. only, as he must be presumed to have kept down the interest payable during his life.—*Hinds v. H.*, 2 I. C. R. 227; 2 I. Jur. 105. (C.)

2. V., tenant for life of estates incumbered to the amount of £3600, by marriage settlement covenanted that he should have power to charge them with £2000 "provided he paid off all the incumbrances then affecting the lands." He paid them off. His personal representative presented a cause petition praying that two sums, which he had paid, might be declared to be still charged on the estate; and for payment.

The tenant for life, by will, declared his intention to have been not to exonerate the inheritance. *Held*, that this declaration of intention was sufficient, the expression of the intention being ambulatory during the life of the tenant for life.

That as, from the terms of the contract in the settlement, the tenant for life was bound not to charge the estate with more than £2000, his representatives could not raise charges beyond that amount.—*Lysaght v. L.*, 4 I. Jur. 110. (C.)

3. A petitioner claimed a legacy by her petition and charge; and claimed priority for it

over the other legacies, by reason of a contract with the testatrix that the legacy should be bequeathed to her in consideration of her services as companion. The alleged contract was denied by the discharge, and no evidence was given to prove it. *Held*, that having claimed as legatee, by her petition and charge, she could not, on an appeal from the Master's decree, abandon the legacy and claim as creditor. That she could not claim as a creditor, having given no evidence in support of her claim as such.

V. first devised real estate to A., subject to specified legacies, charged thereon, and exonerated her personal estate from them. Secondly, she devised other real estate to B., subject to other legacies, also charged thereon, and from which her personal estate was also exonerated. Thirdly, she devised other estates to C., subject to other legacies. Fourthly, she devised other real estate to D., in trust to sell and pay two legacies and the residue of the purchase-money to E. Fifthly, she devised other lands to F., subject to a legacy; and bequeathed stock to G., and her household goods, plate, cash, and other personal property to H. She bequeathed the residue of her property, real, freehold, and personal, after payment of her just debts, funeral expenses, &c., and legacies aforesaid, to A., whom she appointed her sole residuary legatee; and if such residue proved insufficient for the purposes aforesaid, she ordered that such deficiency should be paid out of the produce of the sale of the lands devised to D.; and appointed A. and F. her executors. V. had no other lands but those specifically devised. Afterwards, by a codicil duly attested and made in England, her will being then in Dublin, she bequeathed the legacy to the petitioner, and charged it on her real and personal estate; and ratified her will in all other respects. *Held*, that the petitioner's legacy was not charged on the lands specifically devised to A., B., C., and F.

That if there had been any lands not specifically devised, which passed under the residuary devise, they would have been charged with the petitioner's legacy.

That the residue of the purchase-money of the lands devised to D. in trust for E., after payment of the two legacies, was subject to the petitioner's legacy, as E. was to be considered a residuary and not a specific devise.—*Dyer v. Bessonett*, 4 I. C. R. 382. (R.)

4. Testator bequeathed as follows:—"I leave to A. all that and those, the lands, &c. I also leave A. all my furniture, stock, . . . I also leave A. all and every sum of money left me by . . . Also the lands of . . . I also leave him all moneys and debts of every kind due to me at my decease, to be subject to all my debts and the several bequests and legacies hereinafter mentioned, that is to say, I leave and bequeath to my sons, F. and T., the several sums of £100 each." He then went on to leave several other pecuniary legacies, without stating further any fund out of which they were to be paid. *Held*, that the words "to be subject to," extended to all

the preceding clauses; and that the pecuniary legacies were charged on all the real and personal estate.—*Millett v. M.*, 6 I. Jur. 149. (R.)

1. V. bequeathed two pecuniary legacies; and, as to all the rest of his real and personal property, bequeathed and devised it to his son, M., in the fullest manner he could, with liberty to M. to dispose of it as he thought proper. M. mortgaged the real estate. *Held*, that the legacies were well charged on the real estates devised to M., who had not power to sell the lands discharged from the legacies.—*Greville v. Broune*, 5 I. Jur. N. S. 1. (H.L.)—[S. c. 7 H. Lords Cases, 689.]

2. A tenant for life of estates, with power to appoint them to his issue male, and to charge a sum for the benefit of his younger children, executed on the marriage of his third son a bond and warrant of attorney on which judgment was entered for a sum as provision for him. On the marriage of a daughter he made for her also a provision by way of annuity, charged on one of the settled estates; and afterwards, by will, devised some of the estates to his eldest son, subject to all his debts and incumbrances of every description, and subject to charges made by his will in favour of his other children. He then charged sums in favour of others of his children, and devised an estate to his fifth son, freed and exonerated from all his debts, charges, and legacies; his will being that, if any creditor should recover any demand from the lands so devised to his fifth son, that son should be recouped by the estates devised to testator's eldest son; and stated that he had avoided mentioning his married children, as for them he had already provided by bond or otherwise, at their respective marriages, fully and adequately to the provisions thereby made for his other children. The testator did not appear to have left property other than that which was the subject of his power. *Held*, by the majority of the Council, that the charge of the judgment debt to the third son by the will operated as an execution of the power to charge for younger children.

That an instrument should operate as an execution of a power, it is not necessary that the donee should intend to execute the power, or that he should have it in contemplation. It is sufficient if the act which he intends to do, or the benefit which he intends to confer, cannot be done or conferred otherwise than by an execution of the power.—*In re Morgan*, 7 I. C. R. 18. (P.C.)

3. V. devised lands, in trust for B. (a minor), and his sons, in strict settlement, giving B. a power of charging the lands with £5000, for younger children, "to be raised by sale or mortgage of a competent part of said lands, or out of the rents and profits." V. then bequeathed legacies, amounting in all to £12,000, to his grand-daughters, and directed that his executors "should place these legacies in some of the most eligible public funds," and

accumulate such portion of the annual interest of them as was not required for the maintenance, &c., of the legatees. He then, after giving some small legacies, declared "that if his assets, not thereby specifically disposed of, should prove insufficient to pay his debts and legacies," it was his "will that such deficiency should be made good and supplied by his said trustees out of the annual rents and profits arising out of his said estates, which he thereby desired that his said trustees might receive and apply until such deficiency should be made good thereby, allowing, however, to his said grandson B., so much as the said trustees should deem expedient and fitting for his education and maintenance;" but if it happened that there was a surplus of his personal estate, after payment of his debts and legacies, &c., he bequeathed such surplus among his several grandchildren above mentioned. The personal estate proved insufficient for the purposes contemplated. On V.'s death, B. and the other grandchildren were made wards of Court, and one of the executors acted as guardian. In the accounts and dealings in the matter of the minors, the legacies were treated as charged on the *corpus* of the estate, and B. paid interest on them until he died, leaving a son, who refused to pay those charges. *Held*, that only so much of the legacies as the personalty was inadequate to pay was charged on the real estate; that the charge was only on so much of the rents and profits of the real estate in the years immediately following V.'s death as would have made up the deficiency; and that B.'s son was not bound by the dealings in the minor matter.

It is desirable that questions of construction should be settled in the first instance, before the Master proceeds to take the accounts of an estate.—*Scott v. Clements*, 8 I. C. R. 1; *Dr. Rep. temp. Napier*, 91. (C.)

4. V., having two estates mortgaged, with judgments collateral to the mortgages, by will, made after 1854, devised them in strict settlement to two of his sons, bequeathed several pecuniary and specific legacies, and directed that his debts and legacies should be paid out of the residue of his personal estate and property, which he bequeathed to his sons. *Held*, that the mortgage debt should be paid out of the personal estate in preference to the pecuniary legacies.—*Smith v. S.*, 10 I. C. R. 89; 5 I. Jur. N. S. 88. (R.)—[*Affid.*: 10 I. C. R. 461; 5 I. Jur. N. S. 201. (C.A.)]

5. V. devised all his estate in a chattel leasehold interest in lands, and "all other my property and worldly estate whatever," to a trustee, upon trust, in the first place, to preserve the chattel interest, by payment of head rent and renewal fines. He then bequeathed pecuniary legacies, and, among others, £100 to the trustee; "and as to, for, and concerning all the residue of my interest in my said lands, and as to, for, and concerning the residue of my interest similarly of my other personal estate and effects, subject to the hereinbefore trusts, I hereby give,



bequeath, and devise all such residue of my interest in the said lands, as also all such the residue of my personal estate and effects, in trust for my eldest son." V. then charged the lands and the residue of his personal estate with sums for younger children; and declared that, if he died leaving no son, but leaving an eldest or only daughter, then he devised all his interest in the lands, and all the residue of such estate, in trust for such daughter, with remainders over; and directed "that all the intermediate rents and profits of my said lands, as well as of the residue of my said other personal estate and effects, which shall accrue, arise, or be made out of both said funds," subject only to the provision made for his wife by their marriage settlement, and to his debts and funeral expenses, "and to the several legacies hereinbefore enumerated," should go to the trustee. In 1846, Master Henn had made a report, afterwards confirmed by a decree in Ch., finding that the legacies under the will were not charged upon the testator's interest in the lands. *Held*, that, upon the true construction of the will, the legacies were not charged upon the lands.

That the legatees were bound by the Master's report.

The Judges of the L. E. Court are bound by a final decree of the Court of Ch.—[*In re Kelly*, 9 I. C. R. 103, commented on].—*In re Lanauze*, 11 I. C. R. 19; 5 I. Jur. N. S. 30. (C.A.)

1. V. bequeathed to each of his four daughters a legacy of £500, to be paid to them respectively on the days of their respective marriages with the consent of his wife and executors, with power to each of them to dispose thereof by will or deed, as they might think proper; such four legacies to be charged on his personal estate, and the deficiency to be raised out of his real estate, which he empowered his trustees to do by demise, sale, or mortgage; and directed his executors to pay not less than £30 or more than £40 a-year for his daughter's maintenance until their respective marriages, out of his personal estate, and, on a deficiency, out of his real estate. By a codicil to his will, he devised four additional legacies of £500, to be paid to his daughters at the time and in the manner in his will mentioned. One of the daughters died unmarried, having bequeathed her legacies to the survivors. *Held*, that the legacies of the daughters who died could not be raised out of V.'s real estate.

That the legacies to the surviving daughters were not raiseable out of the real estate before their marriage with consent.—*Bolton v. B.*, 12 I. C. R. 233. (R.)

2. V. seized of real estate, subject to a mortgage which he had covenanted to pay, by will, in 1829, bequeathed pecuniary legacies, and directed that all his chattel property whatever (except as before bequeathed) should be sold, and the produce thereof be applied, first, to pay his just debts and funeral expenses, and, next, in discharging his legacies.

The mortgaged estate descended to the heir-at-law. *Held*, that he was entitled to have the mortgage paid out of the personal estate, in preference to the legacies.—*Burley v. Armstrong*, 12 I. C. R. 270; 7 I. Jur. N. S. 50. (R.)

3. V. bequeathed lands in C. and L. to the use that M. should receive an annuity of £50 per annum out of C., and a like annuity out of L., and devised C. to H. in strict settlement. He devised L. subject to the annuity of £50, and "to the charge of £1000 hereafter mentioned," to H., in strict settlement. He then gave to X., W., and R., £1000, and charged it upon L.; and bequeathed the residue of his real and personal estate to X., W., and R. *Held*, that the £1000 was charged on L. in exoneration of the personality.—*Daint v. D.*, 13 I. C. R. 175; 7 I. Jur. N. S. 315. (C.)

4. Testator, by will, directed as follows:—"I direct all my just debts to be paid by my executors and trustees hereinafter named, whom I also direct to pay the following legacies" (which amounted to £800); "and, as to my freehold estate of D., in the King's County, I devise and bequeath same to P. O'S. and T. D. O'F., whom I hereby nominate, constitute, and appoint executors of this my will, upon the trusts" (therein mentioned; and, as to his household furniture and other effects), "My will is, and I order and direct my said executors to sell same by auction, and out of the funds to be realised thereby, and also with the debts and costs due to me, when collected, to pay the several pecuniary legacies hereinbefore bequeathed by me." The creditors of testator having been paid out of the personal estate, which was insufficient to pay them and the legatees, it was contended that the pecuniary legatees were entitled to have the assets marshalled in their favour as against the devisees, and that the debts were well charged on the realty. *Held*, that the real estate was charged in aid of, but not in exoneration of the personality, which was the primary fund for the payment of the debts.—*Lyster v. O'Sullivan*, 9 I. Jur. N. S. 212. (M.O.)

5. V. devised a rentcharge of one hundred guineas to A. for life; and after her death "unto and amongst B., C., and D., the children of the said A. and me, to be equally divided between them, share and share alike; to hold to the said B., C., and D., and to their heirs for ever, as joint tenants; but in default of such heirs," the annuity to sink into the lands.

B., C., and D. were V.'s and A.'s illegitimate children. B., on her marriage, put in settlement her undivided reversionary share.

C. and D. died intestate and unmarried in A.'s life, without having dealt with their shares. B. survived A. *Held*, that B. was entitled to raise out of the lands only one-third of the rentcharge.—*Daly v. Aldworth*, 15 I. C. R. 69. (C.)

6. V., by will, made in 1828, and attested by three credible witnesses, devised freehold

estates in lands to his sons, M. and T., share and share alike; and then bequeathed to his two daughters £1000 each, and charged and incumbered all those lands with payment of their fortunes.

By an unattested codicil, added in the same year, V., having recited that by will he had charged all his real and personal property with payment of those two legacies, ordered and directed "that said sums of £2000" should in the first instance be paid out of whatever money he then had, or might have in bank at his decease, as also out of whatever sums of money might be due to him by bond or otherwise, as far as the same would go towards making up the two sums of £1000, with interest thereon from his decease until fully paid; and if the sums so remaining in bank and so due to him should, when called in, appear inadequate to the payment of those two sums of £2000, with interest as aforesaid, he ordered and directed that the deficiency should be made up from the produce of the sale of his stock of cattle, as by his will was directed. *Held*, that the freehold estates, on which the will charged the legacies, were not exonerated by the codicil.—*In re O'Donel's Estate*, 10 I. Jur. N. S. 83. (C.A.)

1. V. bequeathed all debts which should be due to him, and all chattels which should be in his possession, and all other personal property to which he should be entitled at his decease, to his wife and her assigns absolutely; devised all his real property and real estates to her for life, remainder over in fee; and appointed her executrix. She proved the will, and went into possession of the real estate. V. was lessee for years of a house which he had sub-let at a rent lower than that reserved by the lease. The personalty proving insufficient to pay the rent;—*Held*, that the wife was bound to keep down the rent of the house out of the rents of the real estate, in exoneration of the inheritance.—*Talbot v. The Earl of Radnor*, 3 Myl. & K. 254, examined and considered.—*Fairtlough v. Johnstone*, 16 I. C. R. 442. (R.)

#### XV. 15. Conditional Legacies and Bequests. See LEGACY, VI.

2. V. devised the residue of his estates, which were freehold, to his son S., for life; remainder to such issue, male or female, as S. should think proper to appoint to; but if S. died without issue, male or female, V. devised his estates to his daughter M., provided she married with consent, and to the issue of such marriage, male or female.

After V.'s death, and in the life of S., M. married with consent, and had issue, the deft. S. died without issue, leaving M. and the deft. surviving. *Held*, that the deft. did not take any estate in the devised lands under the will.—*Beasley v. Hourigan*, H. & J. 497. (E.E.)

3. V. devised lands to the persons of the S. and C. families, who should, for the time being, be lord or lords, lady or ladies of the manor of D., "and if the said families should become extinct," then over to a charity. After

V.'s death, the manor of D. was sold by the families of S. and C., but they had not become extinct in blood. *Held*, that the event upon which the estate was to go over was the extinction of the blood of the families of S. and C., and not their ceasing to be lords or ladies of the manor of D.—*Comrs. of Ch. Don. v. Baroness Clifford*, 1 Dr. & War. 245. (C.)

4. In case L. married a professional gentleman, or a man engaged in trade or business, and not possessed of landed property whereon to make a suitable provision for her, a will directed that the fund should be settled to her separate use; but if she married a gentleman of landed property who should make suitable provision for her, the trustees were directed to pay him the whole of the fund, on such settlement being made. L. married a gentleman having no profession or trade, and no landed property at the time of the marriage, who afterwards acquired landed property. *Held*, that this marriage was within the first clause of the will; and that a settlement of the property acquired after marriage, and the death of L., on her issue, would not authorise the trustees to pay him any part of the fund.—*Briscoe v. B.*, 7 I. E. R. 128; 1 Jon. & L. 334. (C.)

4. A testator devised all his real, freehold, and personal property to his son "in case he shall recover from his present illness," and made his daughter "residuary legatee," recommending her, if she married, to have such property as he left her settled to her separate use. Both son and daughter survived him. *Semle*—The condition annexed to the son's devise was void, or only extended to his surviving his father, and he would then have taken the property absolutely; and *Semle also*, the residuary clause would have carried the real estate if the son had died in the father's lifetime.—*Alleyne v. A.*, 8 I. E. R. 493; 2 Jon. & L. 544. (C.)

5. V., seized of houses and lands for lives renewable for ever, and of no other real estate, devised to trustees all his freehold messuages, lands, tenements, and hereditaments whatsoever and wheresoever, upon trusts, viz., to permit his daughter during her life to receive an annuity of £100 payable out of all and every other his freehold estate or estates situate (here the houses and lands above named were mentioned), to her separate use (and without power to alien or mortgage it); after her decease the annuity was to stand to the heirs of her body lawfully issuing, in such shares as she should by will appoint, in default of appointment to her children share and share alike.

V. directed that £50 per annum should be applied in maintaining his daughter until she attained twenty-one or married, and that upon either of those events, the trustees were to assign the annuity of £100, and all interest and dividends due thereon, and all securities wherein the same should be placed out or invested, to her for her own sole use and benefit absolutely for ever, with the usual

powers of distress and entry upon the devised premises, and every or any part thereof. After a bequest of plate and household furniture to his daughter, and of a small annuity to another person, the will contained this clause:—"And in further trust, that in case my said daughter shall happen to die before she attain twenty-one, and unmarried, I give, devise, and bequeath said annuity of £100, and all and every other my freehold estates wheresoever as aforesaid, unto my brother E. C., for and during the term of his natural life; and from and immediately after his decease unto and to the use of his right heirs for ever, in such manner as by his last will he should direct, limit, and appoint;" and V. bequeathed all his personal estate, subject to his debts, to E. C. V.'s daughter survived him and attained twenty-one. Upon a petition presented under the Ch. Reg. Act, s. 11, on behalf of the children and devisees of E. C., who died almost immediately after V., the Court was of opinion that upon the context of the will, the words of contingency, "in case my daughter shall happen to die before she attain twenty-one or marriage," must be confined to the annuity of £100, and that accordingly E. C. and his children took estates to the exclusion of V.'s daughter in the freehold property of V. immediately upon his death; but the case was sent for the opinion of a Court of Law.—*Campbell v. C.*, 1 I. C. R. 503; 4 I. Jur. 45. (C.)

1. V. devised to M. lands, and directed that if M. died before twenty-one, "or at any other age not having lawful heirs begotten by him," the estate should go to the elder brother of M. and to his heirs. M. died over twenty-one, and without issue. The petitioner claimed as heir of the elder brother. *Held*, on the authority of *Glover v. Monckton*, 3 Bing. 13, that the petitioner was entitled to recover.—*Mahaffy v. Rooney*, 5 I. Jur. 245. (C.)

2. A bequest of an annuity to a widow, "so long as she shall continue single and unmarried," will fail if the widow marry in the testator's lifetime, though with his knowledge, unless some general intent in the mind of the testator, that the widow should have the annuity notwithstanding her marriage, can be inferred from the terms of the bequest.—*West v. Kerr*, 6 I. Jur. 141. (C.)

3. V. bequeathed all her property, real and personal, to her son; and, in the event of his receiving a sum of £450 or thereabout, to which she considered herself entitled, requested that he would add to that sum £50 to make up £400, which she left to her grand-daughter. V. received the £450. *Held*, that as to the £450 the legacy was not specific or demonstrative; and the grand-daughter was not entitled to be paid that sum out of V.'s general assets.

That by construction "£400" should be read "£500."—*Taylor v. Creagh*, 8 I. C. R. 281. (R.)

4. V., by will devised (*inter alia*), unto B. the interest in lands, held *pur autre vie*, to have,

receive, and take the rents, issues, and profits thereof; but if B. died before he attained age or married, over. *Held*, that "or" could not be read "and;" and that although B. attained 21, yet that, having never married, he had not acquired an absolute estate.—*In re Clegg's Estate*, 18 I. C. R. 163. (L.E.C.)

5. V., devised and bequeathed his interest in his freehold and chattel property to his grandson J.; "but in case my said grandson J. should happen to die before he attains the age of 21 years, or marries," then over. *Held* (reversing the decision of the Judge of the L. E. Court) that "or" should be read "and;" and that J. had acquired an absolute estate, having attained 21, though he had not been married.—*In re Clegg's Estate*, 14 I. C. R. 70; 8 I. Jur. N. S. 21. (C.A.)

XV. 16. *Of Paying and Appropriating Legacies, &c.* See LEGACY, VIII.

XV. 17. *Of the Satisfaction and Release of Debts and Portions.*

6. *Semble*—Stronger words are required to exonerate personal estate from the payment of debts, than from the payment of legacies.—*Lamphier v. Despard*, 4 I. E. R. 335; 2 Dr. & War. 59; 1 Con. & L. 200. (C.)

7. V., by will, in 1838, devised real estates at M. to his nephew, and bequeathed legacies amounting to £8000 to other persons, which legacies were primarily charged upon the moneys which might be in bank to V.'s credit at his death. In 1839, the nephew, in compliance with V.'s express desire, purchased real estates at C. V., out of moneys standing to his credit in the bank, lent the purchase-money to the nephew, who shortly afterwards repaid it in part; but a balance of £7700 remained due to V. By a codicil made in 1840, V., reciting that he had by will devised real estates to his nephew, charged them with £8000, with interest at £5 per cent. from his decease, and directed that sum and interest to be paid to his executors within six months from his decease, for the purpose of paying off legacies named in his will. *Held*, that parol evidence was admissible of facts showing that V. stood *in loco parentis* to the nephew; and also to show the circumstances attendant upon the purchase of C.; and that, the nephew being unable to repay the balance, V. refused to accept from him a security for it, but instead thereof had directed his own solicitors to prepare a codicil, charging £8000 upon M., which sum was to be applied towards the purposes to which he had by will directed a similar sum formerly in cash at bank to be applied; in consequence of which direction the codicil executed by him in 1840 was prepared.

That these facts amounted in Equity to a release by V. of the debt of £7700 due to him from the nephew; and that the charge of

£8000 upon M. must be considered as substituted for that debt.

The Court admitted the parol evidence, not for the purpose of construing the will or codicil, but to ascertain whether or not the £7700 was a debt due to V. at his death.

*Semble*—The dictum of Wigram, V. C., in *Cross v. Sprigg*, 6 Hare, 552, that if a debt be not released at Law it cannot be considered as released in Equity, is not sustainable.—*Hedges v. Aldworth*, 13 I. E. R. 406. (C.)

**XV. 18. Of Bequests to Charity: of Mortmain.**  
See CHARITY, MORTMAIN.

[10 G. 4, c. 74; 8 & 9 Vic., c. 97.]

1. A devise of lands in Ireland, to Trinity College, Dublin, for the promotion of the knowledge of the Irish language—*Held*, void.—*Att.-Gen. v. Flood*, Hayes, 611; Hay & J., App. xxi. (E.E.)

2. A direction as to charitable trusts upon which real property devised by a will is to be applied, contained in a codicil referred to by the will, but not attested, is not binding on the Master when settling a scheme; but, if proper, should be adopted by him.—*Att.-Gen. v. Madden*, 2 Con. & L. 517. (C.)

3. Testatrix devised all her fee-simple, freehold, and leasehold estates to R. for life, remainder to J. for life, with remainder, save a rentcharge, to the Commissioners of Ch. Don., in trust to pay the head rent, and to apply the profits to charities specified in the will. *Held*, that the charitable bequests were to be paid out of the rents and profits of the property devised, and not out of the general personal estate of the testatrix; and that no charitable trust attached upon the devised estates, until after the death of R. and J.—*Comms. of Ch. Don. v. Espinasse*, 3 I. E. R. 324. (C.)

4. V. being seized of fee-simple lands, had, by articles before his marriage, agreed to convey them upon trust for himself for life, and at his death to secure a jointure for his widow; and, subject thereto, upon trust for the first and other sons of the marriage in tail; remainder to his issue male by any other marriage; remainder to his daughters as tenants in common in tail male; and if he died without issue, or without making a will, the lands were to go to his mother in fee. He subsequently purchased other fee-simple lands; and devised "the residue of his unsettled estate," after payment of his debts and legacies, which he charged upon his real estate, in exoneration of his personal, to his wife for life, remainder to "the Incorporated Society for promoting English Protestant Schools in Ireland." The Society had been incorporated by royal charter, by that title, before the date of the will, and had a license to take in mortmain. *Held*, that the reversion of the lands included in the articles passed by devise; and, that though the devise to the Society, being to a corporation, was void at law, yet,

that as it was for a charitable purpose, there was an original jurisdiction inherent in the Court to sustain it.

The 10 Car. 1, sess. 3, c. 1, is analogous in Ireland to the 43rd Eliz. c. 3, in England.

*Semble*—Charity estates are not within the recent Statute of Limitations, 3 & 4 W. 4, c. 27.—*The Incorporated Society in Dublin v. Richards*, 4 I. E. R. 177; 1 Dr. & War. 258; 1 Con. & L. 58. (C.)

5. A testatrix gave such sum of stock as she should be possessed of at her death to A. and B., "to be by them applied to charitable purposes," according to her instructions deposited with A. The instructions given to A. were verbal, leaving it to his discretion to select the charitable purposes to which it was to be applied. *Held*, that this was a good gift of the stock to charity, and that the Court would direct a scheme for its application.

It is perfectly well settled that, in either case, either where a charitable purpose is expressed generally, or where a particular charity is contemplated, but has not been specified, the Court has jurisdiction to apply the fund to such charitable purposes as it shall select.—*The Commissioners of Ch. Don., &c. v. Sullivan*, 4 I. E. R. 280, 282. (C.)

6. Testatrix bequeathed the residue of her personal property to W., to be by him applied for such pious purposes and uses as should appear to him to be most conducive to the honour and glory of God, and the salvation of her soul. Upon a bill to administer her assets, this bequest was decreed to be a good charitable bequest; and it was, with the consent of W., referred to the Remembrancer to settle a scheme. W. died before the Remembrancer reported. *Held*, that, therefore, the disposition of the fund belonged to the Crown by sign-manual.—*Felan v. Russell*, 4 I. E. R. 701. (E.E.)

7. The Charitable Bequests Act (7 & 8 Vic., c. 97) gives the Commissioners an interest such as entitles them to file a bill to remove a testamentary trustee for a charity, and to procure the appointment of new trustees. The proceeding need not be by information; relief will be granted on the mere ground of the personal unfitness of the trustee.—*Comms. of Ch. Don. & Beg. v. Archbold*, 11 I. E. R. 187. (C.)—[*Revd*: 2 H. L. Cas. 440.]

8. V. bequeathed £500 to two R. C. priests, or the survivor of them, to be applied as they should deem best for the maintenance and education of two priests of the order of St. D. in Ireland. *Held*, that the bequest was null and void, as being opposed to the 10 G. 4, c. 74, and should accrue to the residue of V.'s personal estate.—[*Affirming* Rolls decision, 9 I. Jur. N. S. 404.]

V. bequeathed £500 to another R. C. priest, on a secret trust disclosed to him by V. during his life. The trust was, to apply that sum towards redeeming the rent of the church of the D. Friars in Cork. *Held*, that the bequest, being given on an invalid trust, was void, and

could not be carried out *cy-pres*.—[Reversing on the *cy-pres* point the Rolls decision, 9 I. Jur. N. S. 404.]—*Sinms v. Quinlan*, 17 I. C. R. 43; 10 I. Jur. N. S. 41. (C.A.)

1. Bequest to V. of a residue, to be by him disposed of in such public or private charities as he should think fit. *Seemle*—A void gift, incapable of being carried out either in Ch. or by the Crown.—*Goods of Burrowes*, 10 I. Jur. N. S. 277. (P.)

XV. 19. *Of Interest on Legacies, Intermediate Maintenance, and Disposition of Mesne Profits. See INTEREST PECUNIARY, I.*

2. Maintenance will not be allowed out of funds which, by direction of the will, are to accumulate, and be laid out in the purchase of lands to be entailed on the minor in tail, with remainder over.—*Shaw v. M'Mahon*, 8 I. E. R. 584. (R.)

3. V., who adopted his niece at the age of three years, and until his death maintained her as an inmate of his family, made the following bequest:—"I give, devise, and bequeath, and hereby charge upon all my aforesaid lands and premises, to my niece D., the sum of £3000 sterling, to be payable to her upon her marriage, with the consent of my wife A.; but in case of her marrying without such consent in the lifetime of my said wife, the said charge of £3000 is to merge in the inheritance, and I hereby charge thereon and give to her the sum of one shilling, and no more. It is my wish and will that my said niece D. should live and reside at Q. with my said wife." V. also bequeathed to a brother and sister of D. an annuity of £100 per annum, directing that it should be payable out of certain lands and at certain times. At V.'s death, D. was 19 years of age, and unmarried. A petition having been presented by her for the purpose of enforcing payment of interest upon the £3000 by way of maintenance.—*Held*, that she was not entitled to interest upon that sum.—*Bourke v. Kane*, 7 I. Jur. 169. (C.)

4. Trustees under a will were thereby directed to pay a legacy to an infant legatee when she attained 25; and in the meantime to pay at their discretion for her support and education such portions of the interest as they thought fit: such interest to be paid to the infant's mother on her sole receipt. The legatee, after attaining 21, ceased to reside with her mother, and the Court ordered the dividends to be paid to the legatee herself thenceforward.—*Campbell v. De Verdon*, 6 I. Jur. N. S. 29. (R.)

5. V. bequeathed one-half of the interest of a sum to A. and B., and the other half to C. and D., during their natural life, and after the death of A., B., C., and D., he bequeathed the principal to E., and appointed residuary legatees. A. died. Then B. died, leaving C. and D. surviving. *Held*, that no part of the

principal and interest went to E. during the life of C. and D.

That the executrix of B., and not the residuary legatees, was entitled to the interest of one-half during the lives of C. and D.—*Gray v. Robinson*, 11 I. C. R. 205; 6 I. Jur. N. S. 233. (R.)

6. The rule—that a gift of interest in the meantime will convert a legacy, otherwise contingent, into a vested one—applies to a limitation of a money fund by deed.—*Mostyn v. Brunton*, 17 I. C. R. 153. (R.)

XV. 20. *Of the Surviving of Accruing Shares.*

7. V. bequeathed to his four children, A., B., C., and D., £8000, to be equally divided between them, share and share alike, as tenants in common, and not as joint tenants, but with benefit of survivorship, to be paid and payable to them respectively upon their attaining age, the interest thereof in the meantime, or so much as by his executors should be considered sufficient, to be applied to their maintenance and education; and left to B. and C. all the residue of his personal estate; and in case of their decease before 21, bequeathed the residue to A. and D., or the survivor of them, share and share alike; and in case of the decease of all his before-named children before 21, gave the residue, including his lapsed legacies, to his brother. By a codicil he gave to his children, E., F., G., and H. (born after the will) £4000, in equal shares, with benefit of survivorship, not only as to them, but as to the rest of the children named in the will, payable at 21; maintenance to be granted by the Court of Chancery. *Held*, that the share of G., who died under 21, went to all his surviving brothers and sisters, and not to his widow and child.

The cases as to the period to which survivorship is to be referred, reviewed and classified.—*Forester v. Smith*, 2 I. C. R. 70. (R.)

8. "Surviving daughter" must be taken to mean "other daughter."—*Osborne v. Smith*, 4 I. C. R. 58. (C.)

9. V. bequeathed all his property to his four daughters, share and share alike, the share of each to be given to her on her day of marriage, with consent; and directed that, if any of his daughters should happen to die unmarried, the share of said child to go, share and share alike, among his surviving daughters or daughter so surviving. *Held*, that "surviving daughters" meant "other daughters;" and that the children of a deceased daughter were entitled to a share of the legacy of a daughter who died unmarried.—*In re Connellan's Trusts*, 16 I. C. R. 524. (R.)

XV. 21. *Bequests to the separate Use of Married Women.*

See HUSBAND AND WIFE, III.

**XV. 22. Respecting Limitations of Chattels, and of Chattel and Personal Interest.**

1. Under a bequest of personalty by a will executed after the 1 Vic., c. 26, to "A. and B., to be divided equally," with a request to A. that "should he die without lawful issue, the property which I bequeath him shall revert back to the sons of B.;" A. does not take an absolute interest in the moiety.—*In re O'Beirne*, 1 Jon. & L. 352; 7 I. E. R. 171. (C.)

**XV. 23. Of Election. See ELECTION, II.**

2. V., by will, directed that "if he had but one younger daughter she should have £15,000." This event took place; but she having survived her elder sister, subsequently became entitled to the estates of the testator. *Held*, that this circumstance did not deprive the younger of her portion as the sole younger child.—*Byrne v. B.*, 5 I. Jur. 345. (C.)

3. V., having three sons, A., B., and C., devised property to A., and other leasehold property, together with all the stock-in-trade which should be in the premises, to B. and C. as tenants in common; and directed, that if those sons, or either of them died without leaving lawful issue surviving, the share of such son so dying, in the premises, and in the stock-in-trade which should be therein at the time of such decease, should go to and be divided, share and share alike, between such of those sons as should be then living, as tenants in common. B. and C. carried on the trade after V.'s death. B. died without issue, leaving A. and C. surviving. *Held*, that no case of election arose, there being no condition attached to the bequest, that the stock on the premises, at the death of either of the sons, should be subject to the bequest. A. therefore was only entitled to a moiety of the stock-in-trade at V.'s death.—*Thornton v. T.*, 11 I. C. R. 474; 6 I. Jur. N. S. 95. (R.)

4. V., by marriage settlement conveyed real and personal property therein specified, and all the real and personal property of which he was then, or might die, seized or possessed, on trust, if the petitioner, his intended wife, should survive him, to raise £400 for her. V., by will, bequeathed a considerable portion of the real and personal property specifically mentioned in his settlement, to his wife, for life, with remainders over. He directed other portions of his property to be sold, and the proceeds invested for the benefit of his wife for life, with remainders over; and constituted F. his residuary legatee. V. died, leaving his wife surviving. *Held*, that she was bound to elect between the £400 provided by her settlement, and the benefits conferred by the will.—*Heazle v. Fitzmaurice*, 13 I. C. R. 481. (C.)

5. Two judgments, and a policy of insurance, amounting together to £3084. 12s. 4d., were assigned by marriage settlement in trust for

the wife of V., who received the amount of the policy. By will, V. confirmed the settlement, and bequeathed specified funds and moneys upon trust to pay his wife the £3084. 12s. 4d., "same being the amount secured by certain judgments in said settlement mentioned: viz., a judgment against G. for the principal sum of £1200; and two other judgments against the said G. and W. for the principal sum of £500; and the amount of a policy of insurance for the sum of £1500, late Irish currency (equivalent to the sum of £1384. 12s. 4d. of the present currency), said sums making together the sum of £3084. 12s. 4d., which has been received by me." *Held*, that the wife was not entitled to the legacy and the sums secured by the judgments and policy; but must elect.—*Cooke v. Franklin*, 16 I. C. R. 469. (R.)

6. In 1804, W. conveyed premises of which he was seized in two several streets in D. to the Commissioners of Wide Streets, for £10,579, on which they were to pay W. interest at £5 per cent., equal to £528 a-year until the reconveyance hereinafter mentioned. They covenanted that they, so soon as any of their ground should be set, so that the rent payable thereout to the Commissioners should be sufficient for the payment of the said annual sum of £528, would grant and convey unto W., his heirs and assigns, so much of the ground so to be demised, and the rents and reversions incident thereto, as should amount to that annual sum. In 1818, W. devised "all the rest, residue and remainder of" his "property, real, freehold, and personal"—the personalty amounted to £100,000—"which I shall die possessed of or entitled to," to his two sons, V. and J., and their heirs, &c., in equal shares. In 1823, the Commissioners, pursuant to the covenant, conveyed premises amounting in yearly value to £528, to W., his heirs, &c. In 1826, W. died, leaving V. and J. surviving. *Held*, that since the will was made before the Wills Act, the real estates in those reconveyed premises were not operated upon by the will; and that, respecting them, W. died intestate.

That the heir-at-law was bound to elect whether he would take under, or against the will.—*Sweetman v. S.*, 11 I. Jur. N. S. 313. (C.)—[See *Sweetman v. S.*, Ir. Rep., 2 Eq., 141. (V.C.)]

**XV. 24. Of the Residuary Personal Estate.**

- a. *Rights of Residuary Legatee.*
  - b. *Rights of Next-of-kin.*
  - c. *Rights of Executors.* See EXECUTORS, VII.
- [See also LEGACY.]

**XV. 24. a. Rights of Residuary Legatee.**

7. V. seized of an estate *pur autre vie*, and possessed of personal property to the amount of about £4500, bequeathed "the sum of £1500, the other part of the £4500, together with any further property," in trust for the use of his father, to be disposed of by him, share and share alike, as

he by deed or will should appoint among V.'s brothers, H. and J., and the daughter or daughters of his sister E. The will contained a residuary clause in these words: "As to the rest, residue, and remainder of my worldly estate and fortune, not heretofore and hereby disposed of, in trust to the use of my affectionate father, J. C., and his heirs, executors, and administrators for ever." *Held*, that the estate *pur autre vie* passed under this residuary clause, and not under the words "any further property," upon the true construction of the entire will.—*Acheson v. Fair*, 3 Dr. & War. 512; 2 Con. & L. 208. (C.)

1. The testator bequeathed all his moneys in government stock, and all his other moneys, on trust to sell so much of the stock as should be sufficient to pay the following legacies. He then bequeathed legacies, and directed that his trustees should expend all the residue of his government stock and other moneys which he should die possessed of, after payment of his legacies, debts, &c., in land. *Held*, a gift out of the general residue, and that the legatees should not abate in favour of the devisee of the land to be purchased.—*Jackson v. Hamilton*, 9 I. E. R. 430; 3 Jon. & L. 702. (C.)

2. A testatrix who died possessed of a mortgage in freehold lands, after reciting that she was possessed of several sums lent to several persons, and charged on freehold and other lands, gave and devised them to D. and O., upon trusts; and, after several primary and specific legacies, proceeded thus:—"I leave all the rest, residue and remainder of my property, of what nature and kind soever I may die possessed of, to the said O., in trust for the children of W." *Held*, that the legal estate in the mortgaged premises passed to D. and O.—*Dorcus v. Doherty*, 1 I. Jur. 220. (E.E.)

3. A bequest of "all my houses, farming stock, carriages, plate, furniture, rent, and arrears of rent due to me at my decease, and all the residue of my real and personal estate not hereinbefore specifically bequeathed," is a residuary bequest.—*Osborne v. O.*, 2 I. Jur. N. S. 219. (C.)

4. V., seized of premises subject to a head rent, by deed conveyed a portion of them to trustees, to collect the rents and apply them to B.'s use; but gave no directions regarding the payment of their proportion of the head rent. V., by will, devised the residue to C., "subject to the payment of the head rent and renewal fines." *Held*, that the conveyed portion was relieved from contribution, and C. must pay the whole head rent.—*Carolin v. Hewson*, 5 I. Jur. 328. (C.)

5. V. devised her estates of M. and C. to A. upon trust to sell, and out of the produce pay a legacy, and pay the residue to B. She also specifically devised other real estates, and appointed C. her residuary legatee and devisee. The will contained this clause: "And in case such residue should prove insufficient for the

purpose aforesaid, then and in such case it is ordered and directed that the said deficiency should be paid out of the said lands of M. and C." V., by will specifically devised other lands, with legacies charged thereon, some exclusively, others generally. By codicil she bequeathed to D. a legacy of £2000, charged as well on her real as on her personal estate. *Held*, that the real estate specifically devised was not subject to the latter; and that the price of M. and C. was only bound to make good any deficiency of the residue to answer the debts and legacies bequeathed by the will itself, but was not charged with the legacy of £2000 created by the codicil.—*Dyer v. Bessonet*, 7 I. Jur. 162. (M.O.)

6. V., seized for lives renewable for ever of the reversion expectant on a term of 99 years in G., by deed, dated 16th March 1797, settled his interest in G. upon W. for life; with remainders over; with the ultimate reversion to himself in fee. On the 20th May 1797, V., by will, devised "whatever residue might remain of his fortune undisposed of by his will" equally amongst all his children, sons and daughters. V., by codicil, in 1802, reciting that he had intended to divide the residue of his fortune between his wife and all his children, but that having since considered that it would be "great ease" to his wife to leave his children specific sums, instead of their respective shares of the residue of his fortune, he thereby bequeathed to his children specific sums, "in lieu and stead of all residue of his fortune;" and, after payment thereof, left and bequeathed the rest and remainder of all such residue to his wife. All the limitations in the settlement of 1797, prior to V.'s reversion, were exhausted after the death of V. *Held*, that V.'s interest in G. passed by the residuary devise in the codicil. The word "fortune" in a devise *prima facie* includes both real and personal property.—*Spearing v. Hawkes*, 6 I. C. R. 297; 2 I. Jur. N. S. 406. (C.A.)

7. V., having a general power of appointment over a fund which was settled on her husband for life, by will bequeathed several legacies thereout, and the remainder or residue of the fund, share and share alike, to her sisters; and, as to "any other" residue of moneys or property not specified or disposed of, directed it to be given, share and share alike, to her then surviving sisters who might be living when her will and the bequests therein might become available. One sister died in V.'s life, who died before her husband. *Held*, that the lapsed share of a deceased sister passed under the general residuary clause to the surviving sisters.

That those sisters only who survived the husband took under the general residuary clause.—*Hickson v. Wolfe*, 9 I. C. R. 144. (C.A.)—[*Affg.* 7 I. C. R. 452. (R.)]

8. Lands, held for lives renewable for ever, were conveyed by marriage settlement to trustees, to the use of V. for life; remainder, subject to a jointure, upon trusts, to convey

for the benefit of the issue of the marriage; in default of issue, as V. should appoint; in default of appointment, to the heirs of V. There being no issue, V., in 1854, devised the lands, stating that he held them for lives renewable for ever, to B. for life, subject to the rent and renewal fines payable thereout; and devised all the residue of his property to his executors C. and D. In 1856, one of the lives in the original lease subsisting, a f.-f. grant of the lands was made to V. under the Ren. Lease. Con. Act., subject to a rent; and in 1857 V. purchased and obtained a conveyance of the f.-f. rent. *Held*, that the devise of the lands to B. was not affected by the f.-f. grant.

That the rent was not merged or extinguished, and passed under the residuary devise to C. and D.—*Dixon v. Rowan*, 9 I. C. R. 365. (R.)

1. V., after giving many pecuniary and some specific bequests, proceeded:—"The remainder of my property I leave to my sister, S.;" then, after a few legacies, "I appoint my two sisters, S. and G., my executrixes and residuary legatees of this my last will." *Held*, that the gift of the remainder of her property to S. was not revoked, and that the appointment of S. and G. residuary legatees only gave them any legacies which had lapsed.—*In re Jessop*, 11 I. C. R. 424. (C.)

2. A testator bequeathed pecuniary legacies to each of his children, some of whom were minors; and the residue of his property, after payment of all his just debts, &c., and the several legacies bequeathed by his will, to be equally divided between all his sons and daughters; and directed that the "interest of the legacies" thereby given to such of his children as should not be of age at the time of his decease, should be paid to his wife, to be applied by her for and towards their maintenance and education. *Held*, that the interest of the respective shares of the residue, as well as that of the pecuniary legacies, was applicable to the maintenance of the minor children.—*Guinness v. G.*, 14 I. C. R. 218; 8 I. Jur. N. S. 24. (R.)

3. V. bequeathed whatever money he should die possessed of to his brother, J.; and, after several other bequests, bequeathed all the residue of his property not theretofore disposed of to his nephew, who was appointed residuary legatee.

Part of the money of which V. died possessed was secured by mortgage or charges on land; and part in government stock. *Held*, that, while the sums secured by mortgage, as also arrears of rent and rentcharge, interest, and dividends on consols and stock, passed under the word "money" to J.; the sums invested in consols and stock did not pass thereunder, but went to the residuary legatee.—*Hewitt v. Bredin*, 10 I. Jur. N. S. 85. (C.)—*[Affd.: ibid.*, 265. (C.A.)]

#### XV. 24. b. *Rights of Next-of-kin.*

#### XV. 24. c. *Rights of Executors, &c.* See EXECUTORS, VII.

4. The word "legacies" in a will, held to apply to a gift of the residue, which included real property.

Executors are not relieved from the consequences of a breach of trust, by presenting a petition under the 13 & 14 Vic., c. 89, s. 11.

A special case should be framed thus:—A statement of the facts, followed by a series of interrogatories, signed by a counsel on each side.—*In re the Trusts of Guinness's Will*, 8 I. Jur. N. S. 24. (R.)

#### XV. 25. *Of Legacies, Portions, &c., under Will: how to be raised.* See LEGACY, VIII. —PORTIONS, VI—ANNUITY, IV.

#### XV. 26. *Of the Administration of the Estate: Duties, Rights, Powers, and Liabilities of Executors.* See EXECUTORS, IX, *passim*.

#### XV. 27. *More particularly of Devises, and of Real Estate.*

##### a. *Generally.*

##### b. *Operation of Devises of Land, &c., on Leaseholds and Mortgages.* See COPYHOLD, I.

##### c. *Rights, Powers, &c., of Trustees.* See TRUSTEES.

##### d. *Rights, Duties, &c., of Tenant for Life and Remainderman.* See ESTATE, III.

##### e. *Rights, Duties, &c., of Heir-at-law & Devisee.* See DEVISEE—ESTATE, VIII—EXECUTORS, XI—HEIR-AT-LAW, I.

#### XV. 27. a. *Generally.*

#### XV. 27. b. *The operation of Devises of Land, &c., on Leaseholds, and Mortgages.* See COPYHOLDS.

#### XV. 27. c. *Rights, Powers, &c., of Trustees.* See TRUSTEES.

5. V. devised his real and personal estate to his wife E. and her heirs, in full confidence that she would pay thereout specified legacies to which the real estate was subject, and clear it from all incumbrances:—His "intention being, to give her as full a power and as absolute a dominion over my real and personal estate for that purpose, as I have myself," and to dispose of same amongst their children. In consideration of a fine, E. demised part of the premises to R., under whom ptf. claimed, for three lives renewable for ever; and died, having devised the residue of her real and personal estate to her only child, W.,



and appointed him executor. There was not any evidence whether E. had applied the fine in disencumbering the estate; but W. never alleged that E. had misapplied the money. On a bill for a renewal against deft. claiming under W.; *Held*, that the power enabled E. to raise the money to disencumber the estate by taking fines on leases for lives renewable for ever; and that, as against W. and deft., it must be taken that the fine had been properly applied. The deft. could not refuse to renew; for, if he did, he would render E.'s personal estate, bequeathed to W., liable to compensate ptf. for breach of the covenant to renew. — *Lewis v. Swift*, 1 Jones, 422. (E.E.)

1. In 1772, V. devised to trustees, and their survivor and his heirs, all his real and personal estate, on trust to pay an annuity to his daughter A.; the residue of the rents to be applied in paying his debts; after her death, in trust to permit the second son of A., by J. her husband, afterwards Earl of O., and the heirs male of his body, to receive the same in preference to her eldest son; it being V.'s meaning that such second son "do take and be preferred, &c., until he shall become an eldest son, and so shall each and every second and younger son or sons take place and enjoy the said estates according to seniority, &c., and the heirs male of the body of such second son. In default of such issue, the estates were to go to the use of the daughters of A.; as tenants in common in tail, &c., with ultimate remainder to V.'s trustee in fee. A. had four sons by J.; namely, Walter, John, James, and Charles. All of them were born during V.'s life. John was the second son living at the date of the will, and at V.'s death. In 1793, John joined A. and J. in a recovery of the W. estates so devised by V., and executed a deed declaring the uses to A. for life; remainder to John for life; remainder to John's sons in tail; remainder successively to James and Charles for life, and their respective issue in tale male. The deed contained a proviso for shifting those estates from John to James, and from James to Charles, if the O. estates of J. came to John or James. In 1796, John died. In 1795, J. had died, whereupon Walter had become entitled to, and had suffered recoveries of the O. estates. He became Marquis of O., and died in 1822. James then became Marquis. A. died in 1830. In 1834, James filed his bill against Charles, the present ptf., and the heir of the surviving trustee, claiming the W. estates as tenant in tail, under the will, or as tenant for life, with remainder to his eldest son in tail male, under the deed of 1793. Charles answered the bill. Issue had been joined, and publication passed, when the ptf. died. In 1838, the present ptf. filed his bill against Charles and his three sons, setting out all the charges contained in the former bill, and the several proceedings had thereon, and claiming to be entitled to the W. estates, either as issue in tail under the will, or as tenant in tail under the deed of 1793, and the recoveries. The bill stated that Charles and his sons claimed some interest in those estates, and

in the subject matter of this suit, and in that respect were necessary parties. It prayed that ptf. might have the benefit of the former proceedings, &c., and that the trusts of the will might be carried into execution, &c. Charles's three sons demurred to the bill for want of equity. No grounds were assigned on the record. At the bar, one cause of demurrer was—that ptf. showed no title to the W. estates. *Held*, that A. did not take any estate under the will; that the devise, to her second son and the heirs male of his body, was an executory devise to such son as should answer that description at her death; and, therefore, that the recoveries suffered in 1793 and 1795 were bad for want of a tenant to the *propepe*, so as to bar the remainders over limited by the will, even supposing that on John's death James took an estate tail by way of executory devise.

That the limitation to the trustees and their survivor, and his heirs, vested in them the legal estate in fee.—*Ormonde v. Wandersforde*, 1 I. E. R. 238. (R.)

#### XV. 27. d. *Rights, Duties, &c., of Tenant for Life and Remainderman.*

[See ESTATE—INTERMEDIATE PROFITS.]

2. Testator devised his real estate to the use of trustees, for a term of years, upon trust, that if his personal estate proved insufficient to pay his debts and legacies, the trustees should, after the decease of his wife, by sale or mortgage, raise such sums as should suffice to discharge his legacies, for the discharge whereof his personal estate should prove insufficient; subject thereto he devised the estates to his issue; and for want of issue living at the time of his decease, to his wife for life, remainder to the use of E. for life, remainder to the first and other sons of E., in tail male. He died without issue. *Held*, that the tenant for life should pay the interest on the deficiency, to be ascertained either within a reasonable time after the death of the testator, or to be ascertained by the actual result of the account; and that the estate was to bear the capital only of the deficiency. And that if the personal estate was got in in sums composed partly of capital money, and partly of interest, the interest should be applied in payment of the interest on the legacies, and the capital should be attributable to the capital of the legacies, in ease of the term.—*Coote v. Lord Miltown*, 1 Jon. & L. 501; 7 I. E. R. 391. (C.)

#### XV. 27. e. *Rights, Duties, &c., of Heir-at-law and Devisee.*

[As to Payment of Mortgage by the Heir-at-law, see 17 & 18 Vic., c. 113.]

8. Devise of real estate to W. and his heirs, upon trust to receive the rents and profits, and apply them in discharge of the testator's debts and legacies, and after payment thereof to convey a portion of that real estate to testator's brother, R., for life, and the residue thereof, and the part so devised to R., after

his decease, to such of the sons of W. as should at his decease be his second son, for life; remainder to the first and other sons of such second son in tail male; remainder to the third, fourth, and other sons of W. successively, in strict settlement. Testator appointed W. his residuary legatee. The debts and legacies were all paid, and R. died in the life of W. *Held*, that the heir-at-law of the testator was entitled to the rents and profits of the real estate until the death of W. as undisposed of realty.—*Wills v. W.*, 1 Dr. & War. 439; 4 I. E. R. 53. (C.)

1. The proviso at the end of the 17 & 18 Vic., c. 113, that it shall not affect the rights of any person claiming under any deed or document made before the 1st of Jan. 1855, does not save a right to the heir to be exonerated from the mortgage debt out of the personal estate bequeathed to a legatee by a will made before that date.

In 1834, V., by will, devised to B. all his right and title to, and interest in certain real estate; and also devised and bequeathed to B. all his personal property, together with all other real, freehold, and chattel property of every nature and kind whatsoever of which he might at the time of his death be seized or possessed; and appointed C. his executor. After making his will, V. granted mortgages, for the purpose of securing which he executed a disentailing deed, which was held to be, as to the real estate, a revocation of the will; and died in 1856.

*Quære*—Whether the bequest of the personal estate was specific, so as to exonerate it from the mortgage debts?

*Held*, that the 17 & 18 Vic., c. 113, applied; and that the heir was not, as against the legatee of the personal estate, entitled to be exonerated from the mortgage.—*Power v. P.*, 8 I. C. R. 340. (R.)

XV. 28. *Of Powers: their Execution: by whom: of the Estates created under Powers.*

2. By marriage settlement of 1773, specified estates were limited to V.'s sons in such shares as he should appoint by will; in default of appointment, to them in fee, as tenants in common. V., having three sons, B., C., and D., by will appointed all the lands to B. for life; remainder to B.'s first and other sons in tail; remainder to C. for life, with limitations to his issue; and gave other valuable properties to C. and D., and appointed D. his residuary devisee. *Held*, a bad execution of the power.

B., C., and D., entered into possession of the estates devised to them. In 1802, B. settled the lands to his own use for life; remainder to his sons as he should appoint, &c. In 1817, B., C., and D., executed a deed whereby, after reciting doubts touching the validity of V.'s appointment to B., and that C. and D. had elected to abide thereby; and had accepted, enjoyed, and elected to abide by the lands devised to them; and had agreed to confirm V.'s will; C. and D., in order to confirm the uses of the settlement of 1802,

released all their right under the settlement of 1773 to the uses of the settlement of 1802. *Held*, that the settlement of 1802 was not an election to take under the will, since its limitations did not accord with those in the will; and that the deed of 1817 ratified the appointment so far only as it was an exclusive appointment, and then confirmed the limitations in the settlement of 1802.—*Beere v. Prendergast*, Hay. & J. 384. (E.E.)

8. It is clear and settled law of the land, that a gift in default of appointment gives vested interests to all the objects of the power, subject to be divested by its exercise.—*Heron v. Stokes*, 4 I. E. R. 285. (C.)

4. V., having devised all his estates to three trustees, whom he named his executors, and having charged the estates with various annuities and pecuniary legacies, thus concluded: "I give, devise, and bequeath unto my said trustees, to be equally divided between them, share and share alike, all the rest, residue, and remainder of my property not herein disposed of, to answer any contingency that may arise or happen with respect to the trusts of this my will, or in case of non-payment of my rents, as also to answer the several legacies and bequests herein mentioned, and to pay the expense of agency."

By codicil, V. altered the bequests of the annuities given by the will, and thus proceeded: "I leave my brother-in-law, P. (one of the trustees named in the will), residuary legatee to all my property; and I hereby empower him to keep clerks, agents, &c., in any manner he thinks proper, and also to fee one of the first lawyers upon any question he may think fit to consult for advice, and to do all other acts he may think proper, with or without the consent of my other trustees or executors." *Held*, that all V.'s real estate, not previously disposed of, passed to P.; and that he took the beneficial interest therein.—*Warren v. Newton*, Dr. Rep. temp. Sugden, 464. (C.)

5. V. having power to give a fund to all and every her child or children, and to the exclusion of any one or more of them, in such shares and at such times as she should appoint, by will, reciting that her daughter had gone into a convent, bequeathed £1000, part of the fund, if her daughter should change her mind and return to her family and friends, in trust to pay the interest to her for life, remainder to her children, if any; and in case of her not leaving the convent or not leaving issue, the £1000 to go to V.'s other children. The daughter continued in the convent. *Held*, a gift on a contingency authorised by the power, and that the daughter was not entitled to the interest or any part of it as unappointed, but that it went with the principal, which should be invested, with liberty to the legatees in remainder to apply for it on her death.

By will, made under a power, personal property was given to such children as the testatrix should have living at her death, and in default of such issue over; and other personal property was bequeathed to C., wife of M.,

for her separate use; and if she died without issue by her present husband, or any other husband she might thereafter take, then to other persons. *Held*, that C. took the money absolutely, for her separate use.—*Caulfield v. Maguire*, 8 I. E. R. 164; 2 Jon. & L. 141. (C.)

1. Estates were settled to uses, with a remainder in fee to V., subject to a power of revocation. Under the power they were re-settled to other uses, with a remainder in fee to V., subject to a proviso, under which this settlement became ultimately defeated. V. made a will before 1838, devising the estates, and they were afterwards settled, reserving the remainder in fee to V. *Held*, that the will was inoperative, as the old remainder did not subsist, and the estates went under the latter deed to V.'s heir-at-law.

A will of lands, made before 1838, is entirely revoked by an alteration in the estate, though made after 1838.—*Lord Langford v. Little*, 8 I. E. R. 546; 2 Jon. & L. 613. (C.)

2. V. having by will, in 1837, bequeathed legacies, proceeded as follows:—"To my son, I give, devise, and bequeath all my lands and tenements, rights and credits, *subject to the legacies aforesaid and my debts, the remainder of my property* to be disposed of by him to and amongst his children in such shares and proportions as he shall think proper." The words in italics were inserted by interlineation. By the last clause in the will the interlineations, as well as the original text, were declared to be in V.'s handwriting. In 1839 V. added a codicil, by which he merely made a declaration with reference to one of the legacies. In 1845 the son died, in V.'s life, and without having made any appointment amongst his children. V. having died—*Held*, that the will gave the son a power, coupled with a trust, and that accordingly his children were entitled as well to V.'s real as to his personal estate, in equal shares.

*Semble*—V.'s general personal estate would have passed under the words "rights and credits" alone, even if the interlineations had not been made.

The effect of interlineations considered.—*Hutchinson v. H.*, 13 I. E. R. 332. (C.)

3. £8000 were charged on the lands of K., by marriage settlement, as portions for children, to be divided between them in such parts, &c., and to vest and be paid to them respectively at and upon such age, days, or times, and to be subject to such charges, provisos, and limitations (such charges or limitations being for the benefit of some or one of them), and in such manner as V., the younger, by any deed or deeds, instrument or instruments, in writing, or by will should direct or appoint; in default of appointment, to be equally divided between or among such children, share and share alike; the shares of sons to be paid at 21, and the shares of daughters at 21 or marriage. V. bequeathed a legacy of £2000 to his wife, and the interest of the remainder of the money of which he might die

possessed, for her own use, and for the maintenance and education of his two daughters; and charged K. with £8000, which, together with the residue of his fortune he wished to be divided in equal shares between his two daughters; and left the residue of his fortune in money, after paying the £2000 to his wife, together with the £8000 charged upon K., to be equally divided between them; the entire to belong to either of his daughters, should the other not arrive at the age of 18 years. *Held*, that the will operated as an execution of the power under the settlement, and that the portions of the daughters, vested at M.'s death, and bore interest from that date.—*Murphy v. M.*, 3 I. C. R. 95; 4 I. Jur. 273. (C.)

4. A tenant for life of estates, with power to appoint them to his issue male, and to charge a sum for the benefit of his younger children, on the marriage of his third son, executed a bond and warrant of attorney, on which judgment was entered for a sum as provision for him. On the marriage of a daughter, he made a provision for her, by way of annuity charged on one of the settled estates. He afterwards, by will, devised some of the estates to his eldest son, subject to all his debts and incumbrances of every description, and subject to charges made by his will in favour of his other children. He then charged sums in favour of others of his children, and devised to his fifth son an estate, freed and exonerated from all his debts, charges, and legacies; his will being, that if any creditor should recover any demand from the lands so devised to his fifth son, the latter should be recouped by other estates devised to his eldest son; and stated that he had avoided mentioning his married children, as he had already provided for them, by bond or otherwise, at their respective marriages, fully and adequately to the provisions made thereby for his other children. The testator did not appear to have left any other property but that which was the subject of his power. *Held*, by the majority of the Council, that the charge of the judgment debt to the third son, by the will, operated as an execution of the power to charge for younger children.

That an instrument should operate as an execution of a power, it is not necessary that the donee should intend to execute the power, or that he should have it in contemplation. It is sufficient if the act which he intends to do, or the benefit which he intends to confer, cannot be done or conferred otherwise than by an execution of the power.—*In re Morgan*, 7 I. C. R. 18. (P.C.)

5. A fund was by marriage settlement vested in trust, in the first place to pay the interest to the husband for life, after his death to the wife if she survived him, for life; after the death of both, to assign the sum to and amongst the issue of the intended marriage, in such shares and at such times as the husband should by will or deed appoint; in default of appointment, to assign the sum to and amongst the issue of the marriage, share

and share alike; but if no issue of the marriage living at the decease of the survivor of the husband and wife, then to assign the sum to the husband his executors, &c. There were four children of the marriage. Three died unmarried and without issue, in the husband's lifetime; one of them having attained 21, the others under age. The husband (who survived his wife), while two of the children were alive, appointed by deed a part of the fund to a son who alone survived him; and directed that the remainder should go and be held in all respects as the entire fund would have gone if no appointment had been made. *Held*, that the word "issue" was not confined to children, but meant all descendants.

That the issue took vested interests in equal shares on their births, subject to the amount of the shares being varied by the husband's appointment, and subject to his right to appoint in favour of surviving issue, to the exclusion of the representatives of the issue who had predeceased the appointment; and therefore that the unappointed part of the fund was devisable equally amongst a son who survived the father and the representatives of three children who died in the lifetime of the father, whether they had attained 21 or not—*In re Howard's Trusts*, 7 I. C. R. 344. (R.)

1. By marriage settlement of L., a fund was vested upon trust, after the decease of L., and his intended wife, for the children of the marriage, as L. should appoint; in default of appointment, equally. There was a hotchpot clause, but no advancement clause.

The fund produced £4700, and was, with £300 belonging to L., invested on mortgage. There were five children. In 1844, on the marriage of A., one of these children, L. settled £1000 of his own upon A., her husband, and issue. In 1845, L., by will, appointed and bequeathed the £5000 invested upon mortgage, as to £1000 to J., another of his daughters, and as to the residue among his remaining children excepting A. By the will he also bequeathed £1200 to the trustees of A.'s settlement, for her benefit. In 1848, L., on the marriage of J., gave £1000 of his own, and secured £1200 upon trusts for J., her husband and issue. By a subsequent codicil, L. revoked the appointment and bequests made to J., by his will, "in consequence of what he had paid and secured on her marriage." *Held*, that the sum appointed to J., and revoked by the codicil, was to go as in default of appointment.

That A. and J. were not excluded from sharing in that sum.

That L. could not be taken to be a purchaser of the shares of A. and J., in the unappointed part of the settled fund.

*Folkes v. Western*, 9 Ves. 456, approved of.—*Noblett v. Litchfield*, 7 I. C. R. 575; Dr. Rep. temp. Napier, 158. (C.)

2. V. bequeathed all his estate, real and personal, in trust to pay the rents and dividends to his wife for her life; and directed that after her death his real and personal estate, and all moneys which might have been

got in or might be still due and owing, should go to and be paid in such manner as he should by a codicil or codicils direct; in default of such direction, to his wife, as his residuary devisee and legatee. By codicil he left an annuity of £600 to W. for life, and if W. married and had children, then the £600 per annum was to go to them in what manner W. might think proper; but should he not leave any issue, then the £600 per annum to go to E. and his family, to be so divided as E. might think proper. *Held*, that W. had power to dispose of it among his children as a perpetual annuity; and that there was a trust for them in default of appointment.—*Warren v. Wright*, 12 I. C. R. 401. (R.)

#### XV. 29. Of Remainders, generally, under Wills. See REMAINDERS & REVERSIONS —INTERESTS IN PROPERTY, IV, V.

3. There is no rule of law more sacred than this, that no limitation will be construed to be a springing use, when it can take effect as a contingent remainder. This is one of the settled landmarks of the law.—*Cole v. Sewell*, 2 Con. & L. 359; 4 Dr. & War. 1; 5 I. E. R. 66. (C.)

4. V. devised to his son, T., all his lands and tenements, rights, and credits, subject to legacies and debts; the "remainder" of his property to be disposed of by T. among his children, in such shares and proportions as he should think proper. T. died in V.'s life, without making any disposition of the property. T.'s children filed a bill to ascertain their rights under V.'s will. *Held*, that "remainder" referred to real and personal estate.—*Hutchinson v. H.*, 2 I. Jur. 81. (C.)

5. Articles of agreement provided that the interest of a fund, vested in trustees, should be paid to Lady C. for life; after her death, the principal to go amongst the then unmarried children of herself and her husband, as the husband should by deed or will appoint; in default of appointment, equally among the children living at the death of the husband. The fund was vested in lands pursuant to a trust in the articles; and the husband by will appointed the lands among his four sons, as follows:—A. to John, B. to George, C. to Henry, D. to Nelson, to go to them immediately from and after the decease of Lady C.; with a clause of survivorship among the brothers, if any of them should die before they became respectively entitled thereto. The testator, by two subsequent deeds of appointment, irrevocably appointed A. to John, and C. (before given by the will to Henry) to George; and by a codicil, referring to the two deeds of appointment, revoked the appointment in the will contained of C. to Henry, and, "instead thereof," appointed to him B. Henry died after the testator, but before the death of Lady C.; the tenant for life having by will devised C. upon charitable trusts. *Held*, that the period for the vesting of

the estates was the time of the death of the testator, and not of the death of the tenant for life, and, consequently, that the devise by Henry was good.—*Commrs. of Ch. Don. v. Cotter*, 1 Dr. & War. 498; 2 L. E. R. 196. (C.)—[Affg., the decree; 2 Dr. & Wal. 615.]

1. V. devised all his "part of the lands of A., being lately part of the estate of J. K.," purchased by him under a decree of the Court of Ch., to his son M., "during his natural life, and no longer, unless it shall so happen that my said son shall survive his present wife and marry a second or other wife, by whom he shall have lawful issue; and then and in that case" he devised his "said part of said lands, upon the death of my said son leaving issue male of such second or other marriage, to such issue male, share and share alike; and for want of issue male, to the issue female of such second or other marriage, share and share alike; and, in case it shall so happen that my said son shall die without leaving any such issue of such second or other marriage," he devised the lands to his grandsons. *Held*, that M. took for life; remainder to the issue of a second or other marriage, in fee, as tenants in common; and that the grandsons were to take only on the contingency of the devise to the issue not taking effect.

The rule in *Shelley's case*, as applicable to wills, considered and explained; and the cases on the construction of "issue" and "heirs" in testamentary gifts, reviewed.—*Montgomery v. M.*, 8 L. E. R. 740; 3 Jon. & L. 47. (C.)

2. Bequest of portion of a chattel real to "my son J.; and if J. dies without a lawful male heir, his part of the lands falls to his brother R. I also order that the part of the lands which I bequeath to my son J. is to fall to his youngest son, without any incumbrance." *Held*, that J. did not take an absolute interest in his portion of the lands, and that the gift over to A. was not too remote.—*Dodds v. D.*, 10 L. C. R. 476; 5 L. Jur. N. S. 357. (C.)—[Affd., 11 L. C. R. 374; 6 L. Jur. N. S. 75. (C.A.)]

3. V. by will, in 1806, bequeathed a chattel lease to R. and the heirs of his body; and, if R. died without issue, V. gave it to C. and the heirs of his body; and, if both R. and C. died without issue, V. gave the lease to J. and the heirs of his body. He then directed that if R. and C. died without issue in the life of J., "whereby J. would become entitled to the said premises," £2000, bequeathed to J., should be paid to other persons; and that if R., C., and J. all died without issue, or if R. and C. died without issue in the life of J., and he refused to pay the £2000, if he had received it under the will, then, and in either of such cases, V. gave the lease to G. and the heirs of his body. V. then directed that if, "by either of the events aforesaid happening in the lifetime of G., he should become entitled to the lease," then G. should pay £2000 bequeathed to him to other persons; and if R., C., and J. died without issue in the life of G., and he

refused or neglected to pay the £2000, then, and in either of such cases, V. gave the lease to T. and the heirs of his body; and if, "by either of the events last mentioned happening in the lifetime of T., he should become entitled to the lease," then T. was to pay over £2000 to certain persons.

R., C., and J. all died without having a child, and in the life of G. T. and G. did not pay over the £2000. *Held*, that the bequest to T. was too remote, and did not entitle him to the lease.

V. then gave other lands to X. and the heirs of his body; and in case he died "without issue living at the time of his death," then V. gave those lands to R. and the heirs of his body, and to C. and the heirs of his body the first-named chattel lease; and if X. and R. should "die without leaving issue," then V. gave the second set of lands to C. and the lease to J. and the heirs of his body. V. then declared that if X., R., and J. should "die without issue," or if J., becoming entitled to the lease by the last bequest, should omit to pay over £2000 to the persons named, then V. gave the lease to G. and the heirs of his body, and directed that "if X., R., and C. should die without issue as aforesaid," then the second set of lands should go over to J. and the heirs of his body, and the lease should go to G. and the heirs of his body; and if J. and G. should respectively become entitled to the lands devised to them, in case of the deaths of X., R., and C. without issue, in the life of G., then G. was to pay £2000 bequeathed to him, over to certain persons; and if "X., R., C., and J. should die without issue as aforesaid," then V. gave to "G. and the heirs of his body the second set of lands; unto T. and the heirs of his body, and his several estates and interests in the leasehold lands." *Held*, that the words "die without issue" were to be read in all these bequests, "die without leaving issue;" that the word "and," in the last clause, might be transposed, and placed immediately before the words "unto T. and the heirs of his body," and that X., R., C., and J. having all died childless, T. was entitled to the lease.—[The Lord Justice of Appeal dissenting.]—*Falkiner v. Hornidge*, 8 L. C. R. 184. (C.A.)—[Affg. decision, 6 L. C. R. 551. (C.)]

4. Bequest to younger sons as tenants in common; and, if any of them should die before the distribution, not leaving any wife or children, his share to go to his next eldest brother, and so on to the youngest. The fifth son having died without leaving a wife or child, his share was *held* to go to the sixth.—*Fitzgerald v. F.*, 12 L. C. R. 442; 7 L. Jur. N. S. 9. (C.)

#### XVI. CODICIL. See *supra*, VIII.

5. A will was dated before the change of currency made by the 6 G. 4, c. 79. A codicil, dated after that Act, *Held*, a republication of the will such that the legacies were deemed

bequeathed in British currency, though the codicil merely appointed new executors. — *Hamilton v. Carroll*, 1 I. E. R. 175. (C.)

1. A codicil is never held to revoke a will further than is necessary to effectuate the testator's intentions. — *Young v. Hassard*, 1 Dr. & War. 638. (C.)

2. By will, reciting that the testator was entitled to a remainder in fee expectant on the death of his wife, he devised it, after her death, to his son, W., for life; after his death, to W.'s child or children; for default of such issue, to testator's own heirs. By codicil, he retracted the devise to W., and gave to his wife and grandchildren (issue of his son, J.) what he had originally bequeathed to W. *Held*, that the remainder in fee passed by the codicil to the wife and grandchildren.

*Semble*—The codicil revoked the gift to W.'s children. — *Madden v. Kirwan*, 7 I. E. R. 570. (C.)

3. When a codicil contains an unbroken set of limitations irreconcilable with those in the will, and exhausting the fee, it is to be inferred that the testator intended to dispose of the whole fee by the codicil, though he had disposed of it otherwise by his will. — *Daly v. D.*, 2 Jon. & L. 752. (C.) — [On re-hearing: — 9 I. E. R. 508. (C.)]

## WINDING-UP ACTS.

See JOINT-STOCK COMPANIES.

4. P. and L., lessees of a mine, agreed to sell it to the Irish Consols Mining Company, and to accept, as the purchase-money, 10,000 shares in the company. By a secret agreement they were to re-transfer to the directors 5000 of the shares. B. was employed by P. to "rig the market." In return for his services, P. transferred to B. 175 shares, which B. stated to have been a free gift. Of these 175 shares, P. was a trustee of 50 for the company. B. immediately assigned all, except 25, of the shares for value. The affairs of the company were decreed to be wound up. B. was not made a contributory in respect of the 50 shares, though he was in respect of others. *Held*, that as B., being the voluntary assignee of the company's trustee, would be liable in a plenary suit in respect of those 50 shares, an order of the Master declaring him liable in respect of them should be affirmed.

*Quere*—Whether the Master had jurisdiction under the sections of the Winding-up Acts to make the order? — *Ex parte Banks*, 2 I. Jur. N. S. 85. (C.) — [Aff. Rolls decision, *ibid.* 44.]

5. In a Mining Co. conducted upon the cost-book principle, the cost-book rules contained no proviso entitling the directors to fees or payments; but they from time to time retained sums as remuneration for their personal services. At a general meeting of the company, accounts were submitted and passed. These accounts, under the head of "Cost and

merchants' bills," included the amounts so retained by the directors. They were specifically entered in the cost-book of the company, and could have been discovered by any shareholder on reference to such book. *Held*, that the directors had no right to retain such sums in the absence of a special rule entitling them to remuneration; and that they were bound to repay same on the application of the official manager.

That, assuming the general meeting to have had the power of sanctioning such a retention by the directors, the accounts were not submitted to the general meeting in a form sufficiently open and unequivocal to bind them by its adoption.

*Quere*—Would such a general meeting, under any circumstances, have had the power of sanctioning the payment of the directors?

The directors who received the fees were held primarily liable to repay same; and the directors who signed the cheques for such payments, or who directed same, were held liable in the secondary degree. — *Ex parte Lord Kinsale*, 8 I. Jur. N. S. 216. (M.O.)

## WITNESS.

— *Costs of.* See PRACTICE, COSTS.  
See BANKRUPTCY, VIII—HUSBAND AND WIFE, I—PLEADING, PARTIES—PRACTICE, EVIDENCE—STATUTES, CONSTRUCTION OF, II—TRUSTEE, IV.  
— *Attesting.* See PRACTICE, EVIDENCE—WILL, XV.

## WITHDRAWING.

— *Demurrer.* See PRACTICE, DEMURRER.  
— *Plea.* See PRACTICE, PLEA.

## WORDS.

— *Precatory, Recommendatory, and of Desire.* See WILL, XV.  
— *Construction of.* See AGREEMENT, III—BOND, II—COVENANT, IX—DEED, II—DISTRIBUTION, IV—GENERAL ORDERS—POWER, V, XII—PRACTICE, DECREE—SETTLEMENT, I—STATUTES—TRUST, IX—WILL, XI, XV.

6. In a deed, the extensive and ordinary signification of the word "heirs" will be limited, when the intention of the parties is perfectly apparent. — *Wall v. Wright*, 1 Dr. & Wal. 1. (C.)

7. V., after bequeathing legacies to his relations, A., B., C., and D., and others for charitable purposes, proceeded thus in his will:—"To meet those I have £200 in the Bank of Ireland: the little matters of furniture will be sold. If anything shall remain, after all being paid, the Rev. Mr. G. will divide it amongst the poor." At his death, V. had not any such sum as £200 in the Bank of Ireland, but his property consisted of £1462. 2s. 8d. of £3½ per cent. stock, and £52 in cash. *Held*, that the general residue of

V.'s personal estate passed under the residuary clause.—*Gaffney v. Hevey*, 1 Dr. & Wal. 12. (C.)

1. Devise to "children, share and share alike." A first codicil appointed a guardian "during minority." Second codicil:—"In the event of the death of any of the children, their portions to be divided among the survivors, share and share alike." *Held*, that the phrase, "in the event of the death," &c., meant death during the minority.

In a will, the words, "in the event of the death of" the devisee are never construed to mean the event of a lapse by death before the testator's death, unless necessity requires that construction.—*Montgomery v. M.*, 2 I. E. R. 161. (C.)

2. In my opinion the word "tenant" in the Tenantry Act, 19 & 20 G. 3, c. 30, means "tenant in possession;" and the word "assignee" means in that Act the same thing as if the legislature had said "assignee in possession." [Plunket, C.]—*Smith v. Shannon*, 3 I. E. R. 467. (C.)

3. The word "issue" in a will may be held to mean children, when such is the testator's manifest meaning.—*Ridgeway v. Munkittrick*, 1 Dr. & War. 84. (C.)

4. The Crown is not included in the words "all persons" in the first, or in the words "any person or persons" in the second sec. of the 8 G. 1, c. 4 (St. of Lim.).—*Reg. v. Bayley*, 4 I. E. R. 146, 147. (C.)

5. V. devised the lands in question to trustees, to A.'s use for life; remainder to the use of A.'s first and other sons; in default of such issue, over. *Held*, that the words "in default of such issue" did not enlarge by implication A.'s life estate.—*Parcell v. P.*, 2 Dr. & War. 219, n. (C.)

6. Respecting the meaning of the words "for the time being"—See *Smith v. Lord Duncannon*, 5 I. E. R. 98. (R.)

7. "Leave" construed "have," in a deed, to favour the vesting of portions.—*Houston v. Barry*, 5 I. E. R. 294. (E.E.)

8. The term "assignee," in the 11 Anne, c. 2, ss. 2, 4, applies to under-tenants, as well as to assignees, in that word's proper sense.—*Malone v. Geraghty*, 5 I. E. R. 549; 3 Dr. & War. 239; 2 Con. & L. 235. (C.)—[*Affid.*: 1 H. Lds. Cas. 81.]

9. The judgment in *Doe v. Wainwright*, 5 T. R. 427, lays down the abstract point, that "survivors" is to be construed "others."—*Cole v. Sewell*, 2 Con. & L. 362. See 4 Dr. & War. 1; 6 I. E. R. 66. (C.)

10. In ascertaining whether the words "die without issue," in a will posterior to the 1 Vic., c. 26, mean an indefinite failure of issue; a contrary intention, within the meaning of

sec. 29, is not to be inferred from the use of those very words.—*In re O'Brien*, 7 I. E. R. 171; 1 Jon. & L. 352. (C.)

11. Under a bequest of "money and securities for money," an I. O. U. in testator's possession, and made to him—*Held*, not to pass.—*Barry v. Harding*, 1 Jon. & L. 475-483. (C.)

12. The word "issue," in marriage articles, read "children."—*Roche v. R.*, 2 Jon. & L. 561. (C.)—[See 7 I. E. R. 436.]

13. V., seized of real, and possessed of personal estate, devised a chattel interest to B., her executors, &c., and devised freehold estates and chattel interests to C., her heirs, &c., with a proviso; that, if either should die unmarried, or, being married, should die without issue, the bequests appointed for such of them so dying unmarried, or, being married, dying without issue, should go to the survivor, her heirs, &c. *Held*, that the words "without issue" meant an indefinite failure of issue, not issue living at the devisee's death.—*O'Donohoe v. King*, 8 I. E. R. 185. (E.E.)

14. Money in the hands of the salesmaster, whom the testator was in the habit of employing, is not "ready money" within the meaning of those words in a will.—*Smith v. Butler*, 9 I. E. R. 398; 3 Jon. & L. 565. (C.)

15. Neither the word "thereout," nor "paying," is requisite to make the payment of a legacy a condition so as to give the devisee the fee in lands charged with it.—*Johnson v. Brady*, 11 I. E. R. 386. (C.)

16. Under the 93rd G. O., the term "Vacation" is referable to the period when the Court is not sitting.—*Anderson v. Mulcahy*, 1 I. Jur. 154. (R.)

17. A devise upon trust, "and in case my said son, M., shall leave no child or children him surviving, then upon trust to convey so much of my estate of X. as shall be worth or can be let for £130 as aforesaid, without prejudice as aforesaid, to my own right heirs for ever." M. died without issue. *Held*, that "right heirs" meant the person who was heir at the testator's death; not the person who was heir of the testator at the death of his son and heir, M., without issue.

*Locke v. Southwood*, 1 My. & Cr. 411, considered.—*In re Mathews's Estate*, 2 I. Jur. N. S. 47. (I.E.C.)

18. A plea of confession is not included within the meaning of the terms "warrant of attorney" or "cognovit" in the 12 & 13 Vic., c. 95, s. 2.—*Gibbon v. Magan*, 2 I. Jur. 60. (R.)

19. V. devised to his son T. all his lands and tenements, rights and credits, subject to legacies and debts; the remainder of his property to be disposed of by T. among his children, in such shares and proportions as he should think proper. T. died in V.'s life without

making any disposition of the property. A bill having been filed by the children of T. to ascertain their rights, under the will of V., and a reference having been made; the Master found that by the will of V. a trust and power was vested in T.; and that no disposition being made by him, pursuant to the trust and power, all the children of T. became entitled to the real and personal property of V., subject to the legacies and debts. *Held*, that the word "remainder" referred to real and personal estate; and, on exceptions, the report of the Master was upheld.—*Hutchinson v. H.*, 2 I. Jur. 81. (C.)

1. *Semble*—That the words "rights and credits," in a will, pass the testator's general personal estate.—*Hutchinson v. H.*, 13 I. E. R. 332. (C.)

2. "Satisfaction" of counsel means *reasonable* satisfaction.—*Gordon v. Mahony*, 13 I. E. R. 383. (C.)

3. When there are debts affecting the inheritance, a creditor, having a judgment affecting the life estate, is not an "incumbrancer" within the I. E. Act, 12 & 13 Vic., c. 77; and is not entitled to present a petition to this Court to sell the inheritance.—*In re the Earl of Glengall's Estate*, 4 I. Jur. 65. (I.E.C.)

4. A prior mortgagee, having the legal estate, is not "an owner of land" within the 11th and 12th Orders, and may be served with notice under the 32nd Rule in the Master's office.—*Leonard v. Hartwell*, 4 I. Jur. 74. (R.)

5. A prior mortgagee, having the legal estate, is not an "owner of land" within the 11th and 12th Orders, and may be served with notice under the 32nd Rule in the Master's office.—*Cleland v. Montgomery*, 4 I. Jur. 90. (R.)

6. Bequest to testator's brother for life, then to that brother's wife for life; and, after their deaths, "to such of their children or issue as should survive them, to take and hold under the will; if more than one child, to take in equal shares; the issue of such children also to derive upon the death of their parents." One of testator's nephews predeceased his mother. *Held*, that that nephew's children did not take under the term "issue."—*Draper v. D.*, 4 I. Jur. 221. (C.)

7. The word "insolvent," in a decree or deed, is to be construed in the ordinary sense of a person who is unable to pay his debts; not in the technical sense of one discharged as an insolvent debtor.—*Caulfield v. Maguire*, 5 I. C. R. 78. (R.)

8. The word "fortune," in a devise, *prima facie* includes both real and personal property.—*Spearing v. Hawkes*, 6 I. C. R. 297; 2 I. Jur. N. S. 406. (C.A.)

9. The word "effects" will comprise the entire personal estate of the testator, unless

restrained by the context within narrower bounds.—*Dunally v. D.*, 6 I. C. R. 540. (R.)

10. A bill was filed against A. and B., and referred to the Master to ascertain the rights of parties, and apportion the funds accordingly. He reported that in 1819 there remained due to ptfs. in a previous cause, on foot of the demand therein decreed to them, a sum which, with post costs in said cause, amounted to a specified sum; and that, for payment thereof, with *subsequent interest*, the funds mentioned in the decree in the present cause, as then remaining in the Bank of Ireland to the credit of the previous cause, were applicable. *Held*, that the words "subsequent interest" did not apply to post costs.—*In re Brownrigg's Estate*, 2 I. Jur. N. S. 363. (I.E.C.)

11. V., seized of freehold estates, and possessed of chattels real, by will, directed his executors to make out an inventory of his effects, which were to be sold by auction; and that, if he died "possessed of any funded or other property," they should sell all for the benefit of his children. *Held*, that the word "property" passed the real estates.—*Clibborn v. C.*, 2 I. Jur. N. S. 381. (C.)

12. V. devised lands to his son G. for life; remainder to his first and other sons in tail; remainder to his daughters, tenants in common in tail; and, if either died without issue, then to his surviving daughter and the heirs of her body; in default of such issue to his right heirs for ever. *Held*, that the word "surviving" meant "other."—*Smith v. Osborne*, 3 I. Jur. N. S. 41. (H.L.)—[S. c., 6 H. Lds. Cas. 375.]

13. The "memorandum" mentioned in Sugden's Act (7 & 8 Vic., c. 90), s. 2, must contain the names, place of abode, title, &c., of the ptf. in the original judgment.—*In re Boate*, 9 I. C. R. 524. (C.A.)

14. The words "Court of Chancery," in an Act of Parliament, do not *per se* refer to the Court of Ch. in Ireland.—*In re M'Clintock*, 10 I. C. R. 469; 5 I. Jur. N. S. 209. (C.)

15. In the Sub-letting Act, 6 G. 4, c. 29, s. 2, the word "void" means "voidable" only.—*Strickland v. M'Nicholas*, 5 I. Jur. N. S. 258. (C.)

16. The three months "within" which every appeal must be entered from the date of any decision or order, excludes the day on which the order is pronounced, and includes the day on which the appeal is entered.—*Kennedy v. Cruise*, 6 I. Jur. N. S. 11. (C.A.)

17. The word "vicarage"—*Held*, to include an impropriate curacy. [See this case at length; Title:—*ECCLESIASTICAL PERSONS AND THINGS*.]—*Auchinleck v. Bishop of Ossory*, 6 I. Jur. N. S. 205. (Court of Del.)

18. In the 4 & 5 W. 4, c. 92, s. 68, the phrase "money subject to be invested in lands"



means "money directed" to be so invested.—*Smithwick v. S.*, 12 I. C. R. 181; 6 I. Jur. N. S. 282. (R.)

1. The word "officers," in the statutes authorising the Lord Lieutenant to appoint officers in district county lunatic asylums does not include a chaplain.—*Nelligan v. Jones*, 7 I. Jur. N. S. 39. (Consist.)

2. In gifts of personal estate, the word "survivor" may be taken as referring to the period of distribution. Regarding real estate it is not equally settled that it applies to the determination of the prior limitation. When that word is applied to a class of persons of whom individuals are named, its natural meaning is "the longest liver" of those named.—*Taffe v. Conmee*, 7 I. Jur. N. S. 229. (H. L.); 10 H. Lords Cas. 64.

3. The word "vest" *prima facie* means "come into possession;" not "accrue in point of interest."—*Richardson v. Robertson*, 7 I. Jur. N. S. 269. (H.L.)

4. The word "legacies," in a will—*Held*, to apply to a gift of the residue, which included real property.—*In re Trusts of Guinness's Will*, 8 I. Jur. N. S. 24. (R.)

5. The words "survivors or survivor," in a will, read "others or other."—*M'Blain v. Swanton*, 9 I. Jur. N. S. 122. (C.A.)

6. V. bequeathed to his brother, J., whatever money he should die possessed of; and, after several other bequests, bequeathed all the residue of his property, not theretofore disposed of, to his nephew, who was appointed residuary legatee. Part of the money, of which V. died possessed, was secured by mortgage or charges on land; and part in government stock. *Held*, that while the sums secured by mortgage, as also arrears of rent and rentcharge, interest, and dividends on consols and stock, passed under the word "money" to J., the sums invested in consols and stock did not pass thereunder, but went to the residuary legatee.—*Hewitt v. Bredin*, 10 I. Jur. N. S. 85. (C.)—[*Affirmed: ibid*, 265. (C.A.)]

7. V., seized in fee of lands situated on both sides of a road, demised those on the west side for years; and covenanted, that he would not convert, or permit to be converted any portion of the ground opposite the demised premises, or any part thereof, or any dwelling-house or building to be erected thereon, for any purpose whatsoever, save and except and other than as a private dwelling-house, to be erected and built in the manner in the lease provided. *Held*, that the word "dwelling-house" included "stables;" and that the subsequent lessee (with notice of this covenant) of the opposite premises, who built a "dwelling-house" thereon, could not be restrained by injunction from building stables at its side, and fronting the premises demised by the

first lease.—*Smith v. Crowe*, 10 I. Jur. N. S. 105. (C.)

8. In the 13 & 14 Vic., c. 29, the word "person" includes bodies corporate: e. g., a railway Co.—*In re The Bagnalstown Ry. Co.*, 10 I. Jur. N. S. 156. (B.)—[*Affirmed: ibid*, 253. (C.A.)]

9. A codicil recited that the testatrix had in the Bank of Ireland "money not theretofore disposed of." By that codicil she bequeathed that sum to trustees, upon trust, to pay legacies. She had not any "money" in the Bank of Ireland, but possessed government "stock" sufficient to pay the legacies. *Held*, that they were payable out of her general assets, and in equal priority with other legacies bequeathed by the will and prior codicils.—*Reilly v. Stoney*, 16 I. C. R. 295. (R.)

10. V. bequeathed money to his two daughters, share and share alike, to be paid to them by his executors in twelve months after their respective marriages with the consent of his executors; and directed that his daughters should be paid a yearly sum, less than the interest of their shares, until their respective marriages as aforesaid; and that from their respective marriages each of them should be paid the full legal interest: until their respective marriages, the remainder of the interest on their fortunes was directed to go to V.'s son; and if V.'s daughters, or either of them, died before the age of 21 years or day of marriage, her share of the sum so bequeathed was directed to go to V.'s son, to whom the entire sum should go if both daughters died.

*Semle*—That the daughters' legacies did not vest until marriage.

*Held*, that "or" should be read "and;" and that therefore the legacies did not go over to the son on the death of his sisters unmarried, but remained undisposed of by the will, and divisible amongst V.'s next-of-kin.—*In re Cantillon's Minors*, 16 I. C. R. 301. (R.)

11. The word "said" applies to the immediate antecedent.—*In re Willomier's Trusts*, 16 I. C. R. 389. (R.)

12. "Surviving daughters," in a will, *held* to mean "other daughters."—*In re Connellan's Trusts*, 16 I. C. R. 524. (R.)

13. "Presently" *held* to mean "immediately," in a Scotch deed, which operated as a marriage.—*In re Lockhart's Trusts; ex parte Lady Lockhart*, 11 I. Jur. N. S. 245. (R.)

14. V. devised his estates in several Irish counties (which he named), "and elsewhere in Ireland." Through the word "Sligo," one of the named counties, V. drew a line in ink, and initialed the alteration. The word remained quite legible. The attestation clause ran thus:—"In witness, &c., the word 'Sligo' being struck out before the execution, and initialed by me." *Held*, that "elsewhere in

Ireland" meant "elsewhere in Ireland, except in Sligo," and that the estate in Sligo was not devised thereby.—*Cooper v. Warre*, 11 I. Jur. N. S. 24. (C.)

1. By Lord Westbury:—"In the maxim, "*Ignorantia juris haud excusat*," the word "*jus*" has the sense of *general law*, or of *private right*, according to circumstances.—*Cooper v. Phibbs*, L. Rep. 2 H. L. 149.—[Revg., s. c. 17 I. C. R. 73; 10 I. Jur. N. S. 239. (C.)]

## WRIT.

See PRACTICE, WRIT.

— *Of Procedendo*. See BANKRUPTCY, VI.

## YOUNGER CHILDREN.

See WILLS, XV.

## THE FOLLOWING CASES WERE OMITTED FROM THEIR PROPER PLACES IN THE DIGEST:—

### AGREEMENT, SPECIFIC PERFORMANCE OF. VIII. 2. b.—*Vendor and Purchaser*, IV. 3.

2. The particulars of a sale by auction described the subject as a plot of ground held for a term of 111 years from the 23rd of April 1853, subject to the annual rent of £5. One condition of sale was, that the vendor should deliver to the purchaser or his agent an abstract of title, and deduce a good title to the premises sold, down from the 23rd of April 1853 to the date of the sale: that the lessor's title should not be questioned, nor should the vendor be bound to go behind it: that compared copies of registry searches against the vendor's lessor should be handed to the purchaser; as also of judgments from June 1845 to June 1853, with a compared copy of his abstract of title, also common searches by the vendor, from the date of his lease to that of the sale, in the Registry and Judgment Offices, and not further or otherwise.

The plot of ground was part of two properties, held under two distinct leases, made in 1845 to the vendor's lessor. By those leases respectively rents of £31 and £9 were reserved. The interest sold was under a lease made on the 25th of July 1853, to the vendor of portions of both properties, and was subject to a rent of £5. *Held*, that the title was bad.

That the condition of sale was so ambiguous and uncertain as not to preclude the purchaser from objecting to the title.

That there had been, in the particulars of sale, a suppression of facts such as amounted to a misrepresentation, and disentitled the vendor to a decree for specific performance.—*Geoghegan v. Connolly*, 8 I. C. R. 598. (R.)

### DEBTOR AND CREDITOR, VIII. — PRACTICE, CREDITOR'S SUIT.

3. There was in Court a clear surplus fund, which had been produced by a sale under a decree. On the motion of a subsequent judgment creditor, the Court granted a reference to the Remembrancer to enquire and report who was entitled to the surplus, and whether the applicant had any, and, if any, what lien upon it?—and, if so, whether there was any, and what prior lien thereon.—*Mackey v. Martins*, 1 I. E. R. 331. (E.E.)

### ECCLIESIASTICAL PERSONS AND THINGS.

#### II. 2. *Purchases of*.

4. When, under the 3 & 4 W. 4, c. 37, the Bishop's immediate lessee purchased the fee of the demised lands, and obtained a conveyance thereof, including the royalties—*Held*, that his sub-lessee, having a *t. q.* covenant for renewal, and contributing his proportion of the purchase-money, &c., was entitled, under the 6 & 7 W. 4, c. 99, as to the sub-demised lands, to a like conveyance of the fee thereof, including the royalties.—*Byrne v. Hugo*, 1 I. E. R. 351. (R.)

### PRACTICE, ANSWER, SUPPLEMENTAL—PRACTICE, CHARGE & DISCHARGE—PRACTICE, MASTER, REVIEWING REPORT.

5. E., being seized in tail of the X. estate, including the lands of B. and G., with remainder to V. in tail, levied fines and suffered recoveries of the estate (except B. and G.) in 1814. In 1844, after the death of E., the

Master made a report in the matter of *V. and others minors*, and found thereby that E. had, by fines and recoveries, barred all estates tail in the X. estate. In 1845, there was filed for the minor V., in the cause of *V. v. O'B.*, an answer admitting that E. had, by fines and recoveries, legally barred all estates tail in the X. estate. A similar admission was made in an answer filed for the minor, in 1848, in a creditor's suit of *O'B. v. V.* A decree to account having been made in *W. v. V.*, the ptf.'s charge stated that E., being seized of the X. estate, made his will, &c.; and the discharge of the minors admitted that statement. The Master reported that E. had levied fines and recoveries of all the X. estate, and had acquired a fee-simple therein; but no evidence to support that finding was given before the Master. The cause of *W. v. V.* having been set down for final hearing, was directed to stand over until the return of the report in *O'B. v. V.* A petition having been presented to the I. E. Court, after the sale of one denomination it was discovered that B. and G. were not included in the fines and recoveries. On motion made in 1852, the Court refused to allow V. to file a supplemental answer, but ordered that the Master be at liberty to review his report in relation to the fines and recoveries of 1814, so far as related to B. and G., and in such other particulars as might be made necessary by correcting the error; and that, notwithstanding the admissions in the answer: and gave to V. liberty to file a further discharge, in order to put the matter properly in issue, but upon the terms of accounting for the rents of a part of the X. estate of which V. had been allowed to go into possession; of his executing a disentailing deed of the denomination sold; and of his paying off, out of the purchase-money, a creditor, who had become such at his request.—*Cripps v. Villiers*, 2 I. C. R. 179. (R.)

#### PRACTICE—EVIDENCE—AFFIDAVITS.

1. When additional time for filing affidavits is required, an application for an extension of the time ought, in the first instance, to be made to the opposite solicitor.

Affidavits by way of evidence should contain only legal evidence directed to the matters put in issue by the pleadings.—*Moclare v. M.*, 8 I. C. R. 610. (C.)

PRACTICE, XXXVIII, 11, h: AFFIDAVIT ON APPLYING FOR LEAVE TO SUE IN FORMA PAUPERIS.

2. An application in this Court for liberty to sue *in forma pauperis* must be made on an affidavit that the ptf. is not worth £5, except the matter in question in the suit.—*O'Donnell v. M'Mahon*, 9 I. E. R. 471. (R.)

#### PRACTICE, MASTER—PRACTICE, PRODUCTION OF DOCUMENTS

3. Under the 182nd G. O. of Nov. 1834, the Master should exercise his discretion, and certify *what* books, papers, or writings respectively should be lodged in his office, or produced for inspection only; although the decree under which he may be proceeding requires the parties to bring in and deposit with the Master *all* deeds, writings, &c., in anywise touching or concerning the premises, in their possession or power respectively.

The deeds need not be produced until the Master certifies.—*Chaytor v. C.*, 1 I. E. R. 432. (R.)

#### PRACTICE, TAKING PLEADINGS OFF THE FILE.

4. On an application to take the answer off the file, in order to institute a prosecution for perjury—*Held*, that, in order to sustain such an application, a special case must be made.—*N— v. N.*, 1 I. E. R. 17. (C.)

#### VENDOR AND PURCHASER, IV, 3.

5. A condition of sale provided that the "purchaser shall not be at liberty to require any evidence of the title of the lessors in said lease, or any of them; or object by reason of incumbrances, if any, affecting the title of such lessors; nor require the production of any title deeds connected with the premises, prior to, or of previous date to said lease; but shall admit that said lease has been duly executed and acknowledged by all the parties thereto, and be satisfied with same being handed over to them, and the title deduced therefrom to the owners." *Held*, that this condition did not preclude the purchaser from rejecting the title on the ground of objections to the lessors' title.

Lessees for lives renewable for ever granted to L., his heirs and assigns, a lease at a rent. *Held*, that L.'s estate did not answer the description of a lease for ever.—*Musgrave v. M'Cullagh*, 14 I. C. R. 496. (C.)—[See also *Geoghegan v. Connolly*, 8 I. C. R. 598. (R.), p. 1409 (2).]

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